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SRINAGAR (Kashmir)

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897	Arunachallam Pillay v. Vellaya Pillay ...	15	461
899	Nagabushanam v. Sree Rajah Venkatadri Appa Rao Bahadur...	17	226
900	Akku v. Ramappa Raju ...	15	434
901	Vemusami Gavaramma v. Chilukuri Pitchamma ...	15	573
902	Kintadu Dalapadu, *In re* ...	15	457
903	Gopalakrishnamaraju v. Venkatanarasaraju ...	17	308
904	Narayanasami Aiyar v. Janaki Ammal ...	17	261
907	Subraya Kini v. Ramappa Adige ...	17	265
908	Sudalai Ammal v. Gomathi Ammal ...	16	428
912	Gajjala Veerayya v. Gajjala Gangamma ...	16	839
915	Adusumilli Singarayadu v. Sayani Narayanasami ...	17	273
917	Pichikala Mangamma v. Pamu Ramamma ...	16	587
918	Sakki Reddi Appalasawmy v. Pakkurti Venkatasawmi Naidu...	15	682
919	Muthukrishna Iyer v. Viraraghava Iyer ...	16	601
930	Anglo Indian Trading Company Ltd. v. Gerald Frank Brierly ...	17	256
932	Maliyakkalath Bava v. Pathumma ...	16	689
934	Kolakkot Kuntambi Vydiar v. Pudikakandyil Parkum Muratath Mumacha ...	15	574

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97	Kishanlal v. Aman Singh ...	16	555	123	Shiolal v. Nanhelal ...	17	129
107	Great Indian Peninsula Railway Company v. Amraoti Municipality ...	16	449	128	Sitaram v. Laxman ...	17	133
				133	Pandurang v. Nagoji ...	17	138
				136	Bajirao v. Gulabsingh ...	17	141
113	Ramdin v. Raj Rani ...	17	101	139	Ratanlal v. Bhaskar ...	17	144

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202	Sarabjit Bharthi v. Lagan Dei ...	14	731	263	Jai Govind v. King-Emperor ...	17	72
211	Ram Kumar v. Dwarka Prasad ...	15	5	270	Brij Lal v. Suraj Bikram Singh ...	16	92
223	Kailasha v. Bitto ...	16	471	271	Sajjad Husain v. Nawab Wazir Ali Khan ...	16	197
234	Ram Sarup v. Jagan Nath Prasad	15	523				
239	Qurban Ali v. Raghubar Dayal ...	16	476	278	Mohammad Mehdi Hasan Khan v. Sri Mandir Das ...	17	396
244	Sarat Kumari Devi v. Bhola Nath Banerji ...	15	616	285	Shankar Din v. Gokul Prasad ...	16	78
253	Imdad Ali v. Habib-un-nissa ...	15	250				

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129	Hira v. Chahnnu ...	16	116
130	Birj Raj v. Tirkha ...	16	119
131	Dhan Devi v. Balmokand ...	16	122
132	Hanif Shah v. Murad Ali ...	16	125
133	Juma v. Mubarak Khan ...	15	62
134	Jan Khan v. Ahmad ...	13	445
135	Jiwan v. Dit ...	13	549
136	Brij Lal v. Loku Ram ...	14	16
137	Najabat Ali v. Mehtab Bibi ...	14	789
138	Lehna Singh v. Santa Singh ...	13	852
139	Shahab-ud-din v. Barkati ...	14	779
140	Ramji Das v. Shankar Das ...	13	855
141	Abdulla Khan v. Kanhaya ...	14	751
142	Amar Singh v. Shankar Singh ...	14	66
143	Salamat Ali v. Hakim Ali ...	14	47
144	Duni v. Ali Mohammad ...	13	857
145	Fateh Chand v. Kirpa Singh ...	13	561
146	Karam Bakhsh v. Abdul Karim ...	14	1008
147	Jalal-ud-din v. Crown ...	15	979
148	Kiman v. Sultani Mal ...	13	559
149	Kamola Ram v. Kaura Khan ...	15	404
150	Pars Ram v. Muhammad Yasin Khan ...	13	953
151	Ganda Singh v. Nathu Ram ...	13	661
152	Mangal Das v. Ralla Ram ...	15	721
153	Bhero Das v. Mona ...	14	783
154	Dhian Singh v. Belas Kaur ...	16	127
155	Ram Das v. Kanshi Ram ...	14	335
156	Ganda Mal v. Piran Ditta ...	15	725
157	Rahmat Ali Khan v. Bubu Zuhra	14	486
158	Alia v. Piran Ditta ...	16	867
159	Hayat v. Ramzan ...	16	889
160	Gurditta v. Dheru ...	14	562
161	Chandi v. Thulla Singh ...	14	523
162	Bishen Kaur v. Amar Nath ...	14	561
163	Dewat Ram v. Muhammad Rustam Ali Khan ...	16	891
164	Kariman v. Fazal Muhammad ...	14	532
165	Champo v. Shankar Das ...	14	232
166	Durga Das v. Kanshi Ram ...	16	769
167	Maya Das v. Gurdit Singh ...	16	855
168	Ibrahim Ali Khan v. Muhammad Ahsan Ullah Khan ...	13	695
169	Sundar Das v. Peoples Bank of India, Ltd., Rawalpindi Branch	16	834
170	Jawahri Mal v. Dhanpat ...	17	223
171	Lal Chand v. Nand Lal ...	16	838
172	Kishen Chand v. Bhai Gopal Singh	16	842
173	Jagdip Singh v. Narain Singh ...	15	866
174	Ralla v. Manglan ...	15	559
175	Crown v. Raja ...	15	83
176	Radhe Kishen v. Bholu Mal ...	17	254
177	Phula Singh v. Prem Singh ...	16	844
178	Municipal Committee of Delhi v. Maman Chand ...	15	658
179	Tulsi v. Kirpa Ram ...	15	555
180	Rupa Shah v. Irshad Ali ...	16	847
181	Ram Rakha v. Atma Ram ...	16	851
182	Lakhmi Das v. Balak Ram ...	16	24
183	Saddan v. Teja ...	16	884
184	Khidmat Rai v. Annant Ram ...	17	245
185	Bhagwan Singh v. Hardit Singh...	16	29
186	Abdullah Khan v. Ghulam Jan ...	16	886
187	Raja Ram v. Fatteh Chand ...	17	216
188	Dhanna Singh v. Budhi ...	16	80
189	Ghulam Ali v. Shiv Nath ...	15	845
190	Ram Ditta Mal v. Karam Devi ...	17	243
191	Gehna v. Khuda Bakhsh ...	15	563
192	Yakub Khan v. Raghpat Rai ...	17	235
193	Sri Ram v. Faujdar Singh ...	16	527
194	Lal v. Crown ...	16	528
195	Sher Singh v. Hari Singh ...	16	528
196	Sahib Jan v. Amiran ...	17	214
197	Nathu Mal v. Mul Chand ...	16	232
198	Kesho Das v. Nathu Mal ...	*Not reportable.*	
199	Badar Din v. Karam Din ...	"	
200	Sarfaraz v. Mir Ahmad ...	"	
201	Sunder Das v. Seth Chand Mal ...	"	
202	Ganpat v. Prem Singh ..	15	122
203	Faiz Talab Khan v. Fazal ...	*Not reportable.*	
204	Karam Chand v. Lehna ...	15	708
205	Bhagi v. Muhammad ...	15	734
206	Harif v. Mir Ahmad ...	*Not reportable.*	
207	Karimullah v. Kimon ...	15	839
208	Shaman v. Ari Jang ...	17	503
209	Abdul Karim v. Allah Bakhsh ...	17	208
210	Habib Khan v. Muhammad ...	16	463
211	Thakar Das v. Kahna ...	16	466
212	Nawab v. Duni Chand ...	16	475
213	Badar Bakhsh v. Sahib Jan ...	16	468
214	Nabi Bakhsh v. Bhagat Singh ...	17	251
215	Kalawati v. Bukhan ...	16	254
216	Basawa Singh v. Bhagwan Kaur...	16	270
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65	Ram Chand v. Dewan Chand ...	13	571
66	Kiman v. Sultani Mal ...	13	559
67	Megha Ram v. Makhan Lal ...	13	667
68	Habib Khan v. Muhammad ...	16	463
69	Nawab v. Duni Chand ...	16	475
70	Bhag Bhari v. Wazir Khan ...	14	45
71	Thakar Das v. Kahna ...	16	466
72	Faiza v. Ata Mahomed ...	14	70
73	Ganpat Ram v. Bahara ...	14	252
74	Champo v. Shankar Das ...	14	232
75	Badar Bakhsh v. Sahib Jan ...	16	468
76	Chandi v. Thulla Singh ...	14	523
77	Bawa Ram Lal v. Ram Kishen ...	14	122
78	Bhai Gurdit Singh v. Sher Singh...	14	247
79	Zaka-ud-din v. Siraj-ud-din ...	16	772
80	Ilahi Bux v. Muhammad Rab Nawaz Khan ...	14	328
81	Tulsi Ram v. Ram Chandar ...	14	239
82	Said Khan v. Matwala ...	16	775
83	Iftikhar Ali v. Thakar Singh ...	15	347
84	Bhagwan Das v. Bhana Mal ...	14	566
85	Kariman v. Fazal Muhammad ...	14	532
86	Amir Chand v. Kanhaya Ram ...	16	777
87	Sundar Das v. Narain Devi ...	14	240
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88	H. H. The Maharaja Brij Indar Singh of Faridkot v. Bansi Lal...	17	36
89	Harnam Singh v. Salig Ram ...	16	779
90	Niamat Ullah v. Aisha Bibi ...	17	21
91	Hafiz Abdulla Khan v. Kanhaya...	14	751
92	Shahab Din v. Panah Bibi ...	14	749
93	Niadar Mal v. Col. S. T. Biddulph ...	14	737
94	Nand Lal v. Goojar ...	15	275
95	Ganesha v. Mul Chand ...	15	161
96	Radha Kishan v. Kidar Nath ...	15	773
97	Juma v. Mubarak Khan ...	15	62
98	Rahmtan v. Fateh Muhammad ...	15	106
99	Hukam Chand v. Hayat ...	15	941
100	Nur Khan v. Sarfraz ...	16	21
101	Sheikh Ghulam Ali v. Diwan Shiv Nath ...	15	845
102	Karimulla v. Kimon ...	15	839
103	Dhana Singh v. Budhi ...	16	80
104	Lakhmi Das v. Balak Ram ...	16	24
105	Bhagwan Singh v. Hardit Singh...	16	29
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7	Wadhawa Singh v. The Crown ...	17	54
8	Crown v. Fateh Ali ...	16	521

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126	Bibi Putli v. Jawala Devi ...	16	488
127	Irshad-ul-Haq v. Muhammad-ul-nisa ...	14	150
128	Haria v. Basant Kaur ...	16	491
129	Faiza v. Ata Mahomed ...	14	70
130	Tapessier v. Nasir-ud-din ...	15	402
131	Santu v. Arjan Das ...	13	318
132	Achar Singh v. Badhawa Singh ...	15	285
133	Tulsi v. Madho Ram ...	13	343
134	Bhiku Mal *v.* Nanak Chand ...	16	495
135	Jhindu v. Gopala ...	15	266
136	Dayal Singh v. Ram Rakha ...	15	463
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137	Bhagwan Das v. Bhana Mal ...	14	566
138	Ganeshi Lal v. Dewa Singh ...	16	684
139	Nihal Devi v. Kishore Chand ...	13	564
140	Umra v. Karim Bakhsh ...	14	492
141	Chandi v. Thulla Singh ...	14	523
142	Narayan Singh v. Lal Singh ...	15	478
143	Bishen Kaur v. Amar Nath ...	14	561
144	Karm Ilahi v. Sultan Alam ...	13	812
145	Zenab v. Shah Newaz Khan ...	13	526
146	Maya Das v. Gurdit Singh ...	16	855
147	Alia v. Piran Ditta ...	16	867
148	Champo v. Shankar Das ...	14	232

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151	Dewat Ram v. Muhammad Rustam Ali Khan ...	16	891
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153	Bhagwan Singh v. Hardit Singh ...	16	29
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158	Ghulam Ali v. Shiv Nath ...	15	845
159	Ganesha v. Mul Chand ...	15	161
160	Jagdip Singh v. Narain Singh ...	15	866
161	Badaman v. Net Ram ...	15	507
162	Ilahi Bakhsh v. Rahim Bakhsh ...	14	752
163	Jawahri Mal v. Dhanpat ...	17	223
164	Niadar Mal v. Biddulph ...	14	737
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166	Abdul Salam v. Hamid Ullah ...	15	116
167	Ram Ditta Mal v. Karam Devi ...	17	243
168	Kanhya Lal v. Narpat Rai ...	14	793
169	Khidmat Rai v. Annant Ram ...	17	245
170	Iftikhar Ali v. Thakar Singh ...	15	347
171	Radhe Kishen v. Bholu Mal ...	17	254
172	Shaman v. Ari Jang ...	17	504
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174	Hira Singh v. Lahori Mal ...	17	247
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176	Nabi Bakhsh v. Bhagat Singh ...	17	251
177	Nur Ahmad v. Rahim Bakhsh ...	14	71
178	Nand Lal v. Goojar ...	15	275
179	Daulat Ram v. Sobba Singh ...	15	102
180	Tek Chand v. Gopal Devi ...	13	482
181	Basawa Singh v. Bhagwan Kaur ...	17	270
182	Sahib Ditta v. Narinjan Das ...	15	272
183	Nathu Mal v. Mul Chand ...	17	232
184	Stamp Act, *In re* ...	13	330
185	Udho Ram v. Roda ...	15	934
186	Ilahi Bux v. Muhammad Rab Nawaz Khan ...	14	328
187	Kalawati v. Bukhan ...	17	254
188	Riza v. Girdhari Ram ...	14	236
189	Imam Din v. Kanshi Ram ...	14	244
190	Narain Singh v. Jaggat Singh ...	14	331
191	Dhan Singh v. Kahn Singh ...	15	140
192	Badar Bakhsh v. Sahib Jan ...	16	468
193	Sundar Das v. Narain Devi ...	14	240
194	Habib Khan v. Muhammad ...	16	463
195	Ram Kishen v. Thakur Das ...	14	56
196	Salamat Ali v. Hakim Ali ...	14	47
197	Abdul Karim v. Allah Bakhsh ...	17	208
198	Lachhman Das v. Dyal Das ...	14	558
199	Ram Lal v. Ram Kishen ...	14	122
200	Thakar Das v. Kahna ...	16	466
201	Gujar v. Fatteh Jang ...	15	407
202	Nawab v. Duni Chand ...	16	475
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206	Jafar Ali Shah v. Sant Ram ...	14	409
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209	Ram Chand v. Dewan Chand ...	13	571
210	Municipal Committee of Delhi v. Maman Chand ...	15	658
211	Ralla v. Manglau ...	15	559
212	Bhagi v. Muhammad ...	15	734
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27	Har Lal v. Crown ...	14	194
28	Boori v. Crown ...	16	520
29	Pir Bakhsh v. Crown ...	13	220
30	Crown v. Raja ...	15	83
31	Miran Shah v. Crown ...	15	494
32	Langar v. Crown ...	16	526
33	Sri Ram v. Faujdar Singh ...	16	527
34	Sher Singh v. Hari Singh ...	16	528
35	Lal v. Crown ...	16	528
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7	Bhag Singh v. Jaura Singh ...	15	925
8	Jangi v. Dalipa ...	15	942

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72	Manghanmal v. Tolaram ...	16	773
74*n*	Haji Yusif v. Ghulam Hussein Kassim ...	16	771
76	The Crown v. Rino Sobedar ...	16	753
81	Lalu v. Gurdasmal ...	17	80
82	Imperator v. Khushaldas ...	17	64
83	Gaji v. Jumanshah ...	17	61
85	Chimandas v. Manghoomal ...	16	868
86	Bibi Sona v. H. H. Mir Abdul Husein Khan ...	16	845
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89	Haridas v. Ootoomal ...	17	31
97	Wyse v. Chowksey ...	17	412
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103	Ajumal v. Secretary of State ...	17	79
106	The Crown v. Isardas ...	17	39
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S. N. Dar, B. A., LL. B.
Vakil High Court, Srinagar (Kmr.

INDIAN CASES.

1912.

VOLUME XV.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL No. 267 OF 1910.
April 25, 1912.
Present:—Mr. Justice Stephen and Mr. Justice Richardson.
ANUKUL CHANDRA CHAKRAVARTI AND OTHERS—DECREE-HOLDERS—APPELLANTS
versus
NABIN CHANDRA BOSE AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Mesne profits—Proper basis for assessment—Principle—What defendant got, not what plaintiff lost—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (12).

In assessing mesne profits, the Court should take into consideration what the defendant made, not what the plaintiff lost.

The decree-holder had let certain land out to tenants which during the period of dispossession was cultivated by the judgment-debtor:

Held, that mesne profits should be calculated according to what the judgment debtor gained by the cultivation of the land, not according to what the decree-holder lost by being deprived of rent.

Appeal from the order of the District Judge of Tipperah, dated February 12th, 1910, modifying that of the third Munsif of Chandpur, dated September 20th, 1909.

FACTS.—In this case the decree holders sought to recover the mesne profits in respect of certain land for which he had obtained a decree. He estimated the mesne profits at Rs. 2,841. The learned Munsif found that the land yielded profits to the amount of Rs. 766 during the period of dispossession, which the decree-holders are entitled to recover as mesne profits. On appeal by the judgment-debtors, the learned Judge's decision with regard to this point was as follows:

"The appellant has next contended that the learned Munsif has applied the wrong basis in calculating the amount of mesne profits. He submits that just before the decree-holder was dispossessed, he had settled the land with some of the defendants at a rental of Rs. 40 for four years. The learned Pleader for the appellants further contends that, except in cases where a customary rent is realised, the rent exacted represents the whole profits of the land after deducting what is sufficient for the maintenance of the tenants. In support of his contention, he cited *Pandit Lachmi Narayan* v. *Sheikh Mazhar Hassan* (1). The resultant net produce, after taking into account the cost of production and the risk of the agriculturist, differs but little from competition or rack rent. Assuming complete freedom of competition, the rent paid by the tenant-at-will would practically coincide with the whole net produce of any given piece of land.

The respondent has urged that there is no general principle for ascertaining mesne profits. The Court must ascertain the facts of the case and the nature of plaintiff's possession before ouster, and then determine the principle applicable to each particular case. Now, what are the facts of the particular case? The plaintiff had been in possession just before ouster it is true, but we find from the evidence that he had also just before ouster removed his family to another village and was negotiating with some of the defendants to let out the land to them at the rate of Rs. 40 per year. He had, as it seems to me, given up the idea of cultivating the land himself and had determined to let it out to tenants. Otherwise why had he removed his house? It has been urged by the decree-

(1) 12 C. W. N. 650.

holder that his reason for doing this was that he could not retain possession or cultivate the land owing to the intrigues of the defendants and others. I do not think we are concerned with the reasons which induced the decree-holder to adopt a particular course. At the time when he was ousted, it clearly was his intention to let out the lands. By removing his family elsewhere, he had clearly no longer the intention of cultivating the land himself or through hired servants.

I am, therefore, of opinion that the decree-holder is only entitled to recover rent for the period during which he was dispossessed. He himself was prepared to let out the land at the rate of Rs. 40 per annum. He will be, therefore, entitled to rent at the rate of Rs. 40 per annum for the 7 years 5 months from 1308 to *Bhadra* 1315. This will amount to Rs. 296-10-0.

The decree-holders appealed to the High Court on the ground that they were entitled to get mesne profits on the produce basis and not on the rent basis, and that the Court of Appeal below ought to have allowed as mesne profits, the profits enjoyed by the judgment-debtors during the period of dispossession, notwithstanding the intention of the decree-holders to let out the land to tenants.

Babus *Jogesh Chandra Roy* and *Bhupendra Chandra Guha*, for the Appellants.

Babus *Basanta Kumar Bose* and *Kritanta Kumar Bose*, for the Respondents.

JUDGMENT.—In this case the plaintiff obtained a decree in a title suit and proceeded with a further suit in which he sought to recover mesne profits of lands which he had recovered from the defendant. He succeeded before the Munsif in obtaining a decree for Rs. 766. On appeal to the lower Appellate Court, this was reduced to a sum of Rs. 296-10.

The question before us is whether the basis on which the Appellate Court arrived at the sum of Rs. 296 is a proper basis for the purpose. In our opinion, it is not. It appears that before the plaintiff was dispossessed, he had settled the lands at a rental of Rs. 40 per year and it is on this basis that the Rs. 296 is calculated, that is, the Appellate Court considered not what the defendant may be taken to have made but what the plaintiff lost. This is not the correct basis, as is shown by the definition of mesne profits in section 2, sub-section 12 of the Civil Procedure Code. The duty of the Court in estimating mesne profits is there so clearly indicated that we need not amplify the matter.

A second point has been raised on the question of interest being allowed on the mesne profits. This also appears to be settled by the definition which we have referred to.

It was, therefore, the duty of the Appellate Court to assess mesne profits as described in the Code and we remit the case to the lower Appellate Court in order that mense profits may be ascertained accordingly.

The question of jurisdiction has been raised before us. The jurisdiction of the Munsif is limited to the sum of Rs. 1,000 and in this case the plaintiff claimed more than that sum as mesne damages. Without going into the law applicable to this question, the plaintiff has now reduced his claim for mesne damages to Rs. 700 which brings the whole suit involving the claim for mesne profits within the jurisdiction of the Munsif and the question of jurisdiction is given up. It will not, therefore, be necessary for the lower Appellate Court to try the question of jurisdiction but it will re-hear the appeal bearing in mind the definition to which we have drawn its attention, and will decide the appeal according to law.

The appeal is, therefore, allowed; the case is remanded to the lower Appellate Court but the costs of the appeal will abide the result, the hearing fee being assessed at two gold *mohurs*.

Appeal allowed; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL NO. 3 OF 1912.

February 28, 1912.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

Musammat AMEER BEGAM—DEFENDANT APPELLANT

versus

Khwaja Syed BADRUDDIN HUSAIN—PLAINTIFF—*Syed* ASGHAR HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Privy Council Appeal—Application for leave—Award—Judgment of High Court based on award—

AHMAD BAKHSH *v.* SAIRA BIBI.

Appeal from judgment of High Court—Civil Procedure Code (Act V of 1908), *ss.* 109, 110, 111, *Sch. II, para.* 21, *cl.* (2).

In a case, the value of the subject-matter of which is over Rs. 10,000, and the High Court has reversed the decision of the lower Court, an applicant is entitled to a certificate for leave to appeal to the Privy Council.

The certificate cannot be refused on the ground that in accordance with the provisions of the Code of Civil Procedure, no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Such provisions only affect the appeals in India and do not affect the appeals to His Majesty in Council.

Application for leave to appeal to His Majesty in Council against the decision of the Court of the Judicial Commissioner of Oudh, dated 15th August 1911. See 13 Ind. Cas. 520.

Mr. *J. N. Chak*, for the Appellant.

Mr. *Wazir Hussan*, for the Respondents.

JUDGMENT.—This is an application under Order XIV, rule 3 of the Code of Civil Procedure for a certificate to enable the applicant, *Musammat* Ameer Begam, to appeal to His Majesty in Council against a decision of this Court dated the 15th August 1911, revising a decision of the Subordinate Judge of Lucknow, dated the 5th May 1911. The case before the Subordinate Judge was an application under paragraph 20, Schedule II, of the Code of Civil Procedure asking that the award of an arbitrator might be filed in Court. The Subordinate Judge rejected the application and an appeal against this order was filed in this Court [*Badr-ud-din Hasan* v. *Amir Begam* (1)]. The appeal was allowed, the order of the Subordinate Judge was set aside and it was directed that the award be filed and made a decree of Court save and in so far as it provided for the partition of certain immoveable property. It is not denied that the subject-matter of the suit in the Court of first instance was of a value over Rs. 10,000 and that the value of the subject-matter to be disputed on appeal to His Majesty in Council is in excess of the same amount; and as already stated, the decision of this Court has reversed the decision of the Court below: *prima facie*, therefore, the case is one in which, in accordance with the provisions of sections 109 and 110 of the Code of Civil Procedure, a certificate should be granted. The application, however, is opposed and it is contended on behalf of the opposite party that no certificate should be given in view of the provisions of paragraph 21, clause (2), of the second Schedule to the Code of Civil Procedure, which provides that, after an award has been filed and judgment has been pronounced in accordance with it, a decree shall follow and no appeal shall lie from such decree except in so far as it is in excess of or not in accordance with the award. It is argued that the provisions of this clause bar any appeal to His Majesty in Council. We are unable to accept this contention. Section 109 of the Code enumerates the decrees and orders from which appeals lie to His Majesty in Council. Section 110 lays down certain conditions to which the right of appeal provided in section 109 is subject while section 111 lays down certain cases in which this right of appeal is denied. It seems to us that unless the present case can be brought within the scope of section 111, it is impossible to contend that a certificate should be refused on the ground that no appeal to His Majesty lies. The case before us is certainly not a case falling within that section; and we do not think that the provisions of paragraph 21, clause (2), of the second Schedule to the Code of Civil Procedure can be so read as to affect the right of the applicant to go in appeal in this case to the Privy Council.

We, therefore, order that this application for certificate be granted and that the applicant's costs, if any, be paid by the opposite party.

Application granted.

(1) 14 O. C. 308; 13 Ind. Cas. 520.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 931 OF 1911.

May 2, 1912.

Present:—Mr. Justice Piggott.

AHMAD BAKHSH—DEFENDANT—APPELLANT

versus

SAIRA BIBI—PLAINTIFF—RESPONDENT.

Pleadings, defective—Finding on evidence which plaintiff had no opportunity to meet—Appellate Court, duty of—Remission of issue.

If an Appellate Court is of opinion that the plaintiff has been prejudiced by the defective pleadings and that there has been a finding upon insufficient evidence and upon evidence which the plaintiff had no reasonable opportunity of meeting, the proper course is to remit an issue on the point.

AHMAD BAKHSH v. SAIRA BIBI.

Second appeal from the decision of the District Judge of Azamgarh, dated 18th September 1911.

Mr. *Muhammad Ishaq*, for the Appellant.

Mr. *Surendro Nath Sen*, for the Respondent.

JUDGMENT.—The plaintiff in this case claims certain immoveable property as heir to her father and to her mother. For a reason which is sufficiently obvious the plaint is carefully silent on the question of the actual division of inheritance upon the father's death. But the case for the plaintiff may be put as follows :—Her father, Sheikh Najibuddin, died leaving him surviving a daughter, a widow and a brother. The brother took possession of a 6/16ths share of the estate and has continued in possession since. The mother died shortly afterwards and her surviving heirs were her daughter (the plaintiff) and her father, who is the defendant in the present suit. What actually followed upon the widow's death was that the plaintiff and the defendant each obtained possession of one half of the estate of Najibuddin after excluding the 6/16ths share in the possession of his surviving brother, that is to say, they took possession of 5/16ths of the estate each. Now the plaintiff's case is that, when her father died, the devolution of the estate according to the rules of Muhammadan Law was 6/16ths to the brother, 2/16ths to the widow and 8/16ths to the plaintiff, the daughter of the deceased. Then, when the widow died, her share of 2/16ths should be apportioned equally between the plaintiff and the defendant. Consequently, the plaintiff's case is that the defendant is in wrongful possession of the immoveable property left by his late son-in-law to the extent of 4/16ths, or one-quarter of the whole. To this the defendant replied by calling attention to the question deliberately passed over in the plaint, namely, the actual devolution of the inheritance on the death of Sheikh Najibuddin. He said that the widow *Musammat* Naziran actually took possession of 10/16ths of the estate, and the daughter (the present plaintiff) took nothing at all. He further pleaded that this took place in virtue of a transaction which constituted a transfer by the plaintiff of her share in her father's estate in favour of her mother, the consideration being the claim of the latter for dower-debt. This being the case, the defendant further claimed that upon the death of the plaintiff's mother, he succeeded lawfully by inheritance to the 5/16ths share in the estate left by Sheikh Najibuddin which is actually in his possession. The other 5/16ths share then passed by inheritance to the plaintiff, that is to say, by inheritance from her mother. But the case set up by the defendant was that she had no title whatsoever to dispossess him from any portion of the property actually in his possession. The case went to trial upon issues framed in accordance with these pleadings, but the Court of first instance came to the conclusion that the defendant only partially proved his case. The finding of the learned Munsif was that, upon the death of Najibuddin, nothing took place which could amount in law to a transfer by the plaintiff of her rights as heir of her father, but that the plaintiff did consent to her mother's taking possession of the entire 10/16ths share, that is to say, of the whole estate excluding the portion which devolved upon the brother of the deceased, and continuing in possession of the same in lieu of her dower-debt. Having arrived at this finding of fact, the Court of first instance proceeded to apply the law as laid down by a Bench of this Court in *Ali Baksh* v. *Ala Dad Khan* (1) and held that the defendant had inherited from his daughter, that is to say, from the widow of Sheikh Najibuddin, the right to peaceful possession in lieu of the unpaid dower-debt previously enjoyed by the widow herself so that the plaintiff was not entitled to dispossess him without first paying her rateable share of the aforesaid debt. He then proceeded to come to a finding on such evidence as had been produced before him as to the amount of the dower-debt which he held to be Rs. 5,000. Without pausing to take into consideration any question as to the liability of Sheikh Najibuddin's brother in this matter, he went on to hold the plaintiff liable for the whole of the debt thus ascertained then, holding further that one-half of this liability had been extinguished by the fact that the plaintiff had inherited her mother's claim

(1) 7 A. L. J. 567 at p. 576; 6 Ind. Cas. 376; 32 A. 551.

to this extent; he finally passed a decree in plaintiff's favour for recovery of the property claimed, subject to a previous payment by the plaintiff to the defendant of Rs. 2,500. When the case was taken by the plaintiff to the Court of the District Judge in first appeal, the learned District Judge, beyond expressing a doubt as to the trustworthiness of the evidence which had been accepted by the Court below as proving that the plaintiff's mother was in possession in lieu of her claim for dower-debt, recorded no finding on any of the issues of law or of fact which had determined the decision of the first Court. What he held was that these findings were not open to the Court on the pleadings of the parties and in view of the issues on which the parties went to trial. On full consideration, I am not able to accept this position. There have been analogous cases in which a defendant has resisted a claim to the recovery of immoveable property in his possession on the ground of some alleged transfer in his favour and the Courts have found against the validity of such transfer in which it has, nevertheless, been held that upon the evidence it was just and proper to put the plaintiff to terms and to decree the suit for recovery of possession subject to such payment as appeared to the Court necessary in order to do justice to the defendant. The present case seems to me a peculiarly strong one, because the defendant had actually proved a part of the case set up by him. He undertook to prove that the plaintiff had bargained away her right of inheritance in respect of her father's property in return for the extinguishing of her mother's claim for dower-debt. He failed to establish this, but satisfied the Court of first instance that there had been an arrangement between the mother and the daughter which went to this extent that the mother was permitted to retain possession not only of the $\frac{1}{8}$th share of the father's estate which passed to her under the Muhammadan Law, but of the one-half share which devolved on her daughter, and that her possession in respect of this half share was to be in lieu of her claim for dower-debt and to continue until that claim was satisfied. I am of opinion that although the defendant's pleadings might have been more carefully drafted, such a finding as this was fairly open to the learned Munsif on the pleadings as they stood, and that if he arrived at this conclusion it was his duty to give proper effect to it in his decree. If the lower Appellate Court was of opinion that the plaintiff had been prejudiced by the defective pleadings, and that there had been a finding as to the amount of the dower-debt upon insufficient evidence and upon evidence which the plaintiff had been allowed no reasonable opportunity of meeting, it would have been proper to remit an issue on this point. I have also suggested a difficulty as to the position taken up by the learned Munsif in saddling the plaintiff with the liability for the entire amount of dower-debt. It seems to me also that upon pleadings properly framed a question might have been raised as to partial satisfaction of the dower-debt out of the usufruct of the property by the time of the widow's death or even up to the time of the institution of the suit. I mention these matters which may require further consideration; but, as the case at present stands, it seems to me that the lower Appellate Court has based its decision on a preliminary point and that I am unable to accept the decision on that point as correct. I accordingly set aside the decree of the lower Appellate Court and remand the case under the provisions of Order XLI, rule 23 of the Code of Civil Procedure for a decision on the merits. Costs will abide the event.

Appeal allowed.

S. N. Dar
Advocate High Court
Jammu & Kashmir

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 144 OF 1911.

March 21, 1912,

Present:—Mr. Lindsay, A. J. C.

RAM KUMAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

DWARKA PARSHAD—PLAINTIFF—RESPONDENT.

Pleadings—Mortgage—Sale subject to a mortgage, effect of—Purchaser of a mere equity of redemption as distinguished from a purchaser of the property—Incumbrances, effect of merely notifying—Consideration, failure of, right of a purchaser to take the plea as to—Burden of

RAM KUMAR v. DWARKA PARSHAD.

proof as to failure of consideration on purchaser—Undue influence, competency to raise plea as to—Hard and unconscionable bargain.

A person, who purchases property at an auction sale *subject to a prior mortgage*, is estopped from challenging the mortgage on the ground of the failure of consideration or undue influence.

A distinction must be drawn between the case of a purchaser who buys property *not subject* to a mortgage but with *notice* of a mortgage and subject to such risks as the notice may involve, and the case of a person who purchases property which is declared to be *subject* to prior mortgages. In the former case, the Court does not decide whether the mortgage subsists or not. If there is in reality a subsisting mortgage, the purchaser has to redeem it.

If, on the other hand, the mortgage specified in the proclamation of sale, is a fictitious mortgage or did not subsist at the date of the sale by reason of its having been previously discharged by payment, the purchaser acquires the property free from liability for the mortgage.

When the sale is held *subject* to a mortgage, the purchaser does not get any greater right than the right of redeeming the mortgage.

Inayat Singh v. *Izzat-un-Nissa*, 27 A. 97; *Ramachandra* v. *Hazi Kassim*, 16 M. 207; *Shantappa* v. *Subrao*, 18 B. 175, relied upon.

Where property is sold in accordance with a decree for sale on mortgage, the purchaser of the property cannot raise a plea of priority, in respect of the mortgage, not set up by the mortgagee in his suit for sale.

The purchaser of an equity of redemption stands in the shoes of the mortgagor by virtue of his purchase and cannot, therefore, be allowed to be in a better position than the original mortgagor himself. If, therefore, the purchaser raises a plea as to want of consideration, the burden of establishing it would lie upon him.

Where, in such cases, the mortgagor himself has not raised the plea as to undue influence or as to the bargain being unconscionable, the purchaser, who has purchased the property *subject* to such a *mortgage*, cannot take those pleas and ask the Court to reduce the interest on the ground of its being a hard bargain.

Appeal against the order of the Subordinate Judge, Biswan, dated 14th August 1911.

Mr. *Ishwari Parshad*, for the Appellants.

Messrs. *Gokaran Nath Misra* and *A. P. Sen* for the Respondent.

JUDGMENT.—These two appeals arise out of a suit brought in the Court of the Subordinate Judge of Tahsil Biswan, district Sitapur, by one Dwarka Prasad to recover a sum of Rs. 5,396-15-6 alleged to be due in respect of two mortgages executed on the 3rd March 1899. The mortgages in question were executed by one Bisheshar Bakhsh Singh in favour of one Gauri Shankar. Bisheshar Bakhsh was impleaded as the first defendant and amongst other defendants were two persons, Ram Kumar and Lachman Prasad (defendants Nos. 3 and 4). These two defendants Nos. 3 and 4 are the appellants in First Civil Appeal 144. The plaintiff Dwarka Prasad is the appellant in Appeal No. 145. Before proceeding to deal with the points in dispute between these parties, it is necessary to explain the position of the plaintiff Dwarka Prasad and of these defendants Nos. 3 and 4 in order to show how they have become interested in the mortgages in suit. For this purpose it is necessary to set out, in the first instance, details of certain mortgages executed by Bisheshar Bakhsh in favour of Gauri Shankar. The first of these, which may, for convenience sake, be called mortgage A, was executed on the 3rd March 1899. The mortgage-money in this deed was Rs. 2,000. On the same date, a second mortgage, mortgage B, was also executed in favour of Gauri Shankar to secure a debt of Rs. 500. In both these mortgages, the property mortgaged consisted of a village called Simaria. On the 22nd March 1899, Bisheshar Bakhsh executed a farther mortgage on the same property in favour of one Gokaran Prasad to secure a loan of Rs. 300. This will be referred to as mortgage C. On the same date, the 22nd March 1899, Bisheshar Bakhsh motgaged the same property to one Jagannath for a loan of Rs. 1,000. This is mortgage D. On the 22nd April 1899, Bisheshar Bakhsh executed a further mortgage of Rs. 1,000 in favour of Gauri Shankar. This is mortgage E. It is to be noted that out of the principal amount of this mortgage, namely, Rs. 1,000, Rs. 500 consisted of the mortgage-debt secured by the deed of 3rd March 1899, which we have already referred to as mortgage B. For purposes of priority, therefore, it may be taken that this mortgage E has preference over the two intermediate mortgages C. and D. to the extent of Rs. 500, the rule being that where a mortgagor is unable to re-pay a loan and where an account is taken of the moneys due to the mortgagee on the security and a fresh bond is executed, the priority of the original mortgage is not affected although any fresh advance made under the subsequent deed will not have any effect as against an intermediate incumbrancer. It appears that Gauri Shankar was one of five brothers constituting a joint Hindu family, and in a suit brought in the year 1907 in the Court of the Subordinate Judge of Sitapur,

a declaration was made on the 24th January 1908 that the interest of Gauri Shankar in the mortgages taken in his name amounted to a one-fifth share, that is, 3-1/5 annas. In February 1908, after the decision of the suit just referred to, Gauri Shankar's four brothers, one of whom is the plaintiff Dwarka Prasad in this case, sold their interest in mortgages A. and B. to two persons, who admittedly were *benami* purchasers for the defendants Nos. 3 and 4, namely, Ram Kumar and Lachman Prasad. One of these four brothers, named Channu Lal, having, before the date of this transfer, also acquired in mortgage A. a one-anna share out of the 3-1/5 annas share owned by Gauri Shankar, the result was that by the transfer in question, Ram Kumar and Lachman Prasad became owners of mortgagee rights in mortgage A. to the extent of 13 4/5 annas. As to mortgage B., the transfer gave them mortgagee rights to the extent of 12-4/5 annas. This transfer left Dwarka Prasad without any share in these mortgagee rights; but on the 20th July 1903, in execution of a money decree obtained against Gauri Shankar by one Nandan Prasad, Dwarka Prasad became the purchaser of Gauri Shankar's interest in mortgage A. to the extent of 2-1/5 annas and in mortgage E. to the extent of 3-1/5 annas As has already been said, this mortgage E. included the sum due on mortgage B. For the purpose of this suit, therefore, it may be taken that Dwarka Prasad is to be treated as the owner of 3-1/5 annas share in the mortgage B. It is convenient to deal with mortgage B. as still subsisting although it was incorporated in the deed of latter date; and it is for enforcement of his rights as mortgagee in these two mortgages, that Dwarka Prasad brought the present suit. It is necessary now to refer to another fact. It has already been stated that on the 22nd March 1899, Bisheshar Bakhsh had executed a mortgage for Rs. 1,000 in favour of a mortgagee named Jagannath (mortgage 1). In November 1904, Jagannath brought a suit on this mortgage and obtained a decree for sale. In the suit brought by Jagannath, he impleaded as defendants not only the mortgagor but also Gouri Shankar and Gokaran Prasad. These last two persons were impleaded as prior mortgagees. In paragraph 3 of Jagannath's plaint, (Exhibit 10), it was stated that Gauri Shankar and Gokaran Prasad were prior mortgagees and the plaintiff asked for a decree for sale of the property subject to the mortgages in their favour. On the 12th December 1904, the Court passed a decree for sale of the mortgaged property, that is, *Mouzah* Simaria, subject to the prior mortgages held by Gauri Shankar and Gokaran Prasad. The property was sold and was purchased by Lachman Prasad (defendant No. 4) and by one Bala Prasad, who subsequently transferred his interest to the defendant No. 3, namely, Ram Kumar. This purchase was made on the 22nd April 1906. The result of this transaction, therefore, was that Ram Kumar and Lachman Prasad became owners of the property subject to the prior mortgages of Gauri Shankar and Gokaran Prasad. They have paid off Gokaran Prasad's mortgage (mortgage C.) so that at the present time they are owners of *Mouzah* Simaria subject to the mortgage incumbrances in favour of Gauri Shankar in which they themselves have as already stated acquired the principal interest. We have it, therefore, that the plaintiff Dwarka Prasad is mortgagee to the extent of 2-1/5 annas under mortgage A. and 3-1/5 annas under mortgage B., and that the defendants are owners of the mortgaged property subject to the mortgagee rights of the plaintiff Dwarka Prasad. To come now to the pleadings in the present suit, Bisheshar Bakhsh the mortgagor made no defence. The principal defence raised came from Ram Kumar and Lachman Prasad and the only pleas with which we are here concerned are two, namely;—*first*, that under the two mortgages of 3rd March 1899, which were put in suit, the full consideration had not been paid to the mortgagor Bisheshar Bakhsh, and *secondly*, that the mortgages in question had been obtained by the exercise of undue influence on the part of Gauri Shankar, and that the rate of interest, namely, 24 per cent. per annum compoundable with six monthly rests, was harsh and unconscionable and should not be enforced. On the issues raised by these pleadings, the Subordinate Judge found that these defendants had failed to prove any failure of consideration. He found in their favour on the plea of undue influence and reduced the rate of interest to simple interest at 18 per cent. per

annum. Both parties have appealed. Ram Kumar and Lachman Prasad alleged that lower Court was wrong in holding that the payment of full consideration for the mortgages in suit was proved. Dwarka Prasad, the plaintiff, in appeal attacks the finding of the Court below on the question of interest. It is claimed on his behalf that there was no case for the reduction of interest and that the full interest provided by the mortgage deed in suit should have been awarded.

To deal first with the defendants' appeal, the first question which requires consideration is whether or not, in the circumstances already stated, it was competent to Ram Kumar and Lachman Prasad to raise any plea as regards failure of consideration. As has already been pointed out, these persons have by purchase acquired the largest share of the mortgagee-rights in both the mortgages before the Court, that is, 13-4/5 annas in mortgage A. and 12-4/5 annas in mortgage B. It has also been stated that they purchased the village of Simaria in execution of Jagannath's decree subject to the prior mortgages in favour of Gauri Shankar. As regards this last transaction, there can be no doubt whatever as to the nature of the purchase made. What was sold in exection of Jagannath's decree was the village of Simaria subject to the prior mortgages in favour of Gauri Shankar and Gokaran Prasad. This is clear from the decree of the Court and also from the sale statement which was prepared previous to the time of sale. In this sale statement, the profits of *Mouza* Simaria were estimated at Rs. 117 a year and the value of the property was described as being approximately Rs. 10,892. The property was purchased in execution for Rs. 100 and obviously the reason why such a low price was obtained was on account of the amounts due on the prior incumbrances subject to which the property was sold. Can Ram Kumar and Lachman Prasad, in the face of these facts, turn round now and raise a plea to the effect that the mortgages subject to which they got the property were not given for full consideration? In my opinion, they cannot. In this connection, I would refer to a passage in Ghose's Law of Mortgage, 4th Edition, Volume I, page 302, where the learned author states as follows:—"If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale *in invitum*, or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. The purchaser cannot, therefore, set up any personal disability on the part of the mortgagor to make the mortgage, nor that it was obtained by fraud, nor, if the full amount named in the mortgage was deducted from the price paid for the estate, can he dispute the amount of the mortgage-debt."

The learned author goes on to say that where the purchaser merely buys an estate which is under mortgage but does not take it subject to the incumbrance or undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. In support of what he says, the learned author refers to the following cases:—*Inayat Singh* v. *Izzat un-Nissa Begam* (1), *Ramachandra Joishi* v. *Haji Rassim* (2), *Shantappa* v. *Subrao* (3) and *Shib Kunwar Singh* v. *Sheo Prasad Singh* (4). According to these rulings, a distinction is to be drawn between the case of a purchaser at an auction sale who buys property not subject to a mortgage but with notice of a mortgage and subject to such risks as the notice may involve, and the case of a person who purchases property which is declared to be subject to prior mortgages. This distinction is referred to in the case of *Shib Kunwar* v. *Sheo Prasad* (4), where the learned Judges say (at page 420)—"The Code of Civil Procedure clearly makes a distinction between a case in which property is sold subject to a mortgage and a case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided for by section 282, and the latter by section 287. In the former case, the Court, after being satisfied of the existence of the mortgage, sells only the judgment-debtor's right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. In the latter, he buys the property with notice of the mortgage and subject to such risks as the notice might involve. The Court does not decide whether the mortgage subsists or not. If there is in reality a subsisting mortgage, the purchaser has to redeem it. If, on the other hand, the mort-

(1) 27 A. 97.
(2) 16 M. 207.
(3) 18 B. 175.
(4) 28 A. 418; A. W. N. (1906) 68; 3 A. L. J. 200.

gage specified in the proclamation of sale is a fictitious mortgage, or did not subsist at the date of the sale by reason of its having been previously discharged by payment, the purchaser acquires the property free from liability for the mortgage." Now, in the present case, as has already been pointed out, the sale of property in execution of Jagannath's decree was beyond all doubt a sale subject to prior mortgages. The case was not merely one of notification in the proclamation of sale that certain mortgages were said to exist upon the property. On the contrary, Jagannath himself had in his plaint admitted the existence of these prior mortgages and both the prior mortgagees had been impleaded as defendants in the suit. It is quite clear, therefore, that the auction-purchasers under this decree, when they bought the property for Rs. 100 only, acquired nothing more than the right to redeem the prior mortgages and this being so, it seems to me, in accordance with the opinion expressed in Ghose's Law of Mortgage, Volume I, page 302, that it was not competent for Ram Kumar and Lachman Prasad to set up in this case any plea which called in question the validity of the mortgages subject to which the property was sold. I think the learned Subordinate Judge was in error in allowing such a plea to be entertained. Assuming, however, for the sake of argument that such a plea was open to the defendants-appellants, I agree with the findings of the Subordinate Judge that they failed to discharge the burden of proof which lay upon them. It has been argued here in appeal that the burden of proving that full consideration for the mortgages in question was paid lay upon the plaintiff. These defendants, who took under a sale in execution of a mortgage-decree against the mortgagor, cannot be in a better position than the mortgagor would have been himself. There was no question as to the fact of execution and if Bisheshar Bakhsh, the mortgagor, had thought fit to raise any plea of want of consideration, the burden of establishing it would have been upon him. How these defendants can be in a better position than the original mortgagor himself has not been explained. The defendants, as held by the learned Subordinate Judge, gave no evidence at all to prove that full consideration had not been given and accordingly their case on this point was bound to fail. I may note here that the learned Counsel who appears for the plaintiff respondent in Appeal No. 144 has argued that even if it be assumed that the burden of proof lay upon him, it was duly discharged. I do not think it necessary to enter into the details of the evidence produced on this point by the plaintiff. It is sufficient for me to say that, in my opinion, it establishes clearly that full consideration was paid. This finding disposes practically of the appeal brought by the defendants Ram Kumar and Lachman Prasad. I may, however, note one or two other points which call for an expression of opinion. It was claimed on behalf of these defendants that Jagannath's mortgage of the 22nd March 1899, under which they purchased, was entitled to priority over the mortgages in suit by reason of the fact that a portion of the mortgage-money advanced under this mortgage was applied in extinguishing a mortgage-debt dated the 3rd July 1897 due to one Sital Sah. So far as this claim is concerned, I think the learned Subordinate Judge's decision is perfectly correct. He points out that when Jagannath brought his suit for sale, he never claimed any priority for his mortgage on this account and, this being so, the defendants appellants can certainly not now be heard to raise a plea of priority which Jagannath did not take in his own suit. At the hearing of this appeal, the learned Counsel for these defendants-appellants also attempted to raise a new plea which is not taken in the memorandum of appeal. He complains of the form of the decree and argues that in no case was the plaintiff entitled to have the whole of the village of Simaria brought to sale in order to enforce his mortgagee rights. On being asked to explain how this ground was not taken at the time when the appeal was filed, all that the learned Counsel could say was that he had omitted it by reason of his not having had before him a copy of the decree at the time when he drew the memorandum of appeal. This is no sufficient explanation for such an omission and I cannot allow any fresh ground to be taken now for any such reason. The defendants-appellants have been given six months to pay off the money due to the plaintiff and if they fail to do so, I see no reason why the plaintiff should not get what is owing to him

by sale of the mortgaged property.

There remains to be considered the plaintiff's appeal, Appeal No. 145 of 1911. This relates to the question of interest and it is claimed that the Court below was wrong in reducing the contract rate of interest to 18 per cent. per annum simple. I have already said that this reduction was made by the Court below on a plea of undue influence raised by Ram Kumar and Lachman Prasad. The Subordinate Judge was of opinion that, on the face of it, the contract was unconscionable that the mortgagor was completely in the hands of the mortgagee, Gauri Shankar, and that, therefore, under section 16, sub-section (3),of the Indian Contract Act, it lay upon the plaintiff Dwarka Prasad to establish that the contract was a fair one and was not induced by undue influence. I fail to understand why a plea of this nature was entertained in this case. As I have already stated, I am of opinion that neither of these defendants was competent to question in any way the terms of the mortgages subject to which they bought the property and I certainly think they were not competent to ask the Court to hold that they were entitled to have the rate of interest reduced on the ground of a hard bargain. Who are these defendants to raise a plea of this kind? They bought the property subject to mortgages of the terms of which they were fully cognizant. Further, they have acquired from Gauri Shankar's brothers more than four-fifths of the mortgagee rights under these mortgages and it is impossible to imagine that the price which they paid for them was not calculated in accordance with the terms relating to interest. It does not lie in their mouths now to complain that the rate of interest secured by the mortgages in suit is excessive. It is conceivable that a plea of this kind might have been entertained had it been raised by the mortgagor himself but Bisheshar Bakhsh has never made any complaint on this score. The contest is no longer between a mortgagor and a mortgagee but between two sets of money-lenders who have been buying up mortgagee rights which sprang out of the mortgages executed by Bisheshar Bakhsh. The defendants, Ram Kumar and Lachman Prasad, entered into a speculation and now want to have their bargain made more favourable to themselves at the expense of another person who has stood in their way and prevented them from acquiring the entire mortgagee-rights over the village. These defendants have no equity in their favour which entitles them to complain that the rate of interest in the mortgage-deeds was an unconscionable one. I, therefore, hold that the Subordinate Judge was wrong in allowing this plea and decree the appeal brought by the plaintiff Dwarka Prasad (Appeal Nos 145 of 1911).

The result, therefore, is that the defendants' appeal (Appeal No. 144 of 1911) is dismissed with costs. The plaintiff's appeal (Appeal No. 145 of 1911) is allowed with costs. The decree of the Court below is set side and it is ordered that the plaintiff's claim be decreed in full with costs. The defendants will have six months from the date of the decree of this Court to pay up the sum found due to the plaintiff on the deeds in suit. In default, the mortgaged property will be put to sale. A decree in the usual form will be prepared in the office.

Appeal No 144 *dismissed.*
Appeal No. 145 *allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 812 OF 1911.

May 4, 1912.

Present:—Mr. Justice Piggott.

BHOLE SINGH—DEFENDANT—APPELLANT

versus

BHAGWANT SINGH—PLAINTIFF—RESPONDENT.

Suit for possession by auction-purchaser—Plaintiff to prove his title within time—Limitation—Burden of proof.

In a suit the defendant cannot be put to the defence of his title at all unless the plaintiff claims from the Court the relief to which he is entitled within what the Legislature has laid down to be a suitable time with reference to the facts of each particular case.

Second appeal from the decision of the Subordinate Judge of Agra, dated the 8th May 1911.

Mr. *Damodar Das*, for the Appellant.

Mr. *Bajpai*, for the Respondent.

JUDGMENT.—This was a suit for recovery of possession over certain immoveable property and the only question for determination before me is one of limitation. In stating this question, I think it reasonable to accept everything which the Courts below have found against the conduct of the defendant

upon the facts of the case. It appears that the defendant, holding three distinct mortgages on the property in suit, brought three distinct suits, one upon each mortgage. He obtained decrees and put the property up for sale three times, once upon each decree. He purchased himself at auction under two of his decrees on the 21st February 1898, and obtained formal possesssion on the 7th of September 1898 and again on the 30th of January 1899. In the meantime, the same property had been put up for sale a third time on April the 21st, 1898. The defendant appeared at that auction-sale, said nothing about his previous purchase, but actually bid for the property as if it still belonged to his judgment-debtor. He was out-bid by the plaintiff, who thus became auction-purchaser at this third sale held on April the 21st, 1898. This sale was confirmed by the Court on the 30th of May 1898 and the plaintiff obtained formal delivery of possession on the 15th of May 1899. It must be remembered, therefore, that his judgment-debtor was still in possession at the date of the auction-sale, but the decree-holder, (the present defendant) as auction-purchaser under his first two decrees, had himself obtained formal delivery of possession before the plaintiff did so. The present suit was brought on the 1st of June 1910, and I have to determine which is the Article of the first Schedule to the Indian Limitation Act (IX of 1908) by which that suit is governed. The suit as brought is one to which Article 142 of the said Schedule would apply provided the plaintiff succeeded in establishing the necessary facts. What the plaintiff says is, that he obtained actual, and not merely formal possession on the 15th of May 1899 but lost that possession some time in the month of July 1899 owing to an adverse decision of the revenue Courts. If these facts were established, the suit would be one for possession of immoveable property when the plaintiff while in possession of the property has been dispossessed, Article 142 of the Indian Limitation Act would apply; the date of the origin of the cause of action would be the month of July 1899, and the suit would be within time. In such a suit, however, the burden of proof is on the plaintiff to satisfy the Court that he was actually in possession within limitation. There is no finding in favour of the plaintiff by either of the Courts below on this point, nor has either of them applied Article 142 of the Schedule, nor has either of them calculated the origin of the cause of action from the month of July 1899. Both the Courts below have held that the plaintiff has a cause of action dating from the 15th of May 1899, the date on which formal delivery of possession to him took place under orders of the Court. The learned Munsif himself does not expressly state what Article of the Limitation Act he proposes to apply, but the learned Subordinate Judge on first appeal has expressly applied Article 144. This Article cannot be applied unless the Court is prepared to find that the suit is one for possession of immoveable property not specially provided for under any of the other Articles of the Schedule in question. This seems to me clearly impossible because the suit as framed is one to which Article 142 would apply, and it discloses facts which would make Article 138 of the Schedule applicable. The Courts below have held that this Article 138 of the Schedule is excluded by the principle of the ruling of this Court in *Narain Das* v. *Lalita Prasad* (1). That ruling obviously does not exclude Article 138, because the particular case then before the Court was decided without any determination of the question whether Article 138 or Article 144 would have applied to the facts then before the Court. By implication it seems to me that this ruling is entirely against the plaintiff; but I will refer to this point again presently. There are other authorities for holding that Article 138 of the Schedule would apply to the present suit, as for instance, cases reported as *Sadashiv Mahadu* v. *Narayan Vitha Mawal* (2) and as *Venkatalingam* v. *Veerasami* (3). I come back, therefore, to what seems to me the one question really arguable, namely, whether or not the Courts below should have found in favour of the plantiff on the ground that he has made out a sufficient case for applying the Article of Limitation Act on which his suit was actually based, namely, Article 142. I do not think the case for the plaintiff can be put any higher than this, namely, that the Court should accept his certificate of formal delivery of possession on the 15th of May 1899 as *prima facie* sufficient proof that he obtained

(1) A. W. N. (1899) 56.
(2) 35 B. 452; 13 Bom. L. R. 631; 11 Ind. Cas. 987.
(3) 17 M. 89.

actual possession on that date. If this proposition can be affirmed, then it would not be necessary for the plaintiff to prove that he actually lost possession in the month of July following, or on any specific date; he could claim to have made out a good title, plus possession within twelve years of the date of the suit. Now it is on this very point that the ruling in *Narain Das* v. *Lalita Prasad* (1), already referred to, seems to me against the plaintiff. Applying the principle involved in that ruling to the facts of the present case, I hold that if the judgment-debtor had been in actual possession on the 15th of May 1899, then the Court would have been bound to accept the plaintiff's certificate as sufficient proof that the judgment-debtor was actually ousted from possession on that date and that possession passed to the plaintiff. The case is otherwise when the judgment-debtor was not in possession on the 15th of May 1899, but another person was in possession as auction-purchaser under a previous sale. As against such auction-purchaser, formal delivery of possession to the present plaintiff is not proof that he was actually ousted. Something has been said before me in argument as to the dishonesty of the defendant's proceedings, and as to the question of estoppel. These considerations are quite irrelevant to the question of limitation. If the plaintiff had come into Court within twelve years of the date of the confirmation of his auction-sale, it may be that the Courts below are perfectly right in holding that no sort of defence on the merits would have been open to the defendant, in view of his proceedings, and particularly in view of the fact that he was a bidder at the auction-sale of the 21st April 1898. The whole point of the law of limitation is, however, that a defendant cannot be put to the defence of his title at all unless the plaintiff claims from the Courts the relief to which he is entitled within what the Legislature has laid down to be a suitable time with reference to the facts of each particular case. I hold that the suit as framed is barred by Article 142 of the first Schedule to the Indian Limitation Act, because the plaintiff has failed to prove the ingredients necessary to bring his suit under the operation of that Article. I hold that the facts disclosed are such that the suit would have been maintainable under Article 138 of the same Schedule if it had been filed two days earlier, but that it is barred under that Article because it was brought more than twelve years from the date of the confirmation of the auction sale. I hold that Article 144 of the same Schedule cannot be applied at all, because, from any point of view, the suit is one provided for by another Article in the same Schedule. I, therefore, accept this appeal and, setting aside the decrees of both the Courts below, dismiss the suit with costs throughout, including in this Court fees on the higher scale.

Appeal accepted.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 318 OF 1910.
May 13, 1912.
Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.
THE INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LIMITED, CALCUTTA—DEFENDANT—APPELLANT
versus
HARCHARAN DAS—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), ss. 3 (4) & (5), 80—Railway Company—Navigation Company in connection with Railway traffic—Liability for loss to goods—Detention—"Deterioration"—Goods conveyed by different Companies—Liability of Company detaining goods—Agreement between two Companies for non-liablity to public—Jurisdiction—Place of trial—Contract made where goods delivered for transit—Civil Procedure Code (Act XIV of 1882), s. 17, Exp. III.

A. delivered certain goods to the North-Western Railway Company at Ludhiana for carriage to Bhairab in Eastern Bengal.

The Railway Receipt for the goods was made over to *A.* at Ludhiana and payment for freight was also made there. The lines of various Railway Companies were used for the transit of the goods, which were conveyed to Goalundo by the Eastern Bengal State Railway, and were conveyed thence by the Indian General Navigation and Railway Company to Bhairab.

The goods were detained at Goalundo and Bhairab and plaintiff, after due notice, sued the India General Navigation and Railway Company for damages for loss in the value of goods owing to the detention. The defendant never pleaded in the first Court that it was not a Railway Company. Between the Eastern Bengal State Railway and the defendant Company there was alleged to be an agreement by which each Company was to be responsible to the other for damage to goods but not to the public.

Held, (1) that the defendant Company could not plead in appeal that it was not a Railway Company;

Nural Hussain v. *Shiv Sahai Lal*, 20 C. 1; 19 I. A. 221; *Chuni Lal* v. *Musammat Amir Bibi*, 39 P. R. 1900; P. L. R. 1900 p. 431; *Muhammad Anwarul Haq* v. *Habibul Rahman*, 74 P.R. 1902; *Hans Raj* v. *Ganga Ram*, 88 P. R. 1902; 119 P. L. R. 1902, relied upon.

(2) that the defendant Company was a Railway Company and that section 80 of the Railways Act applied to the case;

(3) that as the contract was made at Ludhiana, the Ludhiana Court had jurisdiction to try the suit;

(4) that even if *A.* had notice of the agreement between the Eastern Bengal State Railway and the defendant Company, it would not relieve the latter of liability to *A.* in the suit;

(5) that "deterioration" in section 80 of the Railways Act included decrease in market-value consequent on detention;

Changa Mal v. *The Bengal N. W. Ry. Company*, 6 P. R. 1897, relied upon.

(6 that the defendant Company was liable for loss caused by detention at Bhairab but not for detention at Goalundo.

Second appeal from the order of the Divisional Judge, Ludhiana Division, at Ferozepore, dated the 8th December 1909, modifying that of the District Judge, Ludhiana, dated the 31st May 1909, decreeing part of the plaintiff's claim.

Mr. *Oertel*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, Messrs. *Obedulla* and *Ghulam Rasul*, for the Respondent.

JUDGMENT.— * * * * *

This appeal and Civil Appeal No. 319 of 1910 can be disposed of together, the points involved being practically indentical. The respondent, Harcharan Das, sued the appellants, the Indian General Navigation and Railway Company, Limited, Calcutta, for damages on account of the loss sustained by him in consequence of detention of his goods by the appellant Company and fall in the market price of those goods during such detention, and for recovery of sums unlawfully recovered from him by the appellant Company in respect of surcharges and demurrage. The principal plea set up is that the Ludhiana Court, in which the suit was instituted, had no jurisdiction but, as remarked by the lower Appellate Court, the appellant Company never pleaded that it was not a Railway Company amenable to the jurisdiction of the Court under the Railways Act and it has throughout described itself as a Railway Company. The goods in respect of which the suit was filed were delivered to the North-Western Railway Company at their station at Ludhiana for carriage to Bhairab in Eastern Bengal. The lines of various Railway Companies were used and the goods were conveyed to Goalundo by the Eastern Bengal State Railway and were conveyed thence by the appellant Company to Bhairab by boat. "Railway" and "Railway Company" are defined in section 3 (4) and (5) of the Indian Railways Act, IX of 1890. Section 3 (4) (*d*) includes in the definition of "Railway" all ferries, ships, boats and rafts used on inland waters for the purposes of the traffic of a Railway and belonging to or hired or worked by the authority administering the Railway.

Under section 80 of the Act. the plaintiff could either sue the Railway administration to which the goods were delivered or the Railway administration on whose Railway the loss, injury, destruction or deterioration complained of occurred. Under section 17, Explanation III, of the Code of Civil Procedure of 1882, in force when the suit was filed, the cause of action arose, and the suit could be filed, at the place where the contract was made. We have no hesitation in holding that the contract was made at Ludhiana. The Railway Receipt entitling the respondent to carriage of the goods to Bhairab was made over to him at Ludhiana and payment for it was made at Ludhiana.

It was contended for the appellant Company that under Exhibit A, Articles of agreement entered into in 1903 between the Eastern Bengal State Railway on the one side and the Indian General Navigation and Railway Company and the Rivers Steam Navigation Company on the other side, each Company is responsible to the other but not to the public. Article 18, however, is as follows:—

"All loss, injury or damage of any kind and all claims for goods, cargo or parcels shall thus be settled by the party with whom the goods, cargo or packages were at the time when the loss or injury occurred from which the claims arose. But where it cannot be ascertained with certainty where the loss or injury arose, the claim shall be divided in proportion to the amount of freight to which each party would be entitled under clause 8, but in such cases no claims shall be admitted or paid without the consent of both parties."

Even if it were held that the respondent was aware of this agreement, it would not, in our opinion, relieve the appellant Company of liability to him in this suit. It has not, however, been pleaded that he had a notice of this agreement and he is not, in our opinion, bound by its terms.

It has further been contended for the appellant Company that section 80 of the Act does not contemplate decrease in the market-price of the goods, and *Changa Mal* v. *The Bengal N. W. Railway Company* (1), which has been cited in support of this contention, does not materially help the appellants as page 26 of the report runs,—

"The exact meaning of the word 'loss' which is in issue in the case is ,perhaps, to a certain extent liable to be obscured by the discussions regarding it in some of the reported cases. It has been held for example to cover a loss of season or market:"

and authority is cited for this interpretation.

The question before the Court in that case really was whether section 77 of the Railways Act barred a suit for damages for negligent mis-delivery of goods to a person other than the owner by reason of notice not having been given to the Railway administration within six months of the loss. The plaint in the present suit alleges delivery to the Railway Company at Ludhiana on the 17th September 1906 and notice to defendants on the 15th January 1907, *i.e.*, within six months. These allegations are not now denied. We see no reason for doubting that deterioration in section 80 includes decrease in market-value consequent on detention.

It is admitted that the goods in suit were conveyed by the appellant Company from Goalundo to Bhairab and on the pleadings, we are satisfied that section 80 of the Railways Act applies. *Nurul Hussain* v. *Shiv Sahai Lal* (2), *Chuni Lal* v. *Musammat Amir Bibi* (3), *Muhammad Anwarul Haq* v. *Habibul Rahman* (4) and *Hans Raj* v. *Ganga Ram* (5), are authority, if authority were necessary, for the proposition that the appellants cannot at this stage plead that they are not a Railway Company within the terms of, section 80 of the Act.

On the facts, we concur with the Courts below that the appellants were liable to the respondent for loss caused him by the detention at Bhairab and that they were not entitled to demand demurrage or surcharge from the respondent. At the same time, we cannot concur in so much of the lower Appellate Court's judgment as makes the appellant liable for detention at Goalundo. At the beginning of the judgment in Civil Appeal No. 326 of 1909, the subject of Civil appeal No. 319 of 1910 before us, the lower Appellate Court says:—

"The consignment in question reached Goalundo on 12th November 1906 and Bhairab on the 11th January 1907, so far the defendant Company was not to blame," and further on the judgment runs,—

"I find that the delay at Goalundo was presumably due to the defendant Company's default."

We are unable to concur in the reasons recorded for this change of opinion and we concur with the Court of first instance in the conclusion that the only detention for which the appellants were liable was at Bhairab. The lower Appellate Court was, however, correct in increasing the amount of surcharge recoverable by the respondent to Rs. 37-2-9 more in each case than was allowed by the Court of first instance. We, therefore, modify the decree of the lower Appellate Court in this appeal by deducting Rs. 233-14-9 from the amount as decreed, and in Civil Appeal No. 319 of 1910 by deducting Rs. 195 from the sum decreed. To this extent only the appeals are decreed but, having regard to the course of the litigation, the appellants will pay the whole of the respondent's costs.

Decree modified.

(1) 6 P. R. 1897.
(2) 20 C. 1; 19 I. A. 221.
(3) 39 P. R. 1900: P. L. R. 1900 p. 431.
(4) 74 P. R. 1902.
(5) 88 P. R. 1902; 119 P. L. R. 1902.

GANPAT SINGH *v.* TOHFA.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 932 OF 1911.
May 3, 1912.
Present:—Mr. Justice Piggott.
GANPAT SINGH—DEFENDANT—APPELLANT
versus
Musammat TOHFA—PLAINTIFF—
RESPONDENT

Res judicata—*Second suit for redemption.*

T. mortgaged her occupancy-holding with possession to *G.* in 1899. In 1909, *T.* brought a suit, not properly framed as a redemption suit, in which she obtained a decree for possession subject to her first paying within 30 days the amount secured under the mortgage. She, however, did not pay the money within time. Subsequently, she brought a suit for redemption:

Held, that the second suit for redemption was not barred by the former suit.

The cause of action in a suit for redemption is the mortgagor's title plus a valid tender or deposit of the mortgage-debt. Unless, therefore, there has been a decree which makes it impossible for the mortgagor to make a valid tender or deposit, his right to do so continues.

Sita Ram v. *Mahdo Lal*, 24 A. 44, referred to.

Second appeal from the decision of the Additional Judge of Aligarh, dated the 31st August 1911.

Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *Govind Prashad*, for the Respondent.

JUDGMENT.—In this case the plaintiff is the occupancy-tenant of a certain holding. By a deed, dated February the 16th, 1899, that is to say, before the Agra Tenancy Act (Act II of 1901) came into force, she mortgaged this holding with possession to the defendant. She now brings this suit for redemption upon tender of Rs. 90, the amount of the mortgage-debt. The defence is that the plaintiff is debarred from bringing this suit by reason of the result of a previous suit brought by her in the year 1909. It appears that this former suit was not framed precisely as a suit for redemption, but at any rate it ended in a decree dated November the 22nd, 1909, the effect of which was that the plaintiff might recover possession of the holding in question, subject to her first paying within thirty days the sum of Rs. 90 found to be due to the defendant. An appeal having been preferred against this decree, the plaintiff was foolish enough to neglect the fulfilment of the condition imposed upon her and failed to deposit the sum of Rs. 90 within the prescribed period. The subsequent dismissal of the defendant's appeal on March the 18th, 1910, left her without any decree of which she could claim execution. She now brings this second suit as a suit for redemption based upon a tender of the mortgage money made subsequently to the decree in the former suit. The question is whether this suit is maintainable. The decision must obviously be governed by the ruling of the Full Bench of this Court in *Sita Ram* v. *Madho Lal* (1) and by the principles involved in that ruling. I cannot put the case for the defendant more strongly than this:—if the former suit of 1909 had ended in a simple decree for possession in favour of the plaintiff, and the plaintiff had neglected to obtain execution of that decree within limitation, she could never have brought a second suit for recovery of possession, no matter how good her title might be. Now the suit actually ended in a decree for possession subject to a certain condition. Failure to comply with that condition left the plaintiff with no decree that she could execute, and it is argued that there is no more reason for allowing her to bring a fresh suit in the one case than in the other. This argument is not without real force, but it overlooks the fact that the decree in the former suit involved, in a sense, a declaration that the parties occupied towards one another the position of mortgagor and mortgagee. When once this is realised, there seems to me no argument in favour of the defendant in the present suit which is not equally an argument against the correctness of the dicision of this Court in *Sita Ram* v. *Madho Lal* (1). I think it may be said that the Honourable Judges of other High Courts, who have refused to accept the view of the law taken by this Court in the decision above referred to, have proceeded in the main upon the lines that a distinction must be drawn between a mortgagor's title as such, and the existence of a legal remedy still available to the mortgagor for the enforcement of the same. In one form or another it seems to me that this argument was considered and rejected by all the learned Judges who decided the case of *Sita Ram* v. *Madho Lal* (1). The decision of this Court proceeds on the assumption that a mortgagor's right to redeem continues until it is expressly taken away by some decree of a competent Court, that is to say, by some decree which in express terms has the effect of extinguishing that right. Otherwise the

(1) 24 A. 44.

mortgagor, in the view taken by this Court, has a fresh cause of action, every time he tenders or deposits in Court the amount of the mortgage-debt, and he could not be debarred from bringing a fresh suit merely by the allegation that it was a suit based upon the same cause of action as some former suit brought by him. To put the point in another way, this Court holds that the cause of action in a suit for redemption is the mortgagor's title plus a valid tender or the deposit of the mortgage-debt. Unless, therefore, there has been a decree which makes it impossible for the mortgagor to make a valid tender or deposit, his right to do so continues. If we turn to the provisions of section 92 of the Transfer of Property Act, it cannot be denied that they afford considerable support to the position taken up by this Court. It is evident that one of the objects of the Legislature in enacting this section was to provide against multiplicity of suits for redemption. If the provisions of that section are properly carried out, every suit for redemption must end in a decree which will have the effect of finally extinguishing the right to redeem. Now, the very fact that such elaborate provision has been made in this section for the sake of securing the above result suggests that, in the absence of such provision, a fresh suit for redemption upon a new cause of action would lie every time the mortgage debt was tendered or deposited. The point seems to me clearer still if we consider the special provisions in the case of usufructuary mortgages. A usufructuary mortgagee as such has no right to bring the property to sale. Nevertheless, the Legislature has thought fit to direct that, in a suit for redemption where the mortgage is usufructuary, the alternative decree in the event of the plaintiff's failing to make the required payment within the prescribed period shall be one for sale of the mortgaged property. The reason for this obviously is that the Legislature did not intend that the holder of a usufructuary mortgage should, under any circumstances, obtain a decree for foreclosure pure and simple, or a decree which should have the effect of a foreclosure. In order to prevent this, and yet at the same time to protect usufructuary mortgagees from the danger of a multiplicity of suits for redemption, the Legislature adopted the only possible alternative, by providing that in the event of the plaintiff failing to avail himself of his decree for redemption, the mortgaged property should be put for sale. By so doing, the Legislature secured for the benefit of the mortgagor whatever difference there might be between the market-value of the mortgaged property and the amount of the mortgage-debt. It was, no doubt, in order to secure this benefit for the mortgagor that the Legislature refused to allow usufructuary mortgagees an alternative decree for foreclosure. It seems to me, therefore, that, but for one peculiar feature to which I am about to refer, the case for the defendant in the present suit is, upon any reasonable application of the ruling of this Court in *Sita Ram* v. *Madho Lal* (1), scarcely arguable at all. The mortgagee was himself a party to the former suit; if he wanted to protect himself against the possibility of a further suit for redemption, it was his business to see that the alternative decree, which was the decree which he himself might have to execute, was properly passed in accordance with the provisions of section 92 of the Transfer of Property Act. By failing to do this, he would lay himself open to a fresh suit for redemption, because the mere dismissal of a plaintiff's suit for redemption does not in itself bar the bringing of a fresh suit upon a fresh cause of action.

The peculiar feature of this case, of course, is that the mortgaged property was not saleable. It was an occupancy holding, and it could not have been put up for sale either under the provisions of the former North-Western Provinces Rent Act (XII of 1881) or under those of the present Agra Tenancy Act (II of 1901). I can only say that it does not seem to me that this circumstance should be allowed to put the mortgagee in any better position. He accepted a mortgage of a right which he knew not to be permanently transferable. As the law now stands cases of this sort will not arise again, because it is now settled that an occupancy-holding may neither be sold nor mortgaged with possession. As the law formerly stood, the possibility of a temporary transfer by way of usufructuary mortgage was admitted but there is force in the position taken up by the learned District Judge in his decision in the present case, that to permit such temporary transfer to become permanent, by holding that the

dismissal of the former suit has debarred the plaintiff for ever from her right to redeem, would be to defeat the provisions of the law against the transferability of such holding. It does not seem to me an unreasonable position to take up, to say that a defendant who accepted a usufructuary mortgage of an occupancy-holding prior to the passing of the Agra Tenancy Act (II of 1901) must be held to have done so with a knowledge of any inconvenience to which he might be subjected by reason of the fact that the property taken by him on mortgage was not permanently transferable. One of these inconveniences was that no Court could ever give him a decree for sale under section 92 of the Transfer of Property Act. This seems to me no good reason for holding that a decree merely dismissing the plaintiff's suit for redemption must, therefore, be held to operate as a decree for foreclosure in favour of the mortgagee, when it was the clear intention of the Legislature that no such decree should ever be passed in the case of a usufructuary mortgage. It seems to me preferable to hold, on the contrary, that the defendant in this case, by accepting a usufructuary mortgage of a holding not legally transferable, has left himself open to a series of suits for redemption, because it was impossible for the Court to give him in any concievable suit any form of decree, either for foreclosure or for sale, which could have the legal effect of finally extinguishing the mortagor's right to redeem. I accordingly dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 73 OF 1908.

April 1, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MEDA VENGAMMA OF GUNKANAPALLY—PLAINTIFF—APPELLANT

versus

MITTA CHELAMIAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family property—Survivorship—Allotment of deceased's share to brother's widow—Nature of estate taken by widow—Widow's estate—Succession—Devolution to husband's heirs—Accretions by income of the properties—Whether descendible to husband's heirs.

Under the Hindu Law, a woman's estate can be created in favour of a Hindu female quite as much by contract of parties or by a grant as it can be obtained by her by inheritance.

It is competent in an undivided Hindu family for a member to grant to his deceased brother's widow the share of her husband which the latter would have got on partition.

Such an estate would be held by the grantee as the ordinary widow's estate, which would be deemed to have been given her in lieu of maintenance, and, on her death, the property would pass to her husband's heirs.

P. and *C.* were members of an undivided family. On *P.*'s death, the property passed to *C.* by survivorship, *L.*, the junior widow of *P.*, and *C.* entered into an agreement, whereby, *inter alia*, he agreed to give her his deceased brother's half share in the properties. After *C.*'s death, the properties were equally divided between *L.* and *B.*, *C.*'s widow, at the instance of arbitrators. In a suit by plaintiff, the step-daughter of *L.* against her father's reversioner:

Held, that the effect of the agreement between *L.* and her brother-in-law as well as between *L.* and her co-widow *B.* was to give *L.* only a life-estate in the properties which were allotted to her and that, on her death, the life-interest descended to the plaintiff:

Held, also, that any property purchased by *L.* out of the income of the estate would not descend to her husband's heir unless she incorporated it with the property held by her as heiress of her husband.

Appeal against the decree of the District Court of Cuddapah, dated 16th December 1907 in O. S. No. 2 of 1907.

The Hon'ble Mr. *T. V. Seshagiri Iyer*, for the Appellant.

The Hon'ble Mr. *P. S. Sivaswamy Aiyar*, Advocate-General, for the Respondents.

JUDGMENT.—In this case the plaintiff is a daughter of one Pedda Tippayya by his first wife, and sues for the recovery of the properties mentioned in the schedules attached to the plaint. Pedda Tippayya had a brother, named Chinna Tippayya, and had married a second wife, Lakshmakka, who was only about ten years old at his death. She died in February 1905. The plaintiff's case is that Pedda Tippayya and Chinna Tippayya were divided in interest, and that they effected an actual division of the moveable properties and the houses, but that the other properties remained in the joint enjoyment of both at the time of Pedda Tippaya's death in 1868. The plaint alleges that Lakshmakka, the widow of Pedda Tippayya, took possession of his properties after his death in 1868 and that the 1st defendant, who joined Lakshmakka, and was looking after her properties took possession of

them on her death in 1905 and that he is wrongfully withholding them from the plaintiff. She denies that the 1st defendant, who claims to have been adopted by Lakshmakka, was really adopted by her, and that Lakshmakka had any authority to adopt him. The second and the other defendants are made parties on the ground that they are in possession of some of the properties without any lawful title.

The 1st defendant contends that Pedda Tippayya and his bother, Chinna Tippayya, were undivided and that all the family properties devolved on Chinna Tippayya on the death of his brother, that Pedda Tippayya a few days before his death gave authority to Lakshmakka to make an adoption to him and that Chinna Tippayya also gave authority to Lakshmakka to adopt any one of his own sons except the first in the event of his begetting sons, or otherwise any other boy. The 1st defendant futher contends that Chinna Tippayya also agreed to give a half share of the properties to Lakshmakka, and that subsequently the properties were divided. He further contends that he was adopted by Lakshmakka in the year 1881, and that he had since been in enjoyment of the properties obtained in the division in his own right as well as of other properties acquired by him subsequently, apparently out of the income of the property obtained at the division.

Issues were framed as to the question of the status of the two brothers, as to the capacity in which Lakshmakka took a half share in the properties, as to the factum and validity of the adoption of the 1st defendant, as to limitation and as to the properties the plaintiff would be entitled to recover in case she was entitled to succeed as reversioner after the death of Lakshmakka.

The lower Court held that the brothers were undivided in interest at the death of Pedda Tippayya, that there was no adoption in fact, and that even if there were, it was invalid as the widow, Lakshmakka, had no authority to adopt. It also held that Lakshmakka held the half share allotted to her at the division absolutely, its view being that Lakshmakka must be taken to have obtained it as a gift from Chinna Tippayya. We agree with the District Judge that it is not proved that there was any division between the brothers before Pedda Tippayya's death. The evidence as to division is really worthless. Of the witnesses examined to prove it, the 2nd witness's evidence is merely hearsay and must be rejected as inadmissible. The 1st witness, who was the 1st defendant, has no personal knowledge of the division. The other witnesses, *viz.*, Nos. 3, 4 and 5, though they profess to have been present at the division, are unable to give any details whatever. The 5th witness in re-examination actually admits that there was only one division and that was after the death of Pedda Tippayya. After Pedda Tippayya's death, an agreement was entered into between Lakshmakka and Chinna Tippayya. It was executed by the latter, and in it he states that Lakshmakka asked him to give her in adoption one of his sons except the eldest, in case he should have sons in future, or to give her a half share in the properties, and he agrees to give her one of his younger sons in adoption and to give her a half share. He agrees, further, in case only one son is born to him, to procure for her some boy of his own choice for adoption, and to give her a half share in place of his brother. He finally agrees, in default of his doing so, to give "her half share in the property" after division. This document, Exhibit IV, is dated the 6th December 1868. On the 30th October 1878, Lakshmakka and Bhagamma, the widow of Chinna Tippayya, who had died in the meanwhile, executed the *muchilika*, Exhibit XVI, in favour of certain persons as arbitrators to effect a partition of all the properties of the family and to settle the disputes between the parties regarding 'senior' and 'junior' shares. Exhibit VII, also dated the 30th October 1878, is a list of properties that fell to each of the widows at the division and include two houses and a lot of moveable properties. The lands are not comprised in it, but we are informed that the lands were also subsequently divided, and it is admitted by both the parties that all the properties were divided between the widows at some time or other. Mr. Seshagiri Aiyar for the appellant relies on these documents as corroborating the plaintiff's evidence as to division between the brothers during the lifetime of Pedda Tippayya. But we can see nothing in them to support his case. Exhibit IV makes absolutely no reference to any such division, and indicates that the idea of a division was due merely to Lakshmakka's request that a half share of the properties

should be allotted to her, whether she was given one of the sons of her brother-in-law or not, and whether or not the latter procured any other boy to be adopted by her. Exhibit VII also contradicts the plaintiff's case about the division of moveables during Pedda Tippayya's life time as it shows that they were divided only on the date of that document. We accept the District Judge's finding that the brothers were not divided during the life-time of Pedda Tippayya. We also agree with the Judge in holding that Lakshmakka had no authority to make an adoption. The 1st defendant's Vakil in the lower Court stated that he would adduce no evidence that Pedda Tippayya during his life-time gave authority to his wife to adopt. Chinna Tippayya's alleged authority is based entirely on Exhibit IV; but it is quite clear that under it he only agreed either to give one of his younger sons in adoption, or to procure some boy of his own choice to be adopted by Laksmakka, and, in any event, to give her a half share of the family properties. It is impossible to construe the document as giving any general authority to Lakshmakka to adopt. The learned Advocate-General stated that the Judge reserved the evidence on the question of adoption, and by mistake afterwards held that it was not proved. But it is unnecessary, in the view we take on the question of authority to adopt, to investigate whether this complaint is well founded. The learned Advocate-General says that the Judge's observation that "it is perfectly clear" that the 1st defendant was living with Lakshmakka as her paramour is entirely unfounded. If this be so, and our attention is not drawn to any evidence in support of the Judge's statement, the observation, in our opinion, was an entirely unwarrantable one.

We have now to consider the 2nd issue. "In what capacity did Lakshmakka, the widow of Pedda Tippayya, take a half share in the property?" The learned Vakil for the appellant contends that she took only a widow's interest in it as the representative of her husband, Pedda Tippayya, and that the plaintiff, as his daughter, was entitled to succeed to it on the death of Lakshmakka. The learned Advocate-General, on the other hand, contends that as the two brothers were undivided in interest and the property passed by survivorship to the junior brother, Lakshmakka must be taken to have obtained the half share purely as a bounty. He contends that on the correct construction of Exhibits IV and XVI, what she took was a gift from her brother-in-law, and that even if under those documents she was intended to have only a life-interest, her right cannot be taken to be a widow's estate descendible to the reversionary heirs of her husband, and that on her death, the reversion would pass to Chinna Tippayya or his heirs, and that the plaintiff in any event has no right to succeed to the property. If Lakshmakka was promised an absolute right to the half share under Exhibit IV or got it subsequently by division between her and Bhagamma, the plaintiff is, of course, out of Court, as she is only a step-daughter of Lakshmakka. In our opinion, Exhibits IV and XVI must be taken together in order to determine the right acquired by Lakshmakka in the half share of the family property; and taken with the circumstances of the case, we have no doubt that the intention of the parties was that she was to have the half share as the representative of her deceased husband. If she validly adopted a boy, this share would pass to him; otherwise, she would continue to hold it. She was, no doubt, not entitled to partition as the widow of a deceased co-parcener. But it seems to be clear that it was the intention of Chinna Tippayya to treat her as if she was entitled to such share. For what reason he did so it is immaterial to consider. If Chinna Tippayya could in law validly give her a widow's interest, we feel no doubt that her half share must pass to her husband's reversioners and the plaintiff being the nearest reversioner would be entitled to succeed. The learned Advocate-General contended that a woman's estate could be obtained by a Hindu female only by inheritance—that such an estate cannot be created by contract of parties or by a grant. We are unable to agree with him. It is not denied that a Hindu female is capable of possessing two different kinds of estate passing by different rules of inheritance, namely, a woman's estate, with respect to which she does not become a stock of descent and which passes after her death to her husband's heirs, and an absolute estate which passes to her own heirs, *i.e*, the heirs to a woman's *peculium*. It has been decided by the Judicial Committee of the Privy Council that a woman's estate may be created in favour of a daughter by contract (see

Radha Prosad Mullick v. *Ranimoni Dasee* (1) and *Karim-ud-din* v. *Gobind Krishna Narain* (2) and in determining the character of the estate taken in any particular case, the rule enunciated in *Mahomed Shamsool* v. *Shewakram* (3) must be borne in mind that "in construing the Will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are able to alienate." That such an estate could be created is assumed in *Sambasiva Ayyar* v. *Visvam Ayyar* (4) and *Sambasiva Ayyar* v. *Venkataswara Ayyar* (5), though the learned Judges did not agree on the construction of the particular instrument in the case as to whether it created a widow's estate or an absolute estate. It has also been decided that property could be given to a Hindu male with the incidents of ancestral property in which his sons would acquire a right by birth [See *Subbarayar* v. *Subbammal* (6); *Sudarsanam Maistri* v. *Narasimhulu Maistri* (7), per Bhashyam Ayyangar J.; *Seth Jaidial* v. *Seth Sita Ram* (8) and *Munisami Chetti* v. *Maruthammal* (9).] We do not think that the observation at page 465 in *Anandra'o Vinayak* v. *Administrator-General of Bombay* (10) relied on by the learned Advocate-General throws any doubt on the possibility of such an estate being created. In *Timannacharya* v. *Balacharya* (11) and *Bai Diwali* v. *Patel Bechardas* (12), there are observations to the effect that a stranger cannot give property to a Hindu impressing it with the character of ancestral estate. But assuming these observations to be well founded, they do not touch the persent case where, instead of an allotment for maintenance being made to Lakshmakka, she is treated by her husband's co-parcener more generously, and is given a half share of the property which her husband would have got on partition. The Advocate-General contended that to allow parties to create such an estate would enable them indirectly to contravene the provision of law that they cannot by grant create rights of property in favour of unborn or unascertained persons, and he relies on the decision in *Nistarini Dassi* v. *Nundo Lal Bose* (13). That went in appeal to the Privy Council in *Benode Behari Bose* v. *Nistarini Dassi* (14). It was, no doubt, held in that case that a gift by Will to the testator's reversionary heirs, whoever they might be, after the death of his widow would be void. But it is no authority for the position that an estate known to and sanctioned by the Hindu Law cannot be granted in favour of a Hindu female simply because the succession would pass on her death by law to her husband's heirs and not to the heirs to her *stridhanam* property. The heirs in such a case do not take under the grant itself but under the rules of law determining the line of inheritance to a particular kind of property held by the female owner. It has been decided that in the case of followers of the Marumakathayam law, a conveyance may be made to a woman with the incidents of *tarwad* property so as to give a right to her unborn children [See *Kunhacha Umma* v. *Kutti Mammi Haiee* (15); *Mooriyat Peetikayil Kunhamina* v. *Mooriyat Peetikayil Kunhambi* (16); *Katankandi Koma* v. *Sivasankaran* (17)]. The Advocate-General's argument is really answered by the Privy Council in *Rai Bishan Chand* v. *Musammat Asmaida Koer* (18). There a Hindu executed a deed of gift of

(1) 35 I. A. 118; 8 C. L. J. 48; 12 C. W. N. 729; 35 C. 896; 5 A. L. J. 460; 10 Bom. L. R. 604.
(2) 36 I. A. 138; 13 C. W. N. 1117; 10 C. L. J. 243; 11 Bom. L. R. 911; 6 A. L. J. 807; 6 M. L. T. 275; 31 A. 497; 19 M. L. J. 687; 3 Ind. Cas. 795.
(3) 2 I. A. 7 at p. 14; 14 B. L. R. 226; 22 W. R. 409.
(4) 30 M. 356; 17 M. L. J. 243; 2 M. L. T. 316.
(5) 31 M. 179; 3 M. L. T. 369.
(6) 24 M. 214; 27 I. A. 162.
(7) 25 M. 149 at pp. 154, 155; 11 M. L. J. 353.
(8) 8 I. A. 215 at pp. 227, 228.
(9) 8 M. L. T. 124; 20 M. L. J. 687; 7 Ind. Cas. 176; (1910) M. W. N. 233.
(10) 20 B. 450.
(11) 4 Bom. L. R. 257.
(12) 26 B. 445; 4 Bom. L. R. 102.
(13) 30 C. 369.
(14) 33 C. 180; 2 C. L. J. 189; 9 C. W. N. 961; 15 M. L. J. 331; 7 Bom. L. R. 887; 32 I. A. 193.
(15) 16 M. 201.
(16) 32 M. 315, 1 Ind. Cas. 195.
(17) 20 M. L. J. 134; 4 Ind. Cas. 90; 6 M. L. T. 373.
(18) 11 I. A. 164; 6 A. 560.

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property in favour of his grandson and his brothers "who may be born hereafter." This gift was impeached as void on the ground that it was a gift to a class of persons some of whom were not born at the time of the gift. After deciding that the gift would take effect in favour of the grandson actually then existing, their Lordships observe as follows :—

"Now in such an arrangement, it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed, in the case of a partition between father and sons, it is laid down in the books that if a son born after the partition of ancestral estate does not, out of the residue of his father's estate, get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, Chapter VII, sections 10, 11 and 12, which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya authorities on which the *Mitakshara* is founded. Indeed, the principle of the joint family is not less closely but more closely insisted on by the Benares School than by the Bengal School of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between Satrujit's heirs on the one hand, and his brothers, if any should be born, on the other. They are only showing that the notions present to the mind of the head of a joint Hindu family, who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

It has, moreover, been held that a Hindu female may by prescription acquire property impressed with the character of a widow's estate if the title she asserted during the time of prescription was that of a widow holding as representative of her husband; [see *Bapanayya* v. *Peddichalamaiya*(19), *Viravara Thodhramal Raja Lakshmi Devi Garu* v. *Viravaramal Surya Narayana Dhatrazu Bahadur Garu* (20).] It is unnecessary to consider whether a mere stranger can give property to a Hindu widow with the incident of a widow's estate descendible to her husband's heirs. We think there can be no doubt that in circumstances like the present, such an estate could be created. It amounts practically to nothing more than an allotment to Lakshmakka of a large share of the family property amounting to what her husband would have got at a partition instead of giving her a smaller portion which would be sufficient for her maintenance. We, therefore, hold that plaintiff is entitled to the properties of Lakshmakka.

The lower Court has recorded no finding on the 5th issue. It will be requested to do so now after recording the evidence that the parties may adduce. The finding should be submitted within two months, ten days will be allowed for objections.

In compliance with the above judgment, the District Judge of Cuddapah submitted the following

FINDING.

This suit was decided by me in December 1907, but the High Court having remanded it on appeal, for a finding on the 5th issue, I have taken the necessary evidence on the point and my finding as to what the plaintiff is entitled to, is as follows:—

2. With regard to schedule A, immoveable property, it is contended that as regards items Nos. 1 and 2, which were got in a partition between 1st defendant and Chinna Thippayya's son, he was given certain lands in excess and to compensate for that, he paid Rs. 150 in cash out of his own money. Apart from the estate of Pedda Tippayya, whose adopted son he professes to be, he had no money of his own. In his answer he has not stated that he had money of his own, nor that his brother assisted him pecuniarily. In his evidence now, he comes forward with this statement that he got the money from his brother. He was adopted into a well-to-do family, and there is no reason why his brother should assist him with money. This statement coming at this late stage must be received with caution. I cannot believe it. The compensation, therefore, must have been paid from the money belonging to the estate of the late Pedda Tippayya.

3. The other items in dispute are items Nos. 3, 4, 5, 6, 7, 10, 11 and 12. These, the 1st defendant alleges, were acquired by him subsequently out of the money which he

(19) 9 M. L. J. 33.
(20) 20 M. 256; 24 I A. 118.

saved from his income from a trade, the lands of the estate, and what he got from his brother. As to his having got any money from his brother, I have already held that it is a myth. Rejecting then the evidence on this point, it must be held that whatever profit is derived must have been from the estate of the late Pedda Tippayya. The Pleaders for the 1st defendant have relied on *Akkanna* v. *Venkayya*(21)and *Subramanian Chetti* v. *Arunachelam Chetti* (22) as authorities showing that a tresspaser in possession of an estate is not a trustee and, therefore, not bound to safeguard the interests of a reversioner and whatever he saves out of the income of such an estate is his own property. Both the cases quoted are cases of Hindu widows, and, therefore, do not apply to the present case. In this case the trespasser happens to have been an adopted son. If the adoption was upheld, he exercises full rights of a proprietor over the property but if the adoption is set aside, he happens to be a mere trespasser, and is, therefore, liable to account for the whole of the property that came into his possession. As regards immoveables, I find that the 1st defendant is liable to hand over to the plaintiff all the items claimed by him.

4. As regards moveables, there are two Scheules B. and C. Schedule B. is divided into two portions, (1) items Nos. 1 to 17 consisting of the jewels, and the second portion consisting of items Nos. 18 to 24 grain, item No. 25 utensils and item No. 26 cattle. First defendant denies the existence of Nos. 4, 5 and 17 in the first part of the Schedule B. Plaintiff has adduced no counter-evidence to prove that they existed. I must, therefore, find that they do not exist, and plaintiff is not entitled to them or the value thereof. Some of the jewels, the 1st defendant states, he gave to his wife and daughter but he admits that they did belong to the estate of Pedda Tippayya. That being the case, he is liable for them. My finding is that the 1st defendant is liable to make good the value of the jewels which he handed over to his wife and daughter.

5. As regards grain, 1st defendant's contention is that it was consumed during the pendency of the suit. He having been found to be a trespasser, must account for all the property that came into his possession. It is no excuse to say that he has consumed it. He must make good the value of the grain, which he admits existed at the time he came in possession of the property.

6. As regards items No. 25 in Schedule B, defendant denies the existence thereof. There is no evidence per contra and, therefore, I disallow the claim. As regards item No. 26, two buffaloes are claimed, only one of which is admitted to exist. I allow the claim for the existing one and as there is no evidence on the other side as regards the other, I disallow that.

7. Schedule C. consists of debts due to the estate of the late Pedda Tippayya. The first item is said to be a debt of Rs. 500. The 1st defendant says that it is a debt of of Rs. 250, and Rs. 50 out of it has already been paid. There are three other debts which the 1st defendant says he has already collected. The debts are admittedly payable to the estate of Pedda Tippayya and, therefore, the 1st defendant is liable to make good whatever he has collected.

8. As regards item No. 11 in Schedule C., defendant denies the existence of that debt. Plaintiff has not adduced any evidence in support thereof. My finding, therefore, is against the plaintiff and he cannot claim that debt.

9. My finding on the 5th issue, which is the only issue on which I have been directed to record a finding is that the plaintiff is entitled to recover all the items claimed in Schedule A, all the items or the value thereof in Schedule B except Nos. 4, 5, and 17 which are said not to exist; and I disallow item No. 25 and allow only one buffalo as regards item No. 26: and all the items in Schedule C except item No. 1 which is reduced to Rs 250 instead of Rs. 500 as stated by the 1st defendant and item No. 11 which is denied by the defendant to exist.

10. Plaintiff has put in a petition to amend the plaint as regards the number of a certain field which is wrongly put down as No. 69 which ought to be No. 96. The other side has contended that as the case is pending in the High Court, I have no right to order that amendment. I accordingly leave it for the orders of the High Court.

This appeal coming on for final hearing this day, after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

(21) 25 M. 351. (22) 28 M. 1.

JUDGMENT.—We have now to deal with the question raised in the 5th issue, which of the plaint properties the plaintiff is entitled to recover. The Judge in his finding has proceeded on the assumption that all moveable properties purchased by 1st defendant or by Lakshmakka out of the income of the property that the latter obtained at the division between her and her husband's *dayadis* would descend to plaintiff as the heir of Pedda Tippayya. This assumption is wrong. The income of the estate held by Lakshmakka was entirely at her disposal, and any property purchased out of it would not descend to her husband's heir unless she incorporated it with the property held by her as the heiress of her husband. The plaintiff did not allege in her plaint that any such incorporation was made. Her case was merely that she was entitled to all acquisitions made by means of the income as a matter of law. Moreover, there is nothing to show that the properties were purchased by Lakshmakka herself and not by the 1st defendant in whose name the title-deeds stand. No doubt, 1st defendant admitted in his written statement that the purchases were made by him by means of the income of Pedda Tippayya's estates but the plaintiff cannot ask us to draw from this fact the inference that the properties purchased by 1st defendant were incorporated with Tippayya's estate. We must disallow plaintiff's claim with regard to items Nos. 3 to 7, 10 to 12 and 17 to 20 of Schedule A.

With regard to Schedule B, we see no reason to interfere with the finding of the Judge, which is based finally on admissions made by 1st defendant.

With regard to Schedule C. consisting of outstandings, plaintiff did not adduce any clear evidence to prove what bonds taken by Lakshmakka came into 1st defendant's possession or were renewed in his name. It is stated by the learned Vakils for plaintiff and 1st defendant that bonds of the value of Rs. 325 were taken by 1st defendant in 1881 and 1882 and fresh bonds to the extent of Rs. 200 in 1883. There were bonds in 1878 in Lakshmakka's name to the extent of Rs. 210. On the whole, we think we may take it that Lakshmakka had outstandings belonging to her husband's estate amounting to Rs. 700 and that she obtained possession of the bonds evidencing them. We shall award Rs. 700 to plaintiff on account of her claim under Schedule C. of the plaint with interest at six per cent. from the date of plaint. First defendant will be entitled to recover from the debtors the amount of the bonds. We reverse the decree of the lower Court and give the plaintiff a decree in the terms indicated above. Plaintiff will receive proportionate costs on the amount of the decree given to her and will pay 1st defendant proportionate costs on the claims disallowed. The lower Court will hold an inquiry into the question of mesne profits due to plaintiff from date of plaint on the immoveable properties decreed to her and pass a final decree for the amount that may be found due.

Appeal allowed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 247 OF 1911.

April 23, 1912.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice and Mr. Justice Chapman.

MOHUNGA OJHA AND OTHERS—PETITIONERS—JUDGMENT-DEBTORS—APPELLANTS

versus

RAM BAHADUR SINGH—OPPOSITE PARTY—DECREE-HOLDER—RESPONDENT.

Costs—Mortgage-decree—Execution of decree for costs—Transfer of Property Act (IV of 1882), s. 90—Personal decree for costs.

A mortgage-decree-holder can realise his decree for costs otherwise than by proceeding under section 90 of the Transfer of Property Act, if the Court has passed a personal decree for costs.

Appeal from the order of the District Judge of Mozaffarpur, dated December 19th, 1910, reversing that of the first Munsif of Mozaffarpur, dated August 15th, 1910.

FACTS.—This was an application by the judgment-debtor taking exception to the execution of the decree upon the ground that the decree being a mortgage decree and the decree having already been previously executed with the result of an auction-sale of the property covered under the mortgage, the portion of the decree now remaining unsatisfied should not be executed without obtaining an additional decree under section 90 of the Transfer of Property Act. It was

contended in reply on behalf of the decree-holder that the portion of the decree remaining unsatisfied relates to the costs of the suit only, and is not, therefore, a mortgage-decree, and that there is, therefore, no bar to his applying for execution of the portion of the decree relating to the costs only.

The learned Munsif held that the decree was one and indivisible and should not be considered as one made in two parts, one relating to the mortgage and the other to the costs of the litigation, and that the properties of the judgment-debtor other than those covered by the mortgage were not liable to be sold without a previous order to that effect under section 90 of the Transfer of Property Act.

In the mortgage-suit, the first Court had passed a decree dismissing the suit. On appeal by the plaintiff mortgagee, the Appellate Court "set aside the judgment and decree of the lower Court and in lieu thereof decreed the suit of the plaintiff with costs and interest" and directed that "the defendants do pay up the decretal debt within six months and in default the mortgaged property be sold."

The learned Munsif having dismissed the decree-holder's petition for execution, he appealed to the District Court. That Court said:—"In my opinion, the order of the Munsif cannot be maintained. He relies on the case of *Raj Kumar Singh* v. *Sheo Narayan Sahu* (1) in support of his decision, but that case follows a ruling in *Maqbul Fatima* v. *Latla Prasad* (2), in which case it was not apparently disputed that costs of an appeal could be recovered without an order under section 90. The order of the appellate decree is that the respondent do pay the costs of the appeal to the appellants and, in my opinion, this indicates not merely that the money is to be recovered from the mortgaged property, but is a personal decree. The case reported in *Adjim Nullah Moodeen* v. *Cruickshank, Agent of the Bengal Bank* (3) also supports this view and the principle is of importance even if this decision was before the Transfer of Property Act. * * Following the words used in the appellate decree that the respondents were to pay the costs of the appeal, I think that this was a personal liability under the decree. In this view, the decision of the Munsif is incorrect and the application for execution must be restored to the file to be dealt with on the merits."

The judgment-debtor appealed to the High Court.

Babu *Atul Krishna Roy*, for the Appellants.

Babus *Dwarka Nath Mitter*, *Baikuntha Nath Mitter* and *Manindra Nath Banerjee*, for the Respondent.

JUDGMENT.—The only point on this appeal is whether the decree-holder can realize his decree for costs otherwise than by proceeding under section 90 of the Transfer of Property Act. In cases of this kind what we have to see is not what decree the Court ought to have passed, but what decree the Court has passed. if the Court passed a personal decree for costs, then there is no necessity of having recourse to the procedure indicated in section 90. The learned District Judge has held that there was a personal liability for these costs imposed by the decree. I see no reason to differ from this, more particularly when it is borne in mind that these were costs not of the suit but of the appeal. Therefore, I think the decree of the District Judge must be confirmed and this appeal dismissed with costs, hearing fee one gold *mohur*.

Appeal dismissed.

(1) 12 C. W. N. 364; 35 C. 431; 8 C. L. J. 151.
(2) 20 A. 523.
(3) 21 W. R. 299.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 99 OF 1911.

March 27, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

SREEMUT DEVASIKHAMANI NATARAJA DESIKAR—APPELLANT

versus

MUTHIAN CHETTY *alias* PERIA KARUPAN CHETTY—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Possession proceedings—Delivery of possession to one of the parties by the Magistrate—Acquisition of title on unsuccessful party's failure to establish title within 3 years—Limitation Act (IX of 1908), s 28, Sch. I, Art. 47—Suit for rent by party placed in possession—Previous attornment by tenant to defeated party in possession proceedings—Joinder of parties.

The effect of an order passed by a Magistrate under section 145, Criminal Procedure Code, putting one of the parties in possession of the property, is that he, on failure by the unsuccessful party to sue to get rid

of the order within 3 years under Article 47 of the Limitation Act, acquires a title to the property under section 28 of the Act.

In a suit for rent against a tenant instituted by the party thus put in possession, the unsuccessful party in the possession proceedings should be impleaded as a party defendant, if the tenant had, prior to the institution of the proceedings under section 145, Criminal Procedure Code, attorned to the latter.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Phillips in Civil Revision Petition No. 514 of 1910, presented against the decree of the Subordinate Judge of Madura East, in S. C. S. No. 1057 of 1907.

Mr. *S. Srinivasa Iyengar*, for the Appellant.

Mr. *K. C. Desikachariar*, for the Respondent.

JUDGMENT.—In this case, the plaintiff's predecessor-in-title granted a lease of a village to a Chetty, and he also granted a lease of some village to the defendants. Then, the lessee of the entire village instituted a suit to establish his right in preference to the defendants. The suit was compromised, and the compromise decree provided, among other things, that both the leases were valid and that the defendants should pay the rent due under their lease to the Chetty during the continuance of the Chetty's lease. Thereafter, it appears there was a dispute as to the possession of the village between the Chetty and the plaintiff and proceedings under section 145, Criminal Procedure Code, were instituted. The result of the proceedings was that the plaintiff was found to be in actual possession of the village and an order was passed to that effect. The Chetty, it appears, did not take any steps to establish his right by getting rid of the effect of that order under section 145, Criminal Procedure Code. The plaintiff now sues the defendants for rent.

He obtained a decree from the Subordinate Judge. In revision, Mr. Justice Phillips reversed that judgment and dismissed the plaintiff's suit, holding that, under the compromise decree, the plaintiff was not entitled to any rent. He, however, overlooked the effect of the proceedings under section 145, Criminal Procedure Code. That question is dealt with by the Subordinate Judge in his judgment. If the proceedings related to the land now in possession of the defendants, then, under Article 47 of the Limitation Act, the Chetty would have to institute a civil action within three years of the date of the order in order to establish his right to the property and, failing that, the person, who was placed in possession of the land, would acquire a right to the property under section 28 of the Limitation Act. The Chetty, however, was not made a party to the suit. As it is contended by the learned Pleader who appeared in support of the judgment of Mr. Justice Phillips that the proceedings under section 145, Criminal Procedure Code, did not relate to the land in dispute, and that there is every possibility that his client might be exposed to further litigation if the Chetty is inclined to sue him for rent, we think that Palaniappa Chetty should have been made a party to the suit so that the question might be finally decided and set at rest in the presence of all the parties concerned. We reverse both the judgments and direct the suit to be re-tried by making Palaniappa Chetty a defendant in the suit. The costs of all proceedings up to date will abide and follow the result.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 926 OF 1911.

May 1, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

ALA SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

WASAWA AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47 – Custom —Succession—Decree obtained against widow, how far binding on reversioners—Representative of judgment-debtor—Jurisdiction.

On a bond executed by one *H. S.*, a decree was obtained against his widow. On the re-marriage of the widow, the property of *H. S.* came into the possession of his reversioners. The decree-holder sought execution of his decree by attachment of the property of *H. S.* in the hands of his reversioners. One of the reversioners made an application stating that *H. S.* had not raised any loan from the decree-holder, that he had no necessity for doing so, that the decree obtained against the widow was collusive and fraudulent and not binding on the reversioners. On this application, the Court referred the decree-holder, to a regular suit to establish his right to proceed against the property of *H. S.* in the hands of his reversioners.

ALA SINGH *v.* WASAWA.

But, instead of instituting a suit, the decree-holder preferred an appeal to the Divisional Judge who entertained the appeal:

Held, that as the reversioners did not claim under *H. S.* or his widow and had succeeded to the property on the re-marriage of the widow by virtue of their own rights of collateral succession, they were not representatives of the judgment-debtor under section 47 of the Civil Procedure Code, and that as the said section was inapplicable, the Divisional Judge had no jurisdiction to entertain an appeal against the order of the first Court.

Second appeal from the order of the Divisional Judge, Sialkot Division, dated 26th January 1911, reversing that of the District Judge, Sialkot, dated 22nd February 1911, refusing the application.

Ala Singh, Appellant, in person.

Mr. *Dalip Singh*, for the Respondents.

JUDGMENT.—The facts are sufficiently stated in the order of the District Judge, dated the 22nd February 1911, and in the referring order of the learned Chief Judge. On the re-marriage of the widow of Haveli Singh, his property came into the possession of his reversioners, and the decree-holders made an application on the 15th October 1910 for execution of the decree by attachment of the property of Haveli Singh in the hands of his reversioners whose names were given in the application. On the 17th October, notice was issued to the said reversioners to show cause why the application for execution should not be granted. No attachment was, however, placed on any portion of Haveli Singh's property, though it appears from the record that some of the reversioners of Haveli Singh settled privately with the decree-holders. On the 14th February 1911, Ala Singh, appellant, made an application to the executing Court stating that the decree of which execution was sought was a collusive and fraudulent one; that Haveli Singh had not raised any loan from the decree-holders; that he had no necessity of doing so, and that the decree was not binding upon him as a reversioner of Haveli Singh. Upon this, the District Judge rejected the application for execution and referred the decree-holders to a regular suit to establish their right to proceed against Haveli Singh's property in the hands of the reversioners other than those who had settled with them. It is clear that this order whether it was right or wrong, was not one passed under section 47 of the Civil Procedure Code, inasmuch as the reversioners of Haveli Singh, who were objecting to the execution of the decree against his property in their hands on the grounds mentioned above, were, in no sense of the term, "representatives" of the judgment-debtor, the widow of Haveli Singh, within the meaning of section 47 aforesaid. This is settled by the decision in *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu*(1). In that case, the learned Judges say at page 405:—"The case of the plaintiffs (the reversioners of the last male owner) being that the decree itself was one not binding on them as there was no debt due by the last male owner, the question thus raised with reference to the decree is not one which could have been tried in execution, and section 244 of the Civil Procedure Code has no application to the case." It also appears to us that the question of want of necessity for the loan, for which a bond was alleged to have been executed by Haveli Singh and in respect of which the decree-holders obtained a decree against his widow, is one which could not be decided in execution of the decree as between the decree-holders and the reversioners of Haveli Singh, who did not claim under Haveli Singh or his widow, and who, on the re-marriage of the widow, succeeded to his property by virtue of their own rights of collateral succession. Section 47 of the Civil Procedure Code being thus inapplicable to the case, the decree-holders could not prefer an appeal from the order of the District Judge to the Divisional Court, and the Divisional Judge had no jurisdiction to entertain the appeal. As we have said, no part of Haveli Singh's property was attached in the hands of the present appellants before the order of the District Judge was passed, and, therefore, Order XXI, rule 58, of the Civil Procedure Code does not apply to the case:

As the Divisional Judge heard the decree-holders' appeal without jurisdiction, we treat the reversioners' memorandum of appeal filed in this Court as a petition for revision under section 70 (1) (*a*) of the Punjab Courts Act, and, in the exercise of our revisional powers, we set aside the decree of the Divisional Judge leaving the decree-holders to seek such relief against the order of the District Judge as they may be advised.

Decree set aside.

(1) 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360.

MURAT PANDE *v.* KESHO DAS.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 31 OF 1912.

April 30, 1912.

Present:—Mr. Justice Piggott.

MURAT PANDE—DEFENDANT—APPELLANT

versus

KESHO DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 4—Rent, definition of—Suit for recovery of money equivalent of half the produce of fruit trees in a grove occupied by tenant—Revenue Court, jurisdiction of.

The definition of the word "rent" contained in section 4 of the Agra Tenancy Act is wide enough to make a suit for the recovery of the cash equivalent of one-half the produce of fruit trees, in a grove occupied by tenant, maintainable as a suit for arrears of rent.

Revision against an order of the District Judge of Ghazipur, dated the 3rd November 1911.

Mr. *Ahmad Karim*, for the Appellant.

Mr. *Harendra Krishna*, for the Respondents.

JUDGMENT.—In this case, the plaintiffs as proprietors of a certain village sued the defendant as tenant of a certain grove therein situated for the cash equivalent of one-half of the produce of the fruit-bearing trees in the said grove as being the rent due to them on account of the two years in suit. The suit was filed in the Court of an Assistant Collector of the second class. He framed three issues. The first of these raised the question whether the plaintiffs were entitled to claim the whole rent supposing it to be due, and it was decided in favour of the plaintiffs. The third issue related to the appraisement of the produce during the years in suit and was never decided at all. The second issue ran as follows: "Is the grove in suit in possession of the defendant as a rent free grant?". It is clear, therefore, that it was common ground between the parties in the first Court that the suit had been rightly instituted in the Court of an Assistant Collector and that the defendant held the grove in suit as a tenant. The question was whether he held it rent-free or whether he was liable to pay anything to the plaintiffs as rent therefor. In deciding this issue, the Assistant Collector expressed a doubt whether, according to the provisions of the village record-of-rights upon which the plaintiffs based their claim, the plaintiffs were entitled only to one half of the fallen timber of the grove or to one half of the produce of the fruit bearing trees as well as one half of the fallen timber. He did not, however, decide this point. He went on to say that in his opinion it was only necessary for him to decide whether or not the plaintiffs had actually been receiving one-half of the produce of the fruit bearing trees prior to the year in suit and finding that the plaintiffs had failed to prove this, he held that he had no jurisdiction to inquire further into the respective rights and liabilities of the parties under the village custom or contract recorded in the *Wajib-ul-arz*. He gave as his reason for this finding the ruling of this Court in *Sanam Tewari* v. *Sakina Bibi* (1). The plaintiffs took the case on appeal to the Court of the Collector. The Collector came to the conclusion that the plaintiffs were entitled to receive one-half of the produce of the fruit-bearing trees from year to year; but he proceeded to consider further what remedy the plaintiffs had in the event of failure on the part of the defendant to deliver one-half of the produce due to them in any given year. He held that on the terms of the contract or custom recorded in the *Wajib-ul arz*, the plaintiffs' only remedy would be a suit for ejectment against the defendant for breach of the conditions of the lease on which he held the grove. He also remarked that, possibly, a suit for damages on the ground that the plaintiffs had failed to obtain the enjoyment of fruits to which they were entitled would lie in the Civil Court. The matter was then taken to the Court of the District Judge in Second Appeal. The District Judge held that a question of jurisdiction had in fact been decided by the Collector within the meaning of section 180 of the Agra Tenancy Act (II of 1901) and that an appeal lay to his Court. He then agreed with the Collector that the plaintiffs were entitled to receive half the produce of the fruit bearing trees in the grove in suit every year: and differing from the Collector he further held that there was no reason why the plaintiffs should not enforce this right by way of a suit for arrears of rent under the Tenancy Act. There was nothing left for him to decide except the question of appraisement of the cash value of the plaintiffs' share of the produce for the years in suit. It would have been easy for him to pass an order under the provisions of Order XLI, rule 25, calling for a finding on this point from the lower Appellate

(1) 3 A. 37.

Court and then to dispose of the suit accordingly. He preferred to pass an order under the provisions of Order XLI, rule 23 of the Code of Civil Procedure remanding the suit through the lower Appellate Court to the Court of first instance for disposal on the merits. The defendant has brought this order before this Court by a petition of revision. In this petition, he does not say that the learned District Judge had no jurisdiction to entertain the appeal presented to his Court, but practically this question was raised by the arguments before me. I am not bound to deal with the question at all as it is not taken in the petition for revision. I, therefore, merely remark that, in my opinion, both the Assistant Collector and the Collector had in effect held that there was a difficulty about jurisdiction which either prevented them from giving the plaintiffs relief to which they would otherwise have been entitled, or at any rate debarred them from considering the question whether the plaintiffs might not have been entitled to the relief claimed if they had brought their suit as one for damages in a Civil Court. I think, therefore, that the learned District Judge, in holding that he had jurisdiction to entertain the second appeal, was, at any rate, not so clearly wrong as to compel me to interfere with his order of my own motion upon a ground not taken in the petition before me. In the next place, it is contended that the District Judge was wrong in holding that the suit as brought would lie in a rent Court. This would be at most a wrong decision on question of law which the Court of Second Appeal had jurisdiction to decide. It is, moreover, a somewhat difficult question upon which it does not seem to me altogether easy to harmonize the decisions of this Court as they stood before Local Act II of 1901 was passed .On these grounds alone, I might decline to interfere in revision, I am further of opinion that the definition of the word "rent", contained in section 4 of the Agra Tenancy Act (II of 1901), is wide enough to make a suit like the present maintainable as a suit for arrears of rent. Finally, it is contended that the District Judge had no jurisdiction to remand the suit for trial to the Court of first instance. The provisions of Order XLI of the Code of Civil Procedure refer directly to appeals from original decrees only. They are also applicable as far as may be (*vide* Order XLII of the same Code) to appeals from appellate decrees It is, therefore, certainly within the jurisdiction of a Court of a Second Appeal to remand a suit back to the Court of first instance, if it is of opinion that both the Courts below have decided it on a preliminary point. Personally I consider the procedure adopted by the Court of Second Appeal in this case objectionable, and that the matter should have been dealt with under Order XLI, rule 25 of the Code of Civil Procedure. If the matter were before me as a Court of Appeal, I am not sure that I should not be inclined to hold that a sufficient cause for interference had been made out. It is another matter, however, to say that it affords a good ground for revision that the learned District Judge has not taken the view. I should have been disposed to take as to what constitutes a decision on a preliminary point. I am of opinion that no adequate case for interference in revision has been made out. I dismiss this application with costs.

Application dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 796 OF 1910.

May 6, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

NIHAL CHAND—PLAINTIFF—APPELLANT

versus

MESSRS. DAVID SASSOON AND CO., KARACHI—DEFENDANTS—RESPONDENTS.

Registration Act (III of 1877), s. 17—Registration of document—Recitals or memoranda of previous disposition—Document drawn up to evidence partition made at the time.

Deeds which are mere recitals or memoranda of dispositions of property, which have been previously agreed upon or made and which do not themselves operate to effect any such disposition, need not be registered.

Badhawa Mal v. *Hira*, 30 P. R. 1884; *Sardar Partab Singh* v. *Lala Karam Chand*, 184 P. R. 1889; *Gongad Gir* v. *Sham Gir*, 48 P.R. 1905; 33 P. L. R. 1905, relied upon.

Where a person made a partition of his property, exceeding Rs. 100 in value, among his sons and there and then drew up a document to evidence the partition, and there was no evidence to show that there was any previously completed partition or that the document was merely intended to serve as a memorandum of what had been previously arranged:

Held, that the document was compulsorily registrable.

NIHAL CHAND *v.* DAVID SASSOON & CO., KARACHI.

First appeal from the order of the Subordinate Judge, 1st Class, Ferozepore, dated 17th June 1910, dismissing plaintiff's claim.

Rai Bahadur Bakhshi *Sohan Lal*, and Mr. *Nanak Chand*, for the Appellant.

Sardar *Kharak Singh*, for the Respondents.

JUDGMENT.—This judgment disposes of three Appeals Nos. 796, 797 and 1069. Nos. 796 and 797 are by Nihal Chand, plaintiff, and *Musammat* Rani, plaintiff, respectively, and No. 1069 is by the defendants. The following is plaintiff's pedigree table:—

GULAB RAI=*Musammat* RANI,

Saudagar Mal, Nanak Chand. Nihal Chand.

Fateh Chand.

The defendants got various decrees against Gulab Rai and one or more of his sons and in the execution proceedings attached certain houses. Nihal Chand and *Musammat* Rani filed separate suits for a declaration in regard to one fifth share each in these houses. The plaintiffs relied on an alleged family partition and an entry in the *bahi* under which Gulab Rai divided the property. The lower Court found that this entry needed registration and as it was not registered, it could not be received in evidence. It, therefore, held that the plaintiffs had not proved that they were entitled respectively to one-fifth share each in the houses. It also found that as Nihal Chand was a judgment-debtor in the decree under execution, he could not maintain a suit. It found, however, that *Musammat* Rani was entitled for her life-time to a right of residence inasmuch of the share of the attached property as was necessary for her accommodation. It, therefore, gave her a decree for right of residence, but otherwise it dismissed her suit. Nihal Chand's suit was dismissed *in toto*. Nihal Chand and *Musammat* Rani have appealed and defendants have also appealed in *Musammat* Rani's case from the order giving her a decree for residence in the houses. *Musammat* Rani has died since the decision of the case and, therefore, the decree in her favour has abated, and defendants' appeal is, therefore, given up and is hereby dismissed. *Musammat* Rani in her Appeal No. 797 is now represented by Fateh Chand, son of Saudagar Mal. The translation of the so-called deed of release which is entered in Gulab Rai's *bahi* is given on page 2 of the printed paper-book and a transliteration of the actual entry, or of the greater part of it, is given in the judgment of the lower Court at page 33.

For plaintiffs appellants, it is urged that this document does not require registration, because it does not of itself operate to create or declare any right, title or interest to or in immoveable property, but is merely a recital or memorandum of a previously completed family arrangement or partition of property.

The following rulings have been cited in support of this contention *Badhawa Mal* v. *Hira* (1); *Partab Singh* v. *Karam Chand* (2) and *Gongod Gir* v. *Sham Gir* (3).

In *Badhawa Mal* v. *Hira* (1), it was held that the entry in dispute could not be regarded as an instrument declaring any title to or in immoveable property within the meaning of section 17 of the Registration Act, the transaction being already complete, and the entry in question, being evidently merely intended as an acknowledgment of the correctness of the facts stated in the memo. and not being an acknowledgment of the receipt or payment of the consideration, did not require registration.

The case of *Partab Singh* v. *Karam Chand* (2) dealt with an entry relating to a mortgage. It was held by the Full Bench (1) that the words "I have now mortgaged" should be taken merely as a recital that a mortgage had already been made or agreed upon and that they could not be taken as meaning "I now mortgage by virtue of this deed;" (2) that the document did not itself create or assign an interest in immoveable property. The right created by the deed was merely a right to compel the executant to execute another document and the deed, therefore, fell under clause (5) section 17 of the Registration Act.

In *Gongod Gir* v. *Sham Gir* (3), was it held that entries in the third party's book consisting of details of a partition carried out independently by the parties themselves being only recitals of past facts, which had already been completed, could not be regarded as a deed of partition declaring any right in immoveable property within the meaning of section 17 of the Registration Act and were,

(1) 30 P. R. 1884.
(2) 184 P. R. 1889.
(3) 48 P. R. 1905; 33 P. L. R. 1905.

therefore, admissible in evidence though unregistered.

The principle to be deduced from these rulings is that deeds, which are mere recitals or memoranda of dispositions of property which have previously been agreed upon or made and which do not themselves operate to effect any such disposition, need not be registered. The document in dispute in the present case has near the beginning the words "*farag khati aj din kitti*". The document then goes on to describe what shares are allotted to the different persons and at the end is signed by Gulab Rai, the owner of the property and by attesting witnesses. *Prima facie*, it appears to be a deed of partition of Gulab Rai's property effected by himself, and purports to create certain rights to or in immoveable property in favour of the persons named therein. This becomes still more clear from a consideration of the evidence of Maya Ram, Nand Lal and Viru Mal....The evidence of the first two is printed at pages 21 to 23 of the paper-book, that of Viru Mal by some mistake apparently has not been printed. The evidence of these persons, such as it is, is to the effect that Gulab Rai made a partition of his property and then and there drew up the document in dispute. There is no evidence at all that there was a previously completed partition and that the entry in the book was merely intended to serve as a memorandum of what had been arranged. In connection with the oral evidence, we note that though Gulab Rai was produced as a witness on behalf of the defendants, he was not put any questions in reference to the partition, and to the drawing up of this document though obviously his evidence would have been the best procurable on the point. We are, therefore, of opinion that the lower Court was right in holding that the document required registration and that not having been registered, it is inadmissible in evidence. In any case, the oral evidence in support of the alleged partition is very meagre and we do not think we should be justified in holding in a suit of such value that it is sufficient to prove the alleged partition. On these findings, the plaintiffs' suits were rightly dismissed. It is further quite correct that Nihal Chand is himself a party to the decree in execution of which the houses in dispute were attached. If he had any objection to the attachment, the matter was to be settled in the execution proceedings in accordance with section 47 of the Civil Procedure Code. It is further quite obvious that he had no *locus standi* to object to the attachment of his own property in execution of a decree passed against himself. His Counsel sees this quite clearly and does not press his appeal. Appeals Nos. 796 and 797 are accordingly dismissed with costs to defendants respondents.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1635 OF 909.

May 8, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice N. Chatterjea.

HARI MONI DEBI—PLAINTIFF—APPELLANT

versus

MOTI SHEIKH—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *ss.* 159, 160 (*d*), 161 (*a*)—*Burden of proof—Existence or non-existence of protected interest—Incumbrance—Annulment.*

It rests upon an auction-purchaser in the first instance to show that the interest which he wishes to annul, is an incumbrance. But when that is established, the *onus* shifts on to the incumbrancer to prove that his incumbrance is saved through being a "protected interest."

Somir Jama v. *Mahabharat Bakta*, 7 Ind. Cas. 919, relied upon.

Appeal from the decree of the District Judge of Murshidabad, dated May 8th, 1909, affirming that of the Munsif of that place dated March 25th, 1908.

Babus *Mohendra Nath Roy*, *Krishna Prasad Sarbadhikari* and *Manmotha Nath Roy*, for the Appellant.

Babus *Hemendra Nath Sen*, *Sachidananda Gupta* for *Haradhan Nag* and *Kunja Behari Sur*, for the Respondent.

JUDGMENT.—The point of law raised by this second appeal is as to the burden of proving the existence or non-existence of a "protected interest" for the purposes of section 159 and the following sections of the Bengal Tenancy Act, 1885.

The plaintiff, who is the appellant before us, was the purchaser at a sale held in execution of a decree for rent of the tenure or holding of one Nistarini Debi, and having, in pursuance of the provisions of section 167 of the Tenancy Act, served a notice on the

defendant-respondent, as being the sub-tenant of Nistarini and, therefore, an incumbrancer within the meaning of the Act, he sued the latter for the recovery of *khas* possession of the land concerned. The defence was that Nistarini Debi was a tenure-holder, that the respondent was an occupancy-tenant under her, and that consequently the incumbrance, which the appellant was seeking to annul, was, under clause (*d*) of the definition in section 160, a "protected interest" which could not be annulled. Both the Courts below held that the *onus* was on the appellant to prove that the respondent's interest was not a "protected interest," and that, as he had failed to discharge the *onus*, his suit must be dismissed.

We are unable to accept this view of the law as to the *onus probandi* in a case of this kind. Section 159 gives the auction-purchaser power to annul, in the prescribed manner, any "incumbrance" such as is defined by section 161, clause (*a*), and at the same time provides that he shall take subject to any "protected interest" within the meaning of section 160. Now, no doubt, it rests upon the auction-purchaser in the first instance to show that the interest which he wishes to annul, is an "incumbrance": but it seems to us that if, and when that is established, the *onus* shifts on to the incumbracer to prove that his incumbrance is saved through being a "protected interest." In other words, it was for the appellant to show at the outset that the respondent's sub-tenancy was a sub-tenancy created by the defaulting tenant, Nistarini Debi; but, as soon as this was established, it was for the respondent to prove that Nistarini Debi was a tenure-holder and that he had acquired a right of occupancy under her. This is, we think, in accordance with first principles. For the general rule is, that the burden of proving any particular fact rests on him who alleges, not on him who denies it: that is to say, the issue must be proved by the party who states the affirmative, and not by the party who states a negative. Moreover, the provision as to "protected interests" has the effect of introducing a restriction upon, or exception to, the rights of the auction-purchaser, and, as was explained in *Rash Behari Basu* v. *Haramoni Debya* (1), the person pleading a certain exception is bound to bring himself within it. And, finally, the existence of such a "protected interest" as a right of occupancy is a matter specially within the knowledge of the person claiming it, on whom, therefore, the *onus* is placed by section 106 of the Indian Evidence Act, 1872. We observe, too, that our view accords with that taken by Mookerjee and Teunon, JJ., in *Somir Jama* v. *Mahabharat Bakta* (2) while it is not, as will presently appear, opposed to the decision of Brett and Chitty, JJ., in *Normada Sundari Debi* v. *Tarip Mollah* (3).

Returning to the facts before us, we find that there was really no *onus* of proof for the appellant to discharge. For the respondent had admitted in his written statement that he held, and had from the inception of his sub-tenancy held, under Nistarini Debi and her predecessors in-interest, and it was, therefore, of course, unnecessary for the appellant to adduce any evidence to show that the respondent's sub-tenancy was a sub-tenancy created by Nistarini Debi, that is to say, an "incumbrance" within the meaning of section 160, clause (*a*), of the Tenancy Act. And this distinguishes the case from that of *Narmada Sundari Debi* v. *Tarip Mollah* (3), in which it was not only not admitted that the defendant's tenancy was a sub-tenancy under the defaulting *gantidar*, but expressly alleged that the sub-tenancy had been created long before the *ganti*.

Our conclusion, then, is that the *onus* was wrongly placed upon the appellant by both the Courts below. But it is contended by the respondent that, even if this be so, there was evidence on both sides, and no question of *onus* arises. As to this contention, it must be conceded that, as soon as there is a conflict of evidence, the question of *onus* disappears. But conflict implies and predicates not only the existence of evidence on both sides, but also consideration of both by the Court; and in this case, it seems to us patent that if any evidence was produced by the respondent, the lower Court of appeal, at all events, ignored it altogether. The judgment speaks for itself and cannot be misunderstood. It deals exclusively with the appellant's evidence, oral

(1) 15 C. 555 at p. 557.

(2) 7 Ind. Cas. 919.

(3) 1 Ind. Cas. 596; 9 C. L. J. 490; 13 C. W. N. 720.

and documentary; it decides nothing but that that evidence was insufficient to prove that Nistarini was a *raiyat* and not a tenure-holder; and nothing could be clearer than that the learned District Judge would have dismissed the appeal and the suit even if the respondent had not adduced a scrap of evidence of any kind. In these circumstances, we think that we must require him to re-consider the case anew in the light of our ruling as to the initial mistake made both by him and by the Court of first instance. Should a case be made out for the admission of further evidence, it will be open to him to receive it or direct that it be taken by the first Court.

In the result, the appeal is allowed, the appellate judgment discharged and the case remanded for re-disposal in accordance with the foregoing directions. Costs will abide the result.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 32 OF 1912.
April 30, 1912.
Present:—Mr. Justice Piggott.
BABU LAL—DEFENDANT—APPLICANT
versus
BHAWANI DAS AND OTHERS—
OPPOSITE PARTY—RESPONDENTS.

Small Cause Suit—Lease of immoveable property—Suit by lessor to recover rent from lessee—Provincial Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 8, 11.

B. was the mortgagee in possession of a certain Bazar and entitled as such to receive rents from the shop-keepers. He let out this right to the defendant for Rs. 24 a month:

Held, that the lease was a lease of immoveable property and a suit by the lessor to recover the said sum of Rs. 24 a month from the lessee did not lie in a Small Cause Court.

Revision against an order of the Small Cause Court Judge of Agra, dated the 19th of December 1911.

Mr. *S. K. Dar*, for the Appellant.

Mr. *Mangal Proshad Bhargava*, for the Respondents.

JUDGMENT.—The plaintiffs in this case say that they are mortgagees in possession of one half of a certain bazar and entitled as such to receive rents from the shop-keepers occupying shops and houses in one half of the same. They say that they leased out their right to receive these rents to the defendant, Babu Lal and they have sued him for arrears of lease money before the Judge of the Court of Small Causes at Agra. The question is, whether that Court had jurisdiction to entertain this suit. No written contract of lease was produced between the plaintiffs and Babu Lal, and I can only look at the evidence which has been believed by the Court below in order to ascertain the terms of that contract. What the plaintiff Bhawani Das says is,—"I orally leased the rent of the said one half of the bazar to Babu Lal, defendant, at a rent of Rs. 24 per mensem about three or three-and-half years ago, and the water rate was to be paid by Babu Lal and he was also responsible for repairing the shops of the said one half of the bazar". In my opinion, a suit to enforce that contract is a suit for the recovery of rent other than house rent within the meaning of Article 8 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887), or, failing this, it is a suit for enforcement of some other rights to or interest in immoveable property within Article 11 of the same Schedule. As a matter of fact, I have no doubt that it falls under the former of these two Articles. The plaintiffs, at any rate, are not prepared to contend that their contract was anything but a lease of immoveable property within the meaning of section 105 of the Transfer of Property Act. The question, therefore, is,—What was the immoveable property leased?. It was certainly not the houses themselves, and the plaintiff Bhawani Das does not say that it was. It was a right to collect the rents of those shops or houses from the persons actually occupying them and such right is itself "immoveable property" by virtue of the definition in Article 25, section 3 of the General Clauses Act (I of 1897) which definition applies to the Transfer of Property Act (IV of 1882) by reason of section 4 of the General Clauses Act, in so far as it is not inconsistent with the special provisions of section 3 of the Transfer of Property Act itself. The plaintiffs are not suing to recover the rent of shops received on their behalf by Babu Lal as their agent. They are suing to recover from Babu Lal the rent of immoveable property due from him under a special contract of lease; and the sum of Rs. 24 a month which

GANESH *v.* KUNDAN.

Babu Lal is alleged to have covenanted to pay to the plaintiffs under this contract of lease, is not itself "house rent". In my opinion, it was a a distinct abuse of the Small Cause Courts Act that this suit was filed in a Court exercising jurisdiction under that Act. The real dispute is as to the plaintiffs' claim to be the mortgagees in possession of a portion of that bazar and they seem to have endeavoured to bring this matter to trial before a Court of Small Causes in order not to fight the question out by a regular suit. They could have done so no doubt if they were content simply to claim the rents of particular shops; but they seem to have thought it an even more effective way of creating evidence in their own behalf to bring a suit based upon an alleged lease in favour of the very man who was actually collecting the rents of the shops as agent for the rival claimants. In my opinion, the suit as brought is not a claim for house rent; it was entertained and decreed by a Court which had no jurisdiction to do so. I accept this application in revision, set aside the decree of the Court below and direct the Judge of the Court of Small Causes to return the plaint to the plaintiffs with directions to present the same in a Court having jurisdiction to entertain it. The defendant Babu Lal will get his costs in this Court.

Application accepted.

S. N. DAR, B. A. LL. B.
Vakil High Court.
ALLAHABAD HIGH COURT.
BIJNAGAR

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 25 OF 1912.

May 1, 1912.

Present:—Mr. Justice Piggott.

GANESH—PLAINTIFF—APPLICANT

versus

KUNDAN—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 95, 167—Rival claimants to occupancy-tenancy, dispute between—Jurisdiction of Civil Court—Civil Procedure Code (Act V of 1908), s. 115—Revision—Wrong decision on point of res judicata—*Whether good ground for interference.*

Civil Courts are not precluded, by reason of section 167, read with section 95 of the Agra Tenancy Act, 1901, from determining a dispute between rival claimants to an occupancy-tenancy.

Bhup v. *Ram Lal*, 8 A. L. J. 1009; 11 Ind. Cas. 268; 33 A. 795, followed.

A wrong decision on a question of *res judicata* would ordinarily not be a good ground for interference in revision under section 115 of the Civil Procedure Code, 1903.

Revision against an order of the District Judge of Shahjahanpur, dated 14th December 1911.

Mr. *Bital Parshad Ghose*, for the Applicant.

Mr. *M. L. Agarwala*, for the Opposite Party.

JUDGMENT.—The present suit was one for damages upon the allegation that the defendant had cut and carried off the crops upon certain land after the said crops had been grown by the plaintiffs. Incidently, a question arose as to whether the plaintiffs or the defendant were in law the rightful occupancy-tenants of the land in suit. Now, seeing that the suit as brought was one undoubtedly within the cognizance of the Civil Courts, it would seem to be difficult to hold in any case that those Courts were precluded from hearing and determining an issue incidental to the right decision of the suit. In any case, after the decision of a Bench of this Court in *Bhup* v. *Ram Lal* (1), it cannot be said that the Civil Courts are precluded, by reason of section 167 read with section 95 of the Agra Tenancy Act (Local Act II of 1901), from determining a dispute between rival claimants to an occupancy-tenancy. Once it is admitted that the Courts below had jurisdiction both to try this suit and to determine the issue whether the plaintiffs or the defendant were the rightful occupancy-tenant of this land, this application must necessarily fail. It is true that the matter had actually been brought before the Revenue Courts in a suit in which the present defendant Kundan appeared as a plaintiff and the plaintiffs in the present suit as defendants jointly with the proprietor to whom the rent of the occupancy-holding in question was due. It cannot, however, be made a ground for interference in revision that the District Judge in this case refused to accept the finding of the Assistant Collector or that of the Commissioner in the suit under section 95 of the Tenancy Act as having the effect of *res judicata* in the present suit. In the first place, a wrong decision on a question of *res judicata* would not ordinarily be a good ground for interference in revision under section 115 of the Code of Civil Procedure. Apart from this, the decision of the District

(1) 8 A. L. J. 1009; 11 Ind. Cas. 268; 33 A. 795.

Judge on this point appears correct, inasmuch as the Assistant Collector and the Commissioner would not have been competent Courts to try the suit then before him, so that section 11 of the Code of Civil Procedure would not apply. I find, therefore, no adequate ground for interference in this case. This application is dismissed with costs.

Application dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 83 OF 1911.

May 3, 1912.

Present:—Mr. Justice Tudball.

SHEOTAHAL AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

QASIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Rejection of application—Appeal—Revision.

While an application for restoration of a suit under Order IX, rule 9, Civil Procedure Code, 1908, was pending, the territory within which the parties resided and the cause of action arose was transferred from British territory to a Native State and the Court, holding that it had no longer any jurisdiction in the matter, ordered the application for restoration to be returned to the applicant for presentation to the proper Court:—

Held, that the order of the Court was in substance and in effect an order refusing to grant the application for restoration and was not open to revision but was appealable.

Revision against an order of the District Judge of Mirzapur, dated the 29th of May 1911.

Mr. *Damodar Das*, for the Applicant.

Mr. *Baldeo Ram Dave*, for the Respondents.

JUDGMENT.—The circumstances out of which this application has arisen are briefly as follows:—A suit was instituted within British territory and the jurisdiction of the British Courts over the subject-matter of the suit and the parties thereto was territorial. It was originally in the Court of the Munsif, but was transferred by the District Judge to his Court. He dismissed the suit, as the plaintiff failed to appear on the date fixed for hearing. On the 31st March 1911, the plaintiff applied under Order IX, rule 9 for restoration of the suit and a re-hearing. Notice was issued and a date fixed. In the meantime on the 1st of April 1911, the territory, within which the parties resided and the cause of action arose, was transferred from the British territory and became part and parcel of a Native State and, therefore, was outside the jurisdiction of the British Court in Mirzapur. When the application came on for hearing, an objection was taken that the British Court had no jurisdiction over the subject-matter of the suit and the parties thereto and, therefore, the application should be dismissed. The District Judge agreed with this contention and held that he had no longer any jurisdiction in the matter and finally ordered the application for restoration to be returned to the applicant for presentation to the proper Court.

The plaintiffs came here in revision pleading that the Court below had jurisdiction to entertain the application and has, therefore, failed to exercise a jurisdiction which vested in it.

A preliminary objection is taken that the order passed by the lower Court is in substance and in effect an order rejecting an application under Order IX, rule 9, and is, therefore, appealable, *vide* Order XLIII, rule 1, clause (*c*) and, therefore, this application for revision should be rejected.

For the other side, it is argued that this is not an order rejecting an application for re-hearing but it is a refusal by the Court to hear that application. To my mind this hardly seems to be correct. The application was filed when the Court had jurisdiction. It was entertained and a date was fixed and, whatever may be the language in which the Court passed its order that order in substance and in effect is an order refusing to grant an application under Order IX, rule 9 on the ground that the Court had no jurisdiction over the subject-matter of the suit or the parties thereto. The order may be a bad one, but it is in substance an order under Order IX, rule 9, and the plaintiff could have appealed. Therefore, in my opinion, this application for revision must be rejected. It is also very doubtful, indeed, whether the applicant has any really good ground to grumble at the order of the Court below. Even on the merits, he does not seem to have a good case. The application is rejected with costs.

Application rejected

RABI RAI *v.* DHARAMRAJ RAI.

ALLAHABAD HIGH COURT.
CIVIL REVISION PETITION No. 5 OF 1912.
May 17, 1912.
Present:—Mr. Justice Piggott.
RABI RAI—DEFENDANT—APPLICANT
versus
DHARAMRAJ RAI—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1882), s. 24—Court passing decree on a void contract—Jurisdiction—Revision.

A Court, passing a decree for money upon a plaint which on the face of it sets up as its cause of action the breach of a contract which is void in law, acts illegally in the exercise of its jurisdiction.

Ross Alston v. *Pitambar Das*, 25 A. 509, referred to.

Revision against an order of the District Judge of Ghazipur, dated 31st August 1911.

Mr. *Haribans Sahai*, for the Applicant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This was a suit to enforce a contract embodied in a deed dated October 26th, 1902. The defendant, who is the applicant now before this Court, acknowledged previous receipt of a certain sum and covenanted to re-pay the same with interest at a certain rate in four instalments, the last of which fell due on the 6th of June 1906. He also purported to hypothecate what is described as his tenant's holding in a certain village, and covenanted that, in the event of his failure to fulfil the stipulations as to re-payment, the plaintiff-mortgagee might either sue to recover his money or take possession of the holding in question. In the plaint, the land hypothecated is simply described as a tenant's holding (*arazi-kashtkari*) and in his prayer for relief the plaintiff says that since he finds that it is not possible for him to recover his money from the property mortgaged, he desires to sue upon the deed in question as a simple money bond. In reply, the main defence on the merits was a plea of want of consideration. There was also a question raised as to limitation with which I am not now concerned and there was also a plea to the effect that the property mortgaged is an occupancy-holding, hence the deed is "invalid". The Court of first instance, the learned Munsif of Ballia, framed three issues, the second of which was on the question of limitation, while the third was framed in general terms as to the liability of the defendant. The first issue ran as follows—"Whether the deed was executed for consideration and is valid?". The finding upon this issue was that the deed was executed without consideration, and on his last issue the learned Munsif found that "the defendant is not liable, the deed is without consideration and consequently invalid". It seems clear to me that, whatever the learned Munsif may have meant by the frame of his first issue, the question regarding the legal effect of section 24 of the Indian Contract Act, IX of 1872, as invalidating the whole transaction, in the event of a finding that any one of the considerations in the deed in suit was unlawful, was not seriously considered by the learned Munsif. From the circumstance that no evidence was tendered to prove the allegation of fact as to the holding in question being an occupancy-holding, I gather that the point was not seriously pressed by the defendant, and that the parties went to trial upon an assumption that the plaintiff had a right to sever the various agreements specified in the bond in suit and to ask the Court to treat it as a simple money bond. It must be remembered that this suit comes from the Ballia District where there are tenant's holdings (such as fixed-rate tenancies), the transfer of which is not forbidden by law. When the plaintiff appealed to the District Judge, it is clear that before that Court the question now taken in revision (as to the entire contract being void because a part of the consideration was unlawful) was never raised at all. The plaintiff being the appellant in that Court naturally did not raise it, but it was incumbent on the defendant to bring that plea to the notice of the Appellate Court and to ask for a finding thereon in the event of the opinion of the Court being against him on other points. The learned District Judge discussed only the question of payment of consideration. He called attention to an important piece of evidence which had been overlooked altogether by the learned Munsif, *viz.*, the admission by the first defendant before the Registering Officer at the time of registration that he had received the entire consideration for the deed in suit, then, remarking that "the defendant cannot now be allowed to go behind the admission and acknowledgment, he held that the deed was executed for good consideration. The

plaintiff's claim having thus been decreed as against the defendant Rabi Rai, the latter comes before this Court in revision upon two grounds. He contends that the learned District Judge was wrong in treating the acknowledgment made before the Registering Officer as conclusive evidence against the defendant. As a matter of fact, there was very little other evidence on the record. The defendant had called two witnesses, who deposed that there was no payment of consideration at the time of execution, but this might have been presumed from the wording of the deed itself. The Court of first instance had found against the plaintiff because the two witnesses called by the latter contradicted one another, and one of them deposed to what was certainly not true, *viz.*, the payment of the entire consideration at the time of execution. Now, I cannot feel at all certain whether the learned District Judge intended to lay down a proposition of law to the effect that the defendant's acknowledgment before the Registering Officer raised an unrebuttable presumption of law against him. I do not think a Judge of any experience would lay down such a proposition and it seems to me more reasonable to suppose that the lower Appellate Court merely meant to find that the acknowledgment seemed to it decisive in view of the facts of this particular case. If, however, I am mistaken in this view, the utmost that can be said is that the learned District Judge committed an error of law, and I should not regard an error such as is alleged on this point as affording a good ground for interference in revision.

The question as to the effect of the provisions of section 24 of the Indian Contract Act is much more important. I quite appreciate the force of the contention, put forward on behalf of the applicant, that a Court passing a decree for money upon a plaint which on the face of it sets up as its cause of action the breach of a contract which is void in law brings itself within the scope of the ruling of this Court in *Ross Alston* v. *Pitambar Dass* (1) and should be held on the strength of that ruling to have acted illegally in the exercise of its jurisdiction. It seems to me, however, that the present suit must be distinguished by reason of the question of pleadings which I have already explained. The plaint as it stands says no more than this, that there was a covenant to re-pay by instalments together with the hypothecation of a tenant's holding, that the mortgagee feels it impossible to recover his money by enforcement of this hypothecation and he consequently asks for a decree simply on the basis of the covenant to re-pay. There is no necessary presumption in the Ballia District that a tenant's holding is untransferable, or that the mortgage of a tenant's holding is necessarily an illegal contract. The defendant, if he desired to obtain the benefit of his plea on this point, was bound to see that it was laid before the Courts with all necessary materials upon which a clear finding of fact could be arrived at and so made the basis of the decision of the Court on the question of law. In the present case, the illegal or irregular exercise of jurisdiction imputed to the lower Appellate Court is simply that it has neglected to dispose of an issue which was evidently never raised before it at all. If I were satisfied that it could be said with certainty that this neglect on the part of the learned District Judge has led to his giving the plaintiff a decree upon a plaint which was on the face of it based upon a contract void in law, I might feel some difficulty as to the proper order to pass. As the case stands, I do not think that this can be fairly said, and I will not interfere. The application is dismissed with costs.

Application dismissed.

(1) 25 A. 509.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 232 OF 1910.

May 15, 1912.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ABDUR RAFEY KHAN—PLAINTIFF—APPELLANT

RANNI BEGAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—*Distribution of food to poor on the occasion of* urs *and* fateha—*Valid charitable object.*

ABDUR RAFEY KHAN *v.* BANNI BEGAM.

The distribution of food to the poor and the like on the occasion of *urs* and *fateha* is a valid religious charitable object for a Muhammadan *wakf*.

First appeal from the decision of the Subordinate Judge of Shahjahanpur, dated the 27th of May 1910.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Muhamad Ishaq*), for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru* (with him Mr. *Ghulam Mujtaba*), for the Respondents.

JUDGMENT.—In this case the plaintiff, Maulvi Muhammad Abdur Rafey Khan, is the first cousin of one Maulvi Abdul Wajid Khan, deceased, and sues to recover possession of the three-fourths share in the estate left by the deceased which would fall to him under Muhammadan Law. The defendants are *Musammat* Banni Begam, widow of the deceased, and Yusuf Ali Khan, the designated *mutawalli* of a *wakf* said to have been created by Abdul Wajid Khan in his lifetime The suit has been decreed in respect of a few items of property with which we are not now concerned as they were not included in the alleged *wakf*; but the learned Subordinate Judge has dismissed the bulk of the plaintiff's claim upon a finding that the property concerned formed the subject of a valid *wakf* duly created by Maulvi Abdul Wajid Khan in his life-time. This finding is contested by the plaintiff before us in appeal. His contention is that Abdul Wajid Khan never did create, and never intended to create, any valid *wakf*, or at any rate that he never intended to create any *wakf* which should take effect in his own life-time. That is to say, we are asked to hold that, even if Abdul Wajid Khan did intend to make a real and substantial disposal of his property for religious and charitable purposes after his death, and even if he left behind him documents which would have the effect of carrying out that intention, his entire proceedings are vitiated by the fact that he was trying to evade the rule of Muhammadan Law restraining him from making, to the prejudice of his legal heirs, any testamentary disposition of his property affecting more than a one-third share of the same.

The evidence in the case is somewhat voluminous, and has been dealt with by the learned Subordinate Judge in an elaborate judgment, from the main conclusions of which we see no reason to dissent. The essential points of the case, however, lie within a narrow compass. It is quite clear that the notion of disposing of his property by way of *wakf* had long been present to the mind of Abdul Wajid Khan. A copy of a decree, dated July 7th, 1887, by which certain litigation between this gentleman and his own father was settled in accordance with the terms of a compromise between the parties, has been put in evidence (pages 50 and 51 R.) and shows a definite intention to preserve the corpus of the family property intact, and to use it for the foundation of a *wakf* after Abdul Wajid Khan's death. It is proved that Abdul Wajid Khan was famous for his charitable disposition and the religious bias of his mind is shown by the fact that he three times made the pilgrimage to the Holy Places of Arabia. To such a man the idea of founding endowments for religious and charitable purposes would follow naturally upon an intention so to dispose of it after his death. We find that he actually executed four deeds of endowment. He began by taking a significant precaution. On August 31st, 1892, he obtained from his wife (the first defendant in the present suit) a formal relinquishment of her heavy claim for unpaid dower-debt, the lady in this document expressly states that she relinquishes her claim on the understanding that her husband intends to dedicate the propety by way of *wakf*. On the following day, namely, September 1st, 1892, Abdul Wajid Khan executed the first of his *wakf-namas*. Much of the argument in this case, and much of the judgment of the Court below, was occupied with the discussion of the question whether this document, had it stood alone, would or would not on the face of it have constituted a valid *wakf*. There can be no doubt that this deed purports to effect a present alienation of the corpus of the property concerned, with a dedication of the same to charitable or religious purposes. In so far it differs essentially from any testamentary disposition of property, the alienation being irrevocable and taking effect at once. On the other hand, Abdul Wajid Khan in this document appoints himself "*mutawalli*" and leaves himself in absolute and unfettered control of the income of the property, bound by nothing except by his own injunctions that the money is to be spent for charitable and religious objects. Moreover,

he secures the succession to this office of sole trustee for his wife, in the event of her surviving him, and he makes similar provision for his children and their descendants, in the doubtful event (which in fact never occurred) of any children being born to him after the execution of the deed. It is sufficient to say that the validity of this document, if it stood alone, would involve questions of law open to considerable discussion, but questions as to which we find it unnecessary to pronounce any opinion in view of the facts of the case as they stand.

On October 2nd, 1893, Abdul Wajid Khan supplemented his first deed of endowment by another, in which he simply added something to the value of the endowment. On April 12th, 1899, he availed himself of the powers of revision and control which he had reserved to himself by his first deed, in order specifically to devote a portion of his landed property to the endowment of a certain school at Lucknow. It has finally been admitted by the plaintiff that this deed at any rate he is not in a position to contest; it fulfils every possible condition of a valid *wakf*. It may be noted in passing that it involves property of the value of Rs. 10,000. Finally, on October 13th, 1906, Abdul Wajid Khan executed a fourth deed of endowment, and it is on this deed that the case really turns. It was evidently drawn up under careful legal advice. The preamble contains an implied reference to the ruling of this Court in *Muhammad Aziz-ud-din Ahmad Khan* v. *The Legal Remembrancer to Government, North Western Provinces and Oudh* (1), and to certain more recent decisions of their Lordships of the Privy Council, as having thrown some doubt on the validity of the two *wakf-namas* of September 1st, 1892, and October 2nd, 1893. No doubt the writer means that some question might be raised as to whether these documents had in fact been followed by any real and *bona fide* transfer of the property concerned to the nominated *mutawalli* (*i.e.*, to Abdul Wajid Khan himself as *mutwalli*), also that difficulties might arise regarding the possible reservation of a series of life-interests under the terms of the first deed. Therefore, while protesting that he personally regards these earlier deeds as valid under the Hanafi law by which he is bound, and that he has been "acting upon the terms of the deeds up to this time", he proceeds to execute this fresh *wakfnama* of October 13th, 1906, avowedly with the object of removing all difficulties and making a dedication of his property which shall be beyond question and dispute. Now, it was admitted in argument before us that this appeal must fail if we are prepared to maintain this last deed. The only questions for determination are whether this deed on the face of it constitutes a good and valid *wakf* under Muhammadan Law, whether it was executed by Abdul Wajid Khan in good faith with intent that it should operate as such, and whether the disposition of property made therein was actually carried into effect. It is not even necessary for us to consider what would be the legal consequences if we answered either the second or the third of these questions in the negative, because it seems clear to us on the evidence that there must be a finding against the the appellant on each point.

We may consider first the objections taken to the provisions of the deed as it stands. It is contended that the provision made in several paragraphs of the deed for "*urs*" or "*fateha*" ceremonies renders the endowment invalid, at least to the extent of such provision, because expenditure for such purposes is not recognized by some Muhammadan lawyers as of a "religious" character. The tendency of later decisions of this Court is against the appellant on this point, as may be seen from the cases in *Phul Chand* v. *Akbar Yar Khan* (2); *Biba Jan* v. *Kalb Hussain* (3); *Fakhr-ud-Din Shah* v. *Kifayat-ul-lah* (4); *Mazhar Hussin Khan* v. *Abdul Hadi Khan* (5). Moreover, the deed before us seems to have been carefully drafted in order to meet the doubts suggested by these rulings. It provides in every case that the expenditure shall be on charitable objects, the distribution of food to the poor and the like, on the occasion of the ceremonies in question. The difficulty, which some strict Muhammadans have felt regarding the validity of prayers for the repose of the souls of the departed as a suitable "religious" object

(1) 15 A. 321.

(2) 19 A. 211.
(3) 6 A. L. J. 115; 1 Ind. Cas. 763; 31 A. 136.
(4) 7 A. L. J. 1095; 8 Ind. Cas. 578.
(5) 8 A. L. J. 162; 9 Ind. Cas. 753; 33 A. 400.

for a trust or endowment, scarcely seems to arise at all. The distribution of food to the poor is a "charitable" object, and it is difficult to see how it can become less so because the founder of the endowment chooses to associate it with certain particular dates and with the anniversaries of the deaths of departed saints, worthies or relatives of his own. It seems impossible, therefore, to hold that we have not in this trust-deed a substantial dedication of property to religious and charitable purposes. The total annual income of the property dealt with is about Rs. 9,000 and after this objection regarding the "*urs*" or "*fatehæ*" ceremonies has been overruled, there remain only two items to which exception can be taken. These are items Nos. 8 and 12. The first of these provides that Rs. 3,000 shall be sent every year, through a certain firm of bankers at Delhi, to Mecca and Medina for expenditure on various charitable objects. On the face of it, the provision is perfectly good, the suggestion on behalf of the appellant is that it is purely illusory, as Abdul Wajid Khan intended shortly to proceed to Mecca himself and meant the money for his own use. Nothing is proved in support of this suggestion beyond the fact that Abdul Wajid Khan did proceed to Mecca shortly afterwards, and in fact died there. We see no good or sufficient reason for holding that this clause of the trust-deed was not intended to operate according to its apparent purport. By the twelfth clause, a further sum of Rs. 3,000 yearly is directed to be paid over to Abdul Wajid Khan's wife, to be spent in charity at her discretion; the suggestion is that the real object was to provide for the lady's own needs for her life-time. It seems sufficient to say that a *wakf* of property yielding an income of Rs. 9,000 a year would certainly not have been invalidated even if the trust had been saddled, frankly and openly, with the provision of a life annuity of Rs. 3,000 in favour of the wife of the *wakif*.

The deed as it stands is, therefore, a good and valid *wakf*. We can see no reason whatever, on a review of the evidence as a whole, for holding that Abdul Wajid Khan did not intend it to operate as such. The evidence upon the strength of which it was contended that the trust was never carried into effect seems to us wholly insufficient to support any such contention. Abdul Wajid Khan duly caused mutation of names to be effected in the Revenue Records in favour of Yusuf Ali Khan, the *mutawalli* appointed under the deed. He himself left for Arabia about a year after the execution of the trust-deed having handed over the whole property to the *mutawalli*, and he never returned. It is not necessary for us to discuss the details of the evidence; it has been thoroughly considered by the learned Subordinate Judge. The granting of a few leases in the name of Abdul Wajid Khan in his capacity of *Lambardar* after the 13th October 1903 is accounted for by the fact that he was not formally removed from this office until some months later, the suits instituted in Abdul Wajid Khan's name seems to have been for arrears of rent which had accrued due before the appointment of the new *mutawalli*. The account books kept by the latter were actually tendered before the lower Court, and it would be preposterous to draw any decisive inference against the defendants from the fact that when the books were before the Court, neither side thought it worth while to get them formally proved.

We find, therefore, against the appellant on every point and dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1773 OF 1909.

April 22, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice N Chatterjea.

GANENDRA NATH ROY CHOWDHURY —PLAINTIFF—APPELLANT

versus

SURJA KANTA ROY CHOWDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 25 —Remand for finding—Expression of opinion by Appellate Court—Whether Court can change mind after return of finding.

When a case is remanded under rule 25 of Order XLI of the Civil Procedure Code, it remains pending and undisposed of on the Appellate Court's file. If the Judge records any expression of opinion but does not intend to express the same finally, he is not bound by it after return of the findings, for a Judge may

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yield to conviction and change his mind at any time before he has pronounced judgment.

Lachman Prasad v. *Jamna Prasad*, 10 A. 162: *Mubarak Husain* v. *Bihari*, 16 A. 306 and *Kailash Chandra Guha* v. *Heyatunnessa Bibi*, (unreported), S.A. No. 376 of 1902, relied upon.

But the Judge is not bound to reconsider after return of the findings any question which he had already dealt with and upon which he had expressed a final opinion before the remand.

Appeal from the decree of the District Judge of the 24-Pergannahs, dated May 14th, 1909, affirming that of the Munsif of Basirhat, dated December 16th, 1908.

Babus *Sarat Chandra Roy Chowdhury* and *Lalit Mohan Banerjee*, for the Appellant.

Babus *Nil Madhab Bose*, *Sarat Chandra Ghose* and *Manindra Lal Banerjee*, for the Respondents.

JUDGMENT.

CARNDUFF, J.—This appeal arises out of a suit brought by the plaintiff for the recovery of possession from defendant No. 1 of a piece of their *chadrasan*, or ancestral homestead, which had been allotted to the former on partition.

Both the Courts below found that as the plaintiff had transferred the whole of his interest in a number of parcels of land (including this *chadrasan*) by exchange with defendants Nos. 2 and 3, he had no cause of action. The suit was in consequence dismissed, and, as between the parties as arrayed in it, this was bound to be the result. But the plaintiff had set up the plea that his agreement for exchange with defendants Nos. 2 and 3 had been contingent on the defendant No. 1 giving up possession of the *chadrasan*, and that, owing to the defendant No. 1's failure to do so, it became and remained inoperative. This plea was rejected by the Court of first instance. In the lower Appellate Court, the plaintiff persisted in it, but prayed, in the alternative, that, if he again failed to substantiate it, he might be allowed even at that stage to transfer defendants Nos. 2 and 3 from the category of defendants to that of plaintiffs so as to overcome the obstacle to a decree in the suit. This prayer was refused.

When the second appeal first came before Mr. Justice Coxe sitting alone in this Court, the learned Judge pointed out that, if the plaintiff had made a *bona fide* mistake in the matter, he might, under Order I rule 10, have been allowed to do as he proposed. The first Court had found that the exchange had been practically carried into effect, and that the plaintiff had sued, instead of the defendants Nos. 2 and 3, for the benefit of the latter in order to weaken the position of defendant No. 1. It was thought, the learned Munsif believed, that against his co-sharer, the plaintiff, the defendant No. 1 could have no defence; but that against outsiders like defendants Nos. 2 and 3, he might raise the defence, that it was inequitable to thrust strangers into the *chadrasan*. Whether this idea was well founded or not, I think it is unnecessary to consider in this appeal; but the fact remains that the first Court found that there was collusion on the part of the plaintiff and defendant No. 1 and that the other defendants were deliberately not joined as plaintiffs. The lower Appellate Court, however, had not dealt with this aspect of the case, which has a direct bearing on the application of rule 10, Order I, at all. Mr. Justice Coxe, therefore, directed a remand for a finding on the question whether possession of the other lands covered by the deed of exchange between the plaintiff and the defendants Nos. 2 and 3 was actually exchanged, as held by the first Court. If it had been exchanged, he indicated the opinion that the plea of the plaintiff that his title still subsisted could not be regarded as *bona fide*. If not, that is to say, if the exchange had not been actually made, he thought that the application under Order I, rule 10, was one which might be granted.

The appeal has now come back to us after the remand with the report of the learned District Judge that the question sent down to him must be answered in the affirmative. If, then, Mr. Justice Coxe's expression of opinion be adhered to now, the appeal is concluded by this finding of fact and must be dismissed.

The learned Vakil for the appellant, however, contends that we are not bound by any expression of opinion recorded by Mr. Justice Coxe in his order of remand. The learned Vakil who appears for the respondent argues that we are. As to this, I am, in the first place, quite clear that Mr. Justice Coxe did not intend by his order of remand to express any final opinion. His remarks seem to me to come, at most, to this that, as then advised, he inclined to the view which I have al-

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ready indicated. I am equally clear that even if it were otherwise, Mr. Justice Coxe would not himself now be bound by what he laid down in his order of the 17th May, 1911. When a case is remanded in this way, that is to say, under section 556 of the Code of 1882, which corresponds with Order XLI, rule 25, of the present Code, it has been settled, ever since the decision of *Boncharee Ghose* v. *Ainoodden Biswas* (1), and it is obvious from the language of the provision, that it remains pending and undisposed of on the Appellate Court's file. It surely goes without saying that a Judge may yield to conviction and change his mind at any time before he has pronounced judgment, and it seems to me that the contrary view has only to be stated to be exposed as untenable. The view which I take is, I think, supported by *Lachman Prasad* v. *Jamna Prasad* (2) and *Mubarak Husain* v. *Behari* (3) and it is also, I think, in consonance with the unreported decision of the Court in the case of *Kailash Chandra Guha* v. *Heyatunnessa Bibi* (4), which was decided by the late Chief Justice Maclean and Mr. Justice Mitra on the 31st March, 1905.

The learned Vakil who appears for the respondent concedes, indeed, that a Judge can *ex proprio motu* act in this way; but he contends that he cannot be asked to do so, except in review, by either side. It seems to me, however, that there is no force in this contention, and that if a Judge can proceed *ex proprio motu*, he can be moved in the same direction. I hold, then, that Mr. Justice Coxe would not have been bound by what he had already said, and, *a fortiori*, this Bench is not bound thereby. We should, of course, be slow to go back upon the view expressed by another Judge in an earlier stage; and, as was observed by Sir John Edge, C. J., in the earlier of the cases to which I have already referred, we are certainly not bound to reconsider any question already dealt with, while I have no hesitation in saying for myself that I would, as a rule, refuse to do so. But, as I have already said, I do not think that Mr. Justice Coxe intended to express any final opinion: I would, therefore, go into the whole question of *bona fides* on the findings of fact now supplemented and completed by the judgment of the District Judge after the remand.

The short point, therefore, which we have to decide, is whether the plaintiff can be said to have been acting *bona fide* within the meaning of rule 10 of Order I when he brought the suit himself without joining the defendants Nos. 2 and 3 as plaintiffs. The position here may be thus described. The plaintiff set up a case which, on the findings before us, is false. He denied that his agreement with the defendants Nos. 2 and 3 had ever been carried into effect; whereas it has been found that it was carried into effect as completely as could be. He obtained all the lands which had to be given to him in exchange and he gave possession of all the lands which he had to give in exchange to defendants Nos. 2 and 3 except this small piece of *chadrasm*. Notwithstanding, he tried to prove in the first Court that the document was wholly inoperative and even in the appellate stage, he adhered to that case and asked that, if he should again fail to substantiate it, he might be allowed the benefit of Order I, rule 10. The plaintiff had undoubtedly parted with the whole of his interest and whatever his object, it seems to me to be impossible, in these circumstances, to hold that he made nothing but a *bona fide* mistake. It is suggested to us that, if we cannot give relief under the first part of rule 10, Order I, we ought to do so by using the discretionary power conferred on us by the second part. But we clearly cannot help the appellant in this way when the finding as to good faith is against him.

Finally, it is faintly suggested that we should allow the plaintiff even now to withdraw the suit with liberty to bring a fresh action joining the defendants Nos. 2 and 3 as plaintiffs. In my opinion, it is too late to consider that suggestion which is opposed by the respondent.

The result is that this appeal must be dismissed with costs.

N. CHATTERJEA, J.—I agree.

Appeal dismissed.

(1) 24 W. R. 137.
(2) 10 A. 162.
(3) 16 A. 306.
(4) S. A. No. 376 of 1902.

GHULAM HAZRAT *v.* GULZARI LAL.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 341 OF 1911.
May 15, 1912.
Present:—Mr. Justice Piggott.
GHULAM HAZRAT—PLAINTIFF—APPELLANT
versus
GULZARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—*Deed*—*Construction*.

There was a recital in a deed that the income of certain property be spent on the tomb and the *fateha* and *urs* ceremonies of a certain deceased person and in payment of the salary of the *Hafiz* who would read the *Quran* at the tomb but there was nothing to show that the income of the property was ever appropriated for the objects set out in the deed:

Held, that the property did not form part of the subject of a valid *wakf* under the Muhammadan Law.

Fakhruddin Shah v. *Kifayatullah*, 7 A. L. J. 1095; 8 Ind. Cas. 578, referred to.

Second appeal from the decision of the District Judge of Shahjahanpur, dated the 20th of March 1911.

Mr. *Muhammad Ishaq Khan* (with him Mr. *Ibn Ahmad*), for the Appellant.

Mr. *Benode Behari*, for the Respondents.

JUDGMENT.—One Chaudhri Ghulam Hamid died, somewhere in 1877, possessed of considerable landed property. On July 16th, 1879, his heirs executed what is in substance a deed of partition dividing amongst themselves the property of the deceased, with the exception of a certain share in village Nagar, which they admitted to have been dedicated by Chaudhri Ghulam Hamid, in his life-time, to a certain religious purpose. Under the terms of the deed of partition, *Musammat* Riazunnissa, one of the widows of the deceased, obtained possession of certain property in village Sirsa Dabri. This is described in the specification appended to the deed as consisting of a certain share in the *zemindari* of the village, together with a certain area of *muafi* land. On August 8th, 1905, this lady, purporting to act as proprietor, co-sharer and *muafidar* of village Sirsa Dabri, executed in favour of Gulzari Lal and Shib Charan Lal a twenty years' lease of some three *biswas* and odd of her *zemindari* share together with 32 *bighas* and 4 *biswas* of the *muafi* land. The lessees were to pay the Government revenue and other expenses and were to pay the lessor a net rent of Rs. 60 per annum. On May 25th, 1909, *Musammat* Riazunnissa aforesaid executed in favour of Chaudhri Ghulam Hazrat a deed which is described as a *tamliknama* and *sipurdnama* by which she purported to transfer to him whatever rights she herself possessed in the *zemindari* share or in the *muafi* lands in village Sirsa Dabri. This Chaudhri Ghulam Hazrat is a son of Chaudhri Ghulam Hamid by another wife, and on the face of it, *Musammat* Riazunnissa's deed of May 25, 1909, purports to be a transfer in his favour without consideration. It is significant, however, that on May 25, 1909, Ghulam Hazrat, in his turn, executed a deed by which he covenanted to pay *Musammat* Riazunnissa the sum of Rs. 60 per annum for her life as a consideration for the transfer made in his favour. The present suit was filed on July 1, 1910, Chaudhri Ghulam Hazrat being the plaintiff and the defendants being Gulzari Lal and Shib Charan Lal, the lessees and *Musammat* Riazunnissa the lessor under the deed of August 8th, 1905. The relief sought is possession of the 32 *bighas*, 4 *biswas* of *muafi* land, together with a declaration that the lease of August 8th, 1905 is ineffectual in so far as it relates to this particular land. This relief was sought substantially upon two grounds. In the first place, the plaintiff pleaded that the execution by *Musammat* Riaz-un-nissa of the lease of August 8th, 1905, was obtained by undue influence, misrepresentation and fraud. The particular fraud alleged was that the defendants, Gulzari Lal and Shib Charan Lal, had obtained the inclusion of the 32 *bighas*, 4 *biswas* of *muafi* land in the lease in question, without explaining the fact that they were doing so, to *Musammat* Riaz-un-nisa, the lessor. It was pleaded, in this connection, that the value of the entire property leased was such as to make the annual rental of Rs. 60 altogether inadequate. In the *second place*, it was contended that the 32 *bsghas*, 4 *biswas* of *muafi* land appertained to a *wakf* created by the heirs of Ghulam Hamid under the terms of the deed of July, 16, 1879 already referred to. The plaintiff contended that *Musammat* Riaz-un-nisssa was in possession of this particular area merely as *mutwalli* of the aforesaid *wakf* and that in this capacity, she had no right to grant a lease of the *wakf* property for any period exceeding three years. The plaintiff's case further was that he had suc-

ceeded Riaz-un-nissa as *mutawalli* by virtue of the deed of May 25th, 1909, in his favour, and that he was, therefore, entitled to sue for possession in his capacity as *mutwalli* and for cancellation of the lease granted by his predecessor-in-office so far as that lease included property appertaining to the *wakf*.

In so far as the suit was based upon allegations of undue influence, misrepresentation or fraud, it is concluded against the plaintiff by the findings of fact arrived at by the lower Appellate Court. In the memorandum of appeal to this Court, the only paragraph referring to this part of the case is paragraph 6, in which it is suggested that the Court below might have arrivedat a different conclusion on the point, if it had properly considered the principles of law ordinarily applied by the Courts in India to transactions in which one of the parties is a *pardanashin* lady. With regard to this point, I see no reason for holding that the learned District Judge has failed adequately to consider the position of *Musammat* Riaz-un-nissa. The plaintiff's case regarding these pleas of undue influence, misrepresentation and fraud was of the flimsiest character, and I do not see that any evidence was led which could be regarded as having the effect of shifting the burden of proof on to the defendants. If the plaintiff himself had seriously believed in his own allegations of fraud, he would have sued for the cancellation of the entire contract of lease, and not merely of the portion of it, relating to the *muafi* land. Moreover, there is against the plaintiff a clear finding of limitation as affecting this part of the case. In so far as relief is sought on the ground of fraud, the suit would be governed by Article 95 of the first Schedule to the Indian Limitation Act. The prescribed period of limitation would begin to run from the time when the fraud became known to the party wronged. There is no allegation regarding *Musmmat* Riaz-un-nissa's having come to know after execution of the lease of any fact which convinced her that she had been wronged, and as regards Ghulam Hazrat himself, the learned District Judge entirely refused to accept his assertion that he only came to know of the lease after the transfer in his favour, but was of opinion that he must have known of it all along.

The other part of the plaintiff's case depends on the question whether the 32 *bighas*, 5 *biswas* of *muafi* land in question were made the subject of a valid *wakf*, by the heirs of Chaudhri Ghulam Hamid, as alleged in paragraph 1 of the plaint. It must be conceded to the appellant that no form of words is prescribed by Muhammadan Law as necessary to the creation of a valid *wakf*, and there may be an actual dedication of specific property to religious or charitable purposes, without any such words as *waqf*, or "*mutwalli*" being employed. The deed of July 16th, 1879, contains a recital by *Musammat* Riaz-un-nissa, that out of all the property assigned to her under this deed of partition, she will undertake to spend the income of the *muafi* land in Sirsa Dabri "on the tomb and the *fateha* and *urs* ceremonies of the deceased Chaudhri, and in paying the salary of the *hafiz* who will read the *Quran* at the tomb of the deceased Chaudhri." There is also a special provision that her daughter *Musammat* Irshad Batul shall after her death become the owner of the property in the same way, and shall defray the aforesaid expenses. Then, finally, comes a provision that in certain events, the other heirs of Chaudhri Ghulam Hamid shall have powers to take possession of the property allotted to *Musammat* Riaz-un-nissa and to defray the expenses afore-mentioned out of the income of the same.

It should be noted that *Musammat* Riaz-un-nissa also binds herself not to use the income of these *muafi* lands in any other way or to transfer the same by sale, mortgage or hypothecation.

In my opinion, this is a document of doubtful interpretation. It certainly does not contain any words which definitely and expressly alienate the *corpus* of the property concerned and dedicate the same to the Almighty. It is at least open to the argument that it is possible to regard it as nothing more than an expression by *Musammat* Riaz-un-nissa of her pious intention to devote the income of a portion of the property assigned to her on partition to certain specific purposes of a more or less pious or religious nature, and a desire on her part that the same use of this income may continue to be made after his death. It seems to me that a somewhat similar question was before a Bench of

this Court in the case of *Fakhruddin Shah* v. *Kifayatullah* (1). There the question was as to an alleged oral dedication and the Court had to consider whether the evidence as to what was actually done in consequence of the alleged oral dedication was of such a nature as to justify the inference that there had in fact been a valid *waqf*. I think this case is very similar, except that I have to deal with a document of doubtful interpretation, instead of with an alleged oral dedication. I take it that it must have been because he took substantially some such view of the case as this that my learned predecessor thought it advisable not to decide this appeal without calling for a finding from the Court below upon the following issue:—Has the income of the property been appropriated for the objects set out in the document of 1897 or is the alleged *wakf* illusory? Upon this issue the lower Appellate Court has returned a clear finding that it has not been proved that the income of the property was appropriated for objects set out in the document of 1879. That finding is binding upon me in second appeal, and it is certainly borne out by a curious passage in *Musammat* Riaz-un-nissa's deed of May 25th, 1909, in which she states that owing to the fact that some of the property assigned to her under the partition deed of 1879, was in the possession of a mortgagee, the actual expenditure in connection with the tomb of Chaudhri Ghulam Hamid, and the *fateha* and *urs* ceremonies and readings of the *Quran* connected therewith, was being defrayed by Chaudri Ghulam Hazrat out of his own pocket. The wording of this entire deed of May 25th, 1909, deserves to be carefully considered. It is, to say the least of it, ambiguous. It seems to me more consistent with the notion that *Musammat* Riaz-un-nissa was transferring certain property to her step-son, subject to the condition that he would apply a portion of the income thereof in a particular way than with any such notion as that of her resigning the post of *mutwalli* of a *wakf* and appointing Chaudhri Ghulam Hazrat as her successor. If the facts were as contended for by the appellant, I should have had expected the two transactions, *viz.*, the transfer of proprietary title as regards the property which was admittedly not *wakf*, and the appointment of a new *mutwalli* for the *wakf* property to have been effected by two different deeds, or at the very least not to have been confounded together in the way in which they have been in the present document. On these grounds, I accept the finding of the Court below, that it is not proved that the 32 *bighas*, 4 *biswas* of *muafi* land in suit have been made the subject of a valid *wakf*.

There is yet another contention on behalf of the appellant which deserves notice. By the fifth paragraph of the memorandum of appeal, it is suggested that the partition deed of July 16th, 1879, was at least a family arrangement and that *Musammat* Riaz-un-nissa was bound by the covenant against alienation in respect of these *muafi* lands, even if that be regarded as nothing more than a covenant entered into by her towards the other heirs of Chaudhri Ghulam Hamid. This contention is not without force and might require to be considered in the event of a suit brought after *Musammat* Riaz-un-nissa's death. But I can see nothing in the covenant against alienation, which would prevent *Musammat* Riaz-un-nissa, from effecting an alienation which should be valid for the term of her own life. Moreover, once it has been found that the land in suit has not been made the subject of a valid *wakf*, the plaintiff loses his *locus standi*. He is at most a transferee of *Musammat* Riaz-un-nissa, and the objection that she had no right of transfer sounds oddly in his mouth. Moreover as a transferee of *Musammat* Riaz-un-nissa, he could not assail the transaction of lease upon any ground which would not have been open to the lady herself. This appeal, therefore, fails and I accordingly dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

(1) 7 A. L. J. 1095; 8 Ind. Cas. 578.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL NO. 545 OF 1909.

May 8, 1912.

Present:—Mr. Justice Brett and Mr. Justice N. Chatterjea.

GOUR CHANDRA DAS—PLAINTIFF—APPELLANT

versus

SARAT SUNDARI DASYA—DEFENDANT—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50

GOUR CHANDRA DAS v. SARAT SUNDARI DASYA.

Expl. 4—"Just cause"—Mal-administration—Disagreement between joint administrators—Grant "becoming useless and inoperative," meaning of.

The words "become useless and inoperative"in section 50, Explanation (4) of the Probate and Administration Act imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it, *e. g.*, the discovery of a later Will or codicil or the subsequent discovery that the Will was forged or that the alleged testator was still living.

Bal Gangadhar Tilak v. *Sakwarbai* alias *Tai Maharaj*, 26 B. 792; 4 Bom. L. R. 637, followed.

Therefore, mal-administration is not a just cause under section 50, Explaination 4, of the Probate and Administration Act, for revoking a Probate.

Annoda Prosad Chatterjee v. *Kalikrishna Chatterjee*, 24 C. 95, relied upon.

Consequently, a disagreement between joint administrators is not a just cause for annulling the Letters of Admistration.

Appeal from the decree of the District Judge of Dacca, dated September 18th, 1909.

Babu *Kritant Kumar Bose* and Dr. *Sarat Chandra Basak*, for the Appellant.

Babu *Harish Chandra Roy*, for the Respondent.

JUDGMENT.—This is an appeal against an order passed by the District Judge of Dacca on the 18th September 1909, refusing an application made by the present appellant for the removal of Sarat Sundari Dasi from the administration of the estate of Chaitan Krisna Poddar. It appears that the appellant and Sarat Sundari Dasi are related to each other as adopted son and adoptive mother, and that Letters of Administration to the estate of Chaitan Krisna Poddar were granted to them after the death of the widow of Chaitan Krisna in whose favour, as the first beneficiary under the Will, Letters of Administration had previously been granted. There was some difference of opinion between the parties at first and, on the 31st August 1903, a compromise was arrived at and joint administration was granted to both. On the 26th May 1909, the petitioner made an application to the Court which contained several allegations against Sarat Sundari Dasi. Amongst them one was of that she had taken *hat chittas* from various debtors to the estate during the time when she was the sole administratrix and that those *hat chittas* had been taken in her name only. It was asked that the name of the present appellant as joint administrator should be added in those *hat chittas*. The learned Judge took action on that complaint with the result that the addition asked for was made in most of the *hat chittas*; but, in the order recorded on the 3rd September 1909, it was stated that, in certain *hat chittas*, the addition prayed for had not been made and, therefore, they would remain in Court on the record until the change could be made. There was also in the same petition a complaint against Sarat Sundari Dasi that she had not paid the allowance due to the appellant regularly and that she had not paid the Municipal tax for his house which she was bound to pay. Sarat Sundari put in, on the 16th July 1909, a petition in which, with reference to this later complaint, she made certain statements and alleged that if there had been any failure on her part to pay the allowance as it fell due and the Municipal tax, it was not the result of any fault on her part but was owing to the action taken on the part of the appellant and his father-in-law. That matter does not appear to have been dealt with in the proceedings before the Judge on that application; but, on the 17th September 1909, a fresh application was put in by the present appellant asking that Sarat Sundari should be removed from the administration and that the grant of Letters of Administration to her should be revoked. It is not quite clear whether the learned Judge, in passing the order which he did dismissing that application, did so in view of the action which had been previously taken on the previous application, but the question which we have to consider in this case is whether we should interfere with the order passed by the District Judge on the ground that that order was not in accordance with law or not justified by the circumstances of the case. The learned Pleader who appears in support of the appeal admits that the application was made under the provisions of section 50 of the Probate and Administration Act, and he contends that "the cause" for which it was asked that the grant of letters should be revoked or annulled in respect of Sarat Sundari was "a just cause" within the meaning of that section. He refers to the 4th Explanation attached to that section and argues that in this case, "the grant has become useless and inoperative through circumstances." On being pressed to explain what the circumstances are, the learned Pleader is unable to advance any other circumstances than the one that

the lady and her adopted son have quarrelled and he says that in consequence of this quarrel, it has become impossible to carry on the administration. It has also been suggested, but not very strongly pressed, before us that the allegations that she had not administered the estate property would be a sufficient ground for annulling the grant of Letters of Administration. In our opinion, the grounds, which have been advanced in support of the contention that the decision of the learned Judge should be set aside on the grounds that he was not right in holding that just cause for annulling the letters of Administration had not been made out, cannot be sustained. It has been held by this Court, in the case of *Annoda Prosad Chatterjee* v. *Kalikrishna Chatterjee* (1), that a mal-administration is not, under section 50, explanation (4) of the Probate and Administration Act, a just cause for revoking the probate. It has also been held by the Bombay High Court, in the case of *Bal Gangadhar Tilak* v. *Sakwarbai* alias *Tai Maharaj* (2), that the words "become useless and inoperative" in section 50, Explanation (4), of the Probate and Administration Act, imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it, *e.g.*, the discovery of a later Will or codicil, or the subsequent discovery that the Will was forged, or that the alleged testator was still living. We see no reason to differ from the view which has been taken by the learned Judges in these two cases and, following that view, we are of opinion that the only ground which has really been pressed in support of this appeal, namely, that the grant has become useless and inoperative because of the disagreement between the administrators is not a just cause for annulling the Letters. In these circumstances, we are of opinion that we cannot interfere with the decision of the lower Court and that the appeal must be dismissed with costs. At the same time, we desire to say that, if the appellant considers that he has any sufficient ground for pressing the complaints which were made in his application of the 28th May 1909, supposing that those complaints have not up to date received the consideration of the District Judge, it will certainly be open to him to apply to the lower Court in order that an inquiry may be made into the substance of the complaints and such action taken as to that Court may seem fit.

We assess the hearing fee in this Court at two gold *mohurs*.

Appeal dismissed.

(1) 24 C. 95.
(2) 26 B. 792; 4 Bom. L. R. 637.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1540 OF 1912.
May 3, 1912.
Present:—Mr. Justice Brett and Mr. Justice Sharfuddin.

PORT CANNING AND LAND IMPROVEMENT CO., LTD.—DEFENDANT—PETITIONER
versus
ROSON ALI MOLLAH—PLAINTIFF—OPPOSITE PARTY.

Valuation of suit—Suit for lease, annual rent being Rs. 71—Suit to be valued at Rs. 71—Jurisdiction of Munsif—Court Fees Act (VII of 1870), s. 7 cl. x, sub-cl. (c)—Suits Valuation Act (VII of 1887), s. 8—Civil Procedure Code (Act V of 1908), s. 115—Decision on facts—Failure of Court below to grasp real point—Judicial decision—Interference by High Court—Prejudice to neither party—Question of prejudice, if arises.

In a suit in a Sub-Judge's Court, the plaintiff prayed that his *mourasi mokarari* right in certain lands be declared and a decree passed against the defendants for directing them to grant him a lease, the yearly rent payable on which was Rs. 71. The plaintiff valued the suit for the purposes of jurisdiction at Rs. 1,100 but gave no materials or *data* to support the valuation:

Held, that, under the provisions of section 7, clause (x), sub-cl. (c), of the Court Fees Act and section 8 of the Suits Valuation Act, the suit should have been valued at Rs. 71 for purposes of Court-fee and jurisdiction, and it ought to be filed in the Munsif's Court.

Where the decision of a Subordinate Court is arrived at, though wrongly, either on the facts or on a proper judicial consideration of the matters placed before it, the High Court will not interfere under section 115 of the Civil Procedure Code.

But where the Court below failed to grasp the point which really had to be determined, namely, whether, under the provisions of the Court Fees Act and the Suits Valuation Act, the valuation of the suit given by the plaintiff was correct or not, and the Court simply accepted the valuation given by the plaintiff without attempting to ascertain the materials on which the valuation was based, in fact without arriving at a judicial decision at all:

Held, that the High Court should interfere, if satisfied that the decision of the Court below was wrong.

Amir Hussan v. *Sheo Baksh Singh*, 11 C. 6; 11 I. A. 237 and *Mathura Nath* v. *Umesh Chandra*, 1 C. W. N. 626, referred to.

Hari Sankar v. *Kali Kumar*, 32 C. 734; 9 C. W. N. 690, distinguished.

In such a case, the High Court will interfere even if neither party is prejudiced, because the law requires that suits of certain values should be tried in certain Courts and the question of prejudice does not arise.

Rule against the judgment of the Additional District Judge of the 24-Pergannahs, dated January 26th, 1912, passed on an appeal from the judgment of the Sub-Judge of Alipur, dated September 16, 1911.

Dr. *Rash Behary Ghose*, Babus *Debendra Nath Ghosh* and *Jogesh Chandra Bose*, for the Petitioners.

Babus *Baranashibashi Mukherji* and *Hem Chandra Mukherji*, for the Opposite Party.

JUDGMENT.—This Rule was obtained on the opposite party to show cause why the judgment and order of the Additional District Judge of 24-Pergannahs complained against should not be set aside as not in accordance with the provisions of the law as laid down in the Suits Valuation Act and the Court Fees Act. It appears that the opposite party instituted a suit in the 3rd Subordinate Judge's Court at Alipur in which he prayed that his *maurasi mokarari* right in certain lands be declared and a decree passed against the present petitioners for directing them to grant him a lease. The yearly rent payable on the lease was Rs. 71 but the plaintiff, opposite party in this Rule, valued the suit for the purposes of jurisdiction at Rs. 1,100. The Subordinate Judge, when the suit came before him, held that the valuation was incorrect. He held that, under the provisions of section 7 clause (x) sub-clause (*c*) of the Court Fees Act, the proper valuation in a suit between a landlord and tenant for delivery by the landlord of a lease was to be determined according to the amount of the rent of the land payable for the first year of the term in respect of which the lease was claimed; and that, as the suit was, in fact, a suit for a lease and as the rent for the land in respect of which the lease was claimed was Rs. 71, the suit should have been valued at Rs. 71 only, and that under section 8 of Suits Valuation Act that would be the valuation for purposes of jurisdiction. He, therefore, directed that the plaint be returned to the plaintiff to be filed in the Court of the Munsif. Instead of complying with the directions of the Subordinate Judge, the plaintiff, the opposite party in the present proceedings, appealed to the District Judge. The District Judge set aside the judgment and order of the Subordinate Judge and, holding that the valuation of Rs. 1,100 was correct, directed that the suit should be filed in the Subordinate Judge's Court. The petitioners then came to this Court and obtained the present Rule.

There can be no doubt, under the provisions of the law as laid down in the Court Fees Act, section 7, clause (x), sub-clause (*c*), and section 8 of the Suits Valuation Act, that the view taken by the Subordinate Judge was correct and that the suit ought to have been valued for the purposes of jurisdiction as well as for the determination of the Court-fee stamp at Rs. 71. Neither in the plaint nor before the Subordinate Judge, nor apparently before the District Judge, does any attempt appear to have been made by the opposite party, the plaintiff, to explain on what basis he arrived at the conclusion that the proper valuation of the suit was Rs. 1,100. The learned Pleader who has appeared to oppose this Rule has not attempted before us to dispute the correctness of the decision of the Subordinate Judge with reference to the valuation of the suit nor has he attempted to assist us in understanding on what materials the plaintiff arrived at the valuation of the suit at Rs. 1,100 but he has confined his arguments mainly to two points, *first*, that this Court is unable to interfere, having regard to the previous decisions of the Court and *secondly* that even if this Court has power to interfere, it should not interfere.

In support of the first contention, the learned Pleader for the opposite party has invited our attention to the decision of the Privy Council in the case of *Amir Hassan* v. *Sheo Baksh Singh* (1) and the decision of this Court in the case of *Mathura Nath* v. *Umesh Chandra* (2) and, on the basis of these decisions, he has contended that, even if the decision of the District Judge in this case was wrong, this Court shall not interfere under the provisions of section 115 of the Code of Civil Procedure. We do not think that the decisions in those two cases can be taken to apply to the facts of the present case at all. In these two cases, their Lordships of the

(1) 11 C. 6; 11 I. A. 237.
(2) 1 C. W. N. 626.

Privy Council and the learned Judges of this Court following them, held that where, under the law the lower Court had power to arrive at a decision but arrived at a wrong decision, it could not be said that that Court excercised its jurisdiction illegally or with material irregularity so as to justify an interference from the Appellate Court under section 92 of Act XII of 1879, corresponding with section 115, Civil Procedure Code. In both those cases, the decisions were arrived at either on the facts or on a proper judicial consideration of the matters placed before the lower Courts. In the present case, however, the learned Judge admits in his judgment that he is unable to appreciate the reasons which led the Subordinate Judge to hold that he had no power to take cognisance of the suit, and to return the plaint to the plaintiff. Obviously, the learned Judge in this case failed to grasp the point which really had to be determined, namely, whether, under the provisions of the Court Fees Act and the Suits Valuation Act, the valuation of the suit for the purposes of jurisdiction ought not to be Rs. 71 as found by the Subordinate Judge. The learned Judge has simply accepted the valuation given by the plaintiff without attempting to ascertain the materials on which that valuation is based; in fact without arriving at a judicial decision at all. In our opinion, this is a very different case from those contemplated in the two decisions referred to above and is certainly one in which this Court should interfere, if satisfied that the decision of the lower Appellate Court is wrong.

It has next been contended, on the basis of the decision of this Court in the case of *Hari Sankar* v. *Kali Kumar* (3), that the Subordinate Judge was bound to accept the valuation given by the plaintiff and that he ought to have decided that the valuation of the suit was Rs. 1,100. The case relied on is one in which the plaintiff gave certain *data* for arriving at the value at which the suit was valued and this Court held that, when those *data* or materials were given, there was no reason why this Court should interfere and, on the basis of other *data* or materials, should arrive at a different conclusion. That is, however very different from the present case in which the plaintiff has given no materials or *data* to support the valuation put forward for the purposes of jurisdiction. In our opinion, therefore the two points, which have been taken in support of the view that this Court has not the power under the law to interfere with the decision of the lower Appellate Court cannot be sustained.

The learned Pleader has then contended that, even if this Court has the power to interfere, it should not exercise that power, *first*, because neither party would be materially prejudiced if the order of the lower Court were allowed to stand and, *secondly*, because, though the plaintiff has not stated the materials on which the value was arrived at, still there are grounds for holding that that valuation was not excessive. So far as the first point is concerned, we do not think that in this case we should decline to interfere because neither party would be prejudiced. As a matter of fact, the law requires that suits of certain values should be tried in certain Courts and the question of prejudice does not, in our opinion, arise. As regards the second point, it appears to us that the contention advanced on behalf of the plaintiff is not sound. The learned Pleader admits that his client's case is that he had taken an agreement from the present petitioners under which he was to clear and bring under cultivation a certain piece of land and then, after a certain number of years and when the land had been brought under cultivation, he was to obtain a *maurasi mokarari* lease of the land at a certain rental. The learned Pleader contends that the effect of this agreement was to create, from the time when the agreement was entered into, a *maurasi mokarari* title in the land and that, therefore, the valuation which the plaintiff gave of the suit was not excessive. We do not think that it is possible to accept this view. The agreement was one of the ordinary agreements for the purpose of clearing *jungle* lands and the lease, either permanent or temporary, which was to be granted to the lessee after the land had been cleared, was one which would commence to take affect from the time when the land was brought under cultivation. The suit was brought by the plaintiff in order to obtain that lease from the landlords and we think, in these circumstances and under the provisions of the law, that the proper valuation of the suit both for the purposes of Court-fees and for the purposes of jurisdiction was that laid down in section 7

(3) 32 C. 734; 9 C. W. N. 690.

clause (*x*), sub-clause (*c*), of the Court Fees Act.

The result, therefore, is that the Rule is made absolute. We set aside the judgment and decree of the lower Appellate Court and direct that the plaint be returned to the plaintiff to be filed by him in the Court having jurisdiction to try the suit. The petitioners are entitled to their costs in this Rule which we assess at three gold *mohurs*.

Rule made absolute.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 54 OF 1912.

May 7, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

AZIZ BUX—OBJECTOR—APPELLANT

versus

KANIZ FATIMA BIBI AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution—Attachment—Execution application dismissed on objection—Review of the dismissal order—Attachment, whether subsists pending the review—Civil Procedure Code (Act V of 1908), *O. XXI, r.* 57.

Certain property was attached in execution of a decree. The judgment-debtor objected and the application for execution was dismissed. The decree-holder then applied for review. During the pendency of the application for review the judgment-debtor sold the attached property tc a third person. Subsequently, the application for review was granted and the order dismissing the application for execution set aside:

Held, that Order XXI, rule 57 of the Code of Civil Procedure did not apply, and that the attachment subsisted during the pendency of the application for review.

Execution first appeal from the decision of the Subordinate Judge of Meerut, dated the 20th of November 1911.

Mr. *Nihal Chand*, for the Appellant.

Mr. *B. E. O'Conor* (with him Mr. *Ghulam Mujtaba*), for the Respondents.

JUDGMENT.—This is an appeal by a judgment-debtor from an order passed in execution proceedings.

The person seeking to execute the decree is the assignee of a simple money-decree which was transferred to the Court of the Subordinate Judge of Meerut. The assignee of the decree attached two lots of property, (1) property which was burdened with a mortgage in favour of her assignor, (2) property which was not so mortgaged. Both sets of property were attached. The judgment-debtor objected that the mortgaged property could not be sold in execution without a suit being brought on the mortgage.

The first Court disallowed the objection, an appeal was preferred by the judgment-debtor to this Court, a Bench of which on 2nd June 1909 upheld the objection and passed a decree dismissing the application for execution *in toto*. In this order there was clearly an error as some of the property attached was not mortgaged property.

Accordingly, on 10th August 1909, the decree-holder applied for review of the judgment of 2nd June 1909. The application was granted and this Court on 13th June 1910 passed a modified order dismissing the application for execution only in respect to the mortgaged property and remitting the record to the lower Court with orders to continue with the execution of the decree according to law in regard to the rest of the property. In the meantime, the lower Court, on receipt of the decree of 2nd June 1909, had, on 18th August 1909, sent the record into the record room.

While the application for review was pending, *i e.*, between August 10th, 1909, and June 13th, 1910, the judgment-debtor sold the non-mortgaged property to a third party.

After the decision of 13th June 1910, the decree-holder applied to the lower Court on the basis of this Court's order of that date to go on with the execution proceedings and to sell the attached (non-mortgaged) property. The judgment-debtor (not his transferee) objected, pleading that under Order XXI, rule 57, the previous attachment had ceased to exist and that a fresh attachment was necessary and the property could not be sold as he had already sold it to another person.

The lower Court rejected the objection and hence this appeal by the judgment-debtor.

Stress is laid on Order XXI, rule 57. The rule clearly does not apply. It relates to the case of a default by the decree-holder which prevents the Court from continuing the execution proceedings and results in a dismissal of the application for execution by reason of that default. In such a case the rule lays down that the attachment ceases to exist directly the order of dismissal is passed. The rule allows the Court on the occurrence of such default to either dismiss the application

or adjourn the proceedings and adds that if the application be dismissed, the attachment ceases at once.

In the present case there was no default. Nor after such a dismissal would the revival of the execution proceedings cause a revival of the attachment, at least so as to prejudice the rights of strangers who have in the meantime acquired a title to the property [vide *Patringa Koer* v. *Madhabanand Ram* (1)]. This latter case does not help the appellant who is himself the judgment-debtor, nor is the case reported in *Sasirama Kumari* v. *Meherban Khan* (2) of any assistance for in that case there was a clear specific order releasing the property from attachment.

Prior to the Code of Civil Procedure now in force, there was often considerable doubt whether an attachment came to an end on the passing of an order dismissing an application for execution by reason of the decree-holder's default. [Vide *Govinda Chandra* v. *Dwarka Nath* (3)]. This has now been set at rest by Order XXI, rule 67. But in the present case, there was no such order of dismissal for default. The first order of dismissal passed by this Court on appeal on 2nd June 1909 was set aside on review and the order finally passed on the appeal only disallowed the application for execution in so far as it related to the mortgaged property, and upholding the application in regard to the property now in question and ordering the lower Court to go on with the execution of the decree in respect thereto.

In regard to this property, there has, therefore, been no dismissal of the application for execution. The lower Court's order of 18th August 1909 consigning the record to the record room does not and cannot help the appellant. He made the transfer while the application for review was pending. We would point out that his transferee has not come into Court.

We hold that, in the circumstances of this case, the attachment of the property in question at no time came to an end and we, therefore, dismiss the appeal with costs which in this Court include fees on the higher scale.

Appeal dismissed.

(1) 14 C. L. J. 476; 12 Ind. Cas. 65; 16 C.W.N. 332.
(2) 13 C. L. J. 243; 9 Ind. Cas. 918.
(3) 33 C. 666.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 61 OF 1912.

May 15, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

MUKHTAR AHMAD—JUDGMENT-DEBTOR—APPELLANT

versus

MUQARRAB HUSSAIN—DECREE-HOLDER RESPONDENT.

Execution—Interlocutory order—Appeal—Civil Procedure Code (Act V of 1908), *s.* 47.

An order of the Court disallowing an objection of a judgment-debtor that a fresh attachment was necessary, is an interlocutry order from which no appeal lies.

Jogodishury Debea v. *Kailash Chundra Lahiry*, 24 C. 725; 1 C. W. N. 374; *Sree Nath Roy* v. *Radha Nath Mookerjee*, 9 C. 773; *Behary Lal Pundit* v. *Kader Nath Mullick*, 18 C. 469, referred to.

Execution first appeal from an order of the Subordinate Judge of Moradabad, dated the 4th of November 1911.

Mr. *Muhammad Ishaq*, for the Appellant.

Mr. *Abdul Raoof* (with him Mr. *B. E. O'Conor*), for the Respondent.

JUDGMENT.—In this case property was attached on the 17th of July, 26th of July, 27th of July, 28th of July and 12th of August 1909. The decree-holder along with his application filed an affidavit dated the 15th of May 1909 giving full particulars as required by Order XXI, rule 66. After all these proceedings, the judgment-debtor objected to the execution of the decree. His objection was disallowed and his appeal to the High Court was also dismissed. When the record went back to the Court below in September 1910, notice was issued to the judgment-debtor under Order XXI, rule 66 and the decree-holder was directed to file an affidavit under the same rule. But as no affidavit was filed by him, the Court on the 11th of November 1910 struck off the case for default. The order runs as follows:—"The decree-holder notwithstanding two adjournments has failed to prosecute the proceedings. The case, therefore, cannot be adjourned any more. The proceedings are struck off". The Court, however, subsequently discovered that that order was a wrong order and that in fact there was no default of prosecution on the part of the decree-holder. It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary and it

decided to go on with the execution proceedings. [The judgment-debtor objected that a fresh attachment was necessary but his objection was disallowed. From that order disallowing the objection this appeal is preferred. A preliminary objection to the hearing of the appeal is taken by the learned Counsel for the other side. The substance of his contention is that this order is an interlocutory order and does not come within the purview of section 47 of the Code of Civil Procedure. The words of section 47 are, no doubt, very wide and if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings. But that does not seem to have been the intention of the Legislature. In our opinion, the view taken by Banerji, J., in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1), is a sound one. On page 739, he remarked as follows:—"It is not every order made in execution of a decree that comes under section 244. If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses would be appealable and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended. [See *Sree Nath Roy* v. *Radha Nath Mookerjee* (2) and *Behary Lal Pundit* v. *Kader Nath Mullick* (3).] An order in execution proceedings can come under section 244 only when it determines some question relating to the rights and liabilites of parties with reference to the relief granted by the decree, *not when as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way.* I may add that the language of section 244, which enacts that certain 'questions shall be determined by an order of the Court executing the decree and not by separate suit', clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description and an order determining such a question cannot, therefore, be a decree as defined in section 2". We agree with this view which applies very aptly to the circumstances of the case now before us. The result is that we hold that no appeal lies from the order of the Court below and we dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 24 C. 725; 1 C W. N. 374.
(2) 9 C. 773.
(3) 18 C. 469.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 15 OF 1912.

May 9, 1912

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

SALIG RAM—APPLICANT—APPELLANT

versus

RAM KISHEN DAS—OPPOSITE PARTY—RESPONDENT.

Res judicata—*Former application of insolvency dismissed for failure to produce evidence—Whether second application for declaration of insolvency is barred.*

Where an application to be declared an insolvent is dismissed for failure to produce evidence, a second application for such declaration is not barred as *res judicata.*

First appeal from an order of the District Judge of Farrukhabad, dated 27th October 1911.

Mr. Gulzari Lal, for the Appellant.

Mr. Satya Chandra Mookerji, for the Respondent.

JUDGMENT.—In this case Salig Ram applied to be declared an insolvent. His application was dismissed because he failed to produce evidence. He applied again and that application was dismissed, the Court holding that the principle of *res judicata* barred the application. We find ourselves unable to agree with the Court below that the principle of *res judicata* applies to this case. The question whether the applicant was or was not isolvent was never tried and the mere fact that in consequence of his failure to adduce evidence his former application was dismissed, is no ground for holding that the present application is barred by the principle

of *res judicata*. We, therefore, set aside the order of the Court below, and send the case back to it for trial on the merits. Costs will abide the result.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 182 AND 183 OF 1907.

April 29, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sankaran Nair.

M. MANIYAM PATTAR AND OTHERS—APPELLANTS

versus

K. LAKSHMANA NATTAMA KARAN AND OTHERS—RESPONDENTS (IN No. 182)

AND

E. MANIYAM AND OTHERS—RESPONDENTS (IN No. 183).

Transfer of Property Act (IV of 1882), *s.* 106—*Ejectment suit—Notice to quit—Denial of landlord's title—Purchase by mortgagee in Court sale—Attornment and payment of rent by lessee to lessor's assignee, whether amounts to denial of the title of the purchaser in Court sale.*

Payment of rent by a lessee to the lessor's assignee, who took the property on usufructuary mortgage from the lessor, and attornment to him, do not amount to the denial of the title of a purchaser of the property at Court sale held after the date of the said assignment, so as to dispense with the necessity of giving notice to quit prior to an action in ejectment by the said purchaser to the lessee.

Second appeals against the decrees of the Subordinate Judge of Palghat, in A. S. Nos. 304 and 313 of 1906, presented against the decrees of the District Munsif of Palghat, in O. S. Nos. 400 and 401 of 1904.

Mr. *A. Nilakanta Aiyar*, for the Appellants.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—It was first argued that the 1st defendant alone is entitled to raise the plea that there was no notice to quit and as he did not appear in appeal, the Appellate Judge was wrong in dismissing the suit on that ground. But we find that the question was raised by the 1st defendant and formed the subject of an issue and though there was no decision on this point by the Court of first instance, it was necessary for the Appellate Court on appeal by the plaintiff to decide that question.

It is next argued that the first defendant denied the plaintiff's title and, therefore, was not entitled to notice. The 1st defendant was the 2nd defendant's tenant. Both the plaintiff and the 3rd defendant were simple mortgagees under the 2nd defendant and while a suit by the plaintiff to enforce his mortgage was pending, the 2nd defendant granted a usufructuary mortgage to the 3rd defendant to whom the 1st defendant attorned. The plaintiff became a purchaser in execution of his mortgage-decree. It is not contended that the attornment or payment of rent before his purchase was a denial of his landlord's title because the plaintiff was admittedly not then the landlord. Nor can the subsequent payment of rent under the lease to the 3rd defendant, admittedly valid at the time it was granted, be treated as such denial. The 1st defendant never denied his character as lessee nor did he set up the title of any person against his lessor or any person who may have acquired any title under his lessor. The only question was who was the representative of the lessor? We think, therefore, this contention also must be disallowed.

The next question is whether the plaintiff is not entitled to recover arrears of rent. If the plaintiff proves his title. we do not see why a decree for rent should not be given to him in this suit. The lower Appellate Court has not decided the question whether he is so entitled. We must, therefore, ask the lower Appellate Court to return findings on issues Nos. 4 to 8 on the evidence on record.

The findings should be submitted in six weeks, and seven days will be allowed for filing objections.

After the return of the findings of the lower Appellate Court, the Court delivered the following

JUDGMENT.—We accept the findings of the lower Appellate Court on the issues and dismiss the second appeals with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 5466 OF 1911.
April 16, 1912.
Present:—Mr. Justice Mookerjee and
Mr. Justice Carnduff.
GOPAL CHANDRA MUKERJI—DECREE-HOLDER—PETITIONER
versus
NOTOBAR KUNDU—CLAIMANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XXI, r. 58—Claim application, if can be proceeded with after execution sale—Inherent power, doctrine of—Revisional powers of High Court—Subordinate Court acting in excess of jurisdiction and in violation of express provisions of Code.

It is not competent to an execution Court to proceed with a claim application under rule 58 of Order XXI of the Civil Procedure Code after the execution sale has actually taken place.

The doctrine of inherent power has no application to a case of this description. That doctrine is applicable when the Court finds it necessary, for the ends of justice or to prevent an abuse of its process, to make an order for which no express provision has been made by the Legislature.

Panchanan v. *Dwarka Nath*, 3 C. L. J. 29 and *Hukum Chand* v. *Kamalanand*, 3 C. L. J. 67; 33 C. 927, relied upon.

Where a Subordinate Court has acted clearly in excess of its jurisdiction and in violation of an express provision of the Code, the High Court will not hesitate to interfere.

Brajabala Debi v. *Gurudas Mandal*, 3 C. L. J. 293; 33 C. 487, followed.

Rule against the order of the Munsif of Kotalpur, dated August 21st, 1911, allowing the claim of the opposite party with costs.

Babu *Abani Bhushan Mukherji*, for the Petitioner.

Babu *Jnanendra Nath Sarkar*, for the Opposite Party.

JUDGMENT.—The question of law raised in this Rule is whether it is competent to an execution Court to proceed with a claim application under rule 58 of Order XXI of the Code of 1908 after the execution sale has actually taken place.

The petitioner, in execution of a decree, dated the 4th April 1910, against one Kali Dasi Debi, attached certain properties. On the 23rd February 1911, the present opposite party preferred a claim but the claim was not adjudicated upon till the 21st August 1911. Meanwhile the property had been sold on the 25th April 1911 and purchased by the decree-holder. On behalf of the decree-holder auction-purchaser, it had been contended that after the sale had taken place, the Court was no longer competent to proceed with the application under rule 58 and to make on the basis thereof an order under rule 60. In our opinion, this contention is manifestly well founded and must prevail.

Rule 60 of Order XXI provides that where, upon the investigation contemplated in rules 58 and 59, the Court is satisfied that the claim ought to be allowed, it shall make an order releasing the property wholly, or to such an extent as it thinks fit, from attachment. It is thus plain that an order under rule 60 must be made before the sale has taken place. This is also made clear by sub-rule (2) of rule 58 which provides for the adjournment of a sale pending the investigation of the claim preferred under sub-rule (1). But it has been argued by the learned Vakil for the opposite party that the Court below had, under section 151 of the Code, inherent power to allow the claim after the sale and to set aside the sale which had already taken place and had been confirmed. In support of this view, reference has also been made to the cases of *Tuffazal Hossein* v. *Raghunath Prasad* (1), *Hira Lal Mukerji* v. *Premamoyee Debi* (2) and *Gurdeo Singh* v. *Chandrikah Singh* (3). It is clear, however, that the doctrine of inherent power has no application to a case of this description. That doctrine is applied when the Court finds it necessary, for the ends of justice or to prevent an abuse of its process, to make an order for which no express provision has been made by the Legislature. *Panchanan* v. *Dwarka Nath* (4), *Hukum Chand* v. *Kamalanand* (5). In the case before us, rule 60 plainly indicates that an order upon an application under rule 58 must be made before the sale has taken place; upon the sale the application by which the claim has been preferred *ipso facto* terminates. The effect of these statutory provisions cannot be frittered away by an earnest appeal to the doctrine of inherent powers, specially as the objector is not without a remedy. It is open to him to proceed under rules 99 and 100 after the property has been sold and an attempt is made by the purchaser to obtain delivery of possession thereof. It is also open to him to institute a regular suit for the declaration of his right which, if

(1) 7 B. L. R. 186; 14 M. I. A. 40.
(2) 2 C. L. J. 306 at p. 309.
(3) 5 C. L. J. 611; 36 C. 193; 1 Ind. Cas. 913.
(4) 3 C. L. J. 29.
(5) 3 C. L. J. 67; 33 C. 927.

his allegations be true in fact, has not been affected by the execution sale. This, therefore, is a case where the Court would not exercise its inherent powers in contravention of the express provisions of rules 58, 59 and 60 of Order XXI of the Code of 1908.

It has finally been contended, on the strength of certain observations in the case of *G. P. Cooke* v. *The Equitable Coal Company, Limited* (6), that this Court ought not to interfere in the exercise of its revisional jurisdiction in a case of this description. But the case of *Brajabala Debi* v. *Guru Das Mandal* (7) shows that where a Subordinate Court has acted clearly in excess of its jurisdiction and in violation of an express provision of the Code, this Court will not hesitate to interfere.

The result is that this Rule is made absolute and the order of the Court below discharged on the ground that the Court had no jurisdiction to make it after the property had been sold. The petitioner is entitled to his costs of this Rule; we assess the hearing fee at one gold *mohur*.

Rule made absolute.

(6) 8 C. W. N. 621.
(7) 3 C. L. J. 293; 33 C. 487.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 27 OF 1912.
May 21, 1912.
Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr Justice Tudball.
BECHU SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
LACHMI NARAIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Custom or contract—Onus—Wajib-ul-arz—*Evidence.*

The existence or non-existence of a custom of pre-emption must be proved in the same manner as any other question. The proper issue in the case is does or does not the particular custom alleged by the plaintiff exist. The onus of proving the existence of such custom lies on the plaintiff and if he is unable to produce evidence other than an obscure clause in a *wajib-ul-arz*, he must be held to have failed to prove the existence of the custom. A *wajib-ul arz* is merely evidence.

Ganga Singh v. *Chedi Lal*, 33 A. 605, 8 A. L. J. 996; 12 Ind. Cas. 98, referred to.

First appeal from an order of the District Judge of Benares, dated the 26th January 1912.

Dr. *Satish Chandra Banerji* (with him Mr. *Govind Prashad*), for the Appellants.

Mr. *Moti Lal Nehru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiffs alleged that they were co-sharers not only in the same *thok* but in the same *patti* as the vendor, while the vendees were co-sharers in the same *thok* but not in the same *patti* with the vendor. The only evidence the plaintiffs appear to have adduced in support of the alleged custom was the *wajib ul-arz* of 1842, and certain judgments bearing on the interpretation of the clause in this *wajib-ul-arz*.

The Court of first instance seems to have presumed for the purposes of the case in the plaintiffs' favour that a custom of pre-emption existed. It then went on to consider whether or not on the terms of the *wajib-ul-arz* the plaintiffs had a preferential right over the defendants. It held that the plaintiffs had no such right and dismissed the suit.

On appeal to the District Judge, the latter approached the consideration of the case entirely on a consideration of the actual terms of the *wajib-ul-arz* and held that under the terms of the *wajib-ul-arz* the plaintiffs had a preferential right over the defendants and remanded the suit to the Court of first instance for disposal.

The defendants come here in first appeal from the order of remand. The clause in the *wajib-ul-arz* is that, "A co sharer wishing to sell or mortgage his share should first inform his co-sharers of the *thok* and the *patti khas* and afterwards co-sharers of the village". In our opinion, neither the Court of first instance, nor the lower Appellate Court, has approached the consideration of the case in a proper way. The question before the Court was as to the existence or non-existence of a custom of pre-emption giving a preferential right of pre-emption to a co-sharer in the same *patti* and *thok* over co-sharers in the same *thok* but not in the same *patti*. The existence or non-existence of this custom does not depend upon the construction of the *wajib-ul-arz*. The *wajib-ul-arz* is merely evidence. But, in our opinion, a plaintiff coming into Court could

not prove the existence of a custom of the nature claimed in the present suit by the mere production of an obscure clause in the *wajib-ul-arz*. That the clause in the persent *wajib-ul-arz* is obscure is abundantly shown from the fact that different Judges not only of Subordinate Courts but also of the High Court have interpreted it in different ways, Edge, C. J., and Banerji, J., in one of the very judgments relied upon by the lower Appellate Court, describe the clause as obscure. As we pointed out in the case of *Ganga Singh* v. *Chedi Lal* (1), the existence or non-existence of a custom of pre-emption must be proved in the same manner as any other question. The proper issue in the case is "does or does not the particular custom alleged by the plaintiff exist"? The onus of proving the existence of that custom lies on the plaintiff, and, in our opinion, if he can give no evidence other than the clause in the *wajib-ul-arz* he will have failed to prove the existence of the custom.

The Court will, of course, be entitled to consider the *wajib-ul-arz* but taken by itself it is, in our opinion, in the circumstances of the present case, insufficient. We have thought it right to mention these matters because, while we agree that the case ought to be remanded for trial upon the merits, we do not agree with the learned Judge, in so far as he has decided the question solely on the words of the *wajib-ul-arz*. The Court of first instance in dealing with the case on remand will pay attention to the remarks we have made as to what the real issue in the case is.

We discharge the order of the lower Appellate Court and remand the case to the Court of first instance with directions to proceed to hear and determine the same having regard to what we have said above. The Court will receive such further evidence as the parties may adduce. Costs of both parties will be costs in the cause. Costs in this Court will include fees on the higher scale.

Case remanded.

(1) 33 A. 605; 12 Ind. Cas. 98; 8 A. L. J. 996.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 829 OF 1910.

March 8, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

PROSONNO KUMAR BASU—DEFENDANT—APPELLANT

versus

JAMALUDDIN MAHOMED—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), *ss.* 69, 70—*Contribution—Rent decree against plaintiff and defendant No.* 2—*Transfer by defendant No.* 2 *of his share to defendant No.* 1—*Payment of decretal amount by plaintiff—Liability of defendant No.* 1 *to contribute.*

The plaintiff and defendant No. 2 were under-*ryots* possessing their holding in equal halves. Defendant No. 2 sold his half share in 1904 to defendant No. 1. The superior landlord, who was not bound to recognise the sale, brought a rent suit against the plaintiff and defendant No. 2 for the years 1902 to 1905, and obtained a decree and in execution attached the moveables of the plaintiff who thereupon satisfied the decree and brought this suit for contribution:

Held, that defendant No. 1 was liable to pay his share of the decretal amount under sections 69 and 70 of the Contract Act.

Mothoora Nath v. *Kristo Kumar*, 4 C. 369; *Swarnamoyee Debi* v. *Hari Das*, 6 C. W. N. 903 and *Smith* v. *Dinonath*, 12 C. 213, applied.

Appeal from the decree of the Sub-Judge of Dinajpur, dated December 4th 1909, affirming that of the Munsif of that place dated March 31st, 1909.

Babu *Mohini Mohun Chakravarti*, for the Appellant.

Babu *Gour Chandra Pal*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the first defendant in a suit for contribution. The plaintiff and the second defendant are under-*ryots* and possess their holding in equal halves. In 1904, the second defendant transferred his half share of the holding to the first defendant. The superior landlord, who was clearly not bound to recognise the transfer, brought a suit for arrears of rent against the plaintiff and the second defendant to recover his dues in respect of the years 1902 to 1905. He obtained a decree and proceeded to execute it by the attachment of the moveables of the plaintiff. The plaintiff thereupon satisfied the decree and commenced the present action for contribution. The sole question in controversy is whether the first defendant can be made liable for any portion of the sum paid by the plaintiff. It has been argued on his behalf in this Court that he ought not to be made liable because

neither under section 69 nor under section 70 of the Indian Contract Act is any liability imposed on hand.

Section 69 provides that a person, who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other. It has been argued that the first defendant was not bound by law to pay the money which has been paid by the plaintiff, because the decree satisfied was not against the first defendant. This contention, upon a superficial view of the matter, may seem to have some force, but upon closer examination, it turns out to be fallacious. The plaintiff by the payment which he made satisfied the arrears of rent due on account of the holding and that rent was payable unquestionably by the plaintiff and the first defendant. We are, therefore, not prepared to hold that section 69 has no application. The view we take is supported by the observations in *Mothoora Nath* v. *Kristo Kumar* (1) and *Swarnamoyee Debi* v. *Hari Das* (2), notwithstanding the dictum in *Futteh Ali* v. *Gunganath* (3).

But even if it be assumed that section 69 has no application, section 70, undoubtedly, covers the case. That section provides that where a person lawfully does anything for another person not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of the thing so done. There can be no question that the first defendant has enjoyed the benefit of the payment made by the plaintiff. If the plaintiff had not satisfied the decree, the landlord might have proceeded to sell the holding in which the first defendant was interested. The result of the payment by the plaintiff, consequently, has been that the property of the first defendant has been saved, and the act of the plaintiff cannot be deemed, to use the language in *Damodara* v. *Secretary of State*(4), "an officious interference of one man with the affairs or property of another." In our opinion, section 70 completely covers the case [*Smith* v. *Dinonath*(5)].

The result is that the decree made by the Subordinate Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 4 C. 369.
(2) 6 C. W. N. 903.
(3) 8 C. 113; 10 C. L. R. 20.
(4) 18 M. 88, at p. 93.
(5) 12 C. 213, at p. 217.

CALCUTTA HIGH COURT.

CIVIL RULE No. 5688 OF 1911.

April 12, 1912.

Present:—Mr. Justice Harington and Mr. Justice Casperz.

SHEO BARAT RAM AND OTHERS—PLAINTIFFS—PETITIONERS

versus

THE BENGAL AND NORTH-WESTERN RAILWAY CO, AND ANOTHER—DEFENDANTS OPPOSITE PARTY.

Railway—Consignment of goods—Risk note—Freedom of Railway Company from liability except where loss due to wilful negligence of or theft by Company's servants—Burden of proof.

The plaintiffs consigned certain goods through the defendant Railway Company. The contract between the parties provided that the Railway Company would not be liable for loss or damage to the goods except where the loss was due to wilful negligence on the part of the Railway Company's servants or due to theft by the Company's servants or agents. In a suit for loss of the goods:

Held, that the *onus* lay on the plaintiffs to prove that they came within the proviso, that is, that the loss was due either to the wilful negligence of or theft by the Company's servants.

Rule against the decree of the Small Cause Court Judge of Saran, dated July 17th, 1911.

Babus *Dwarka Nath Mitter* and *Bijoy K. Bhattacharyya*, for the Petitioners.

Mr. *B. C. Mitter*, Counsel, Mr. *J. B. Mac-Nair* and Babu *Ambika Pada Chowdhury*, for the Opposite Party.

JUDGMENT.

HARINGTON, J.—This is a Rule calling on the opposite party to show cause why the judgment and decree of the Court below, in so far as it dismisses a portion of the plaintiffs' claim, should not be set aside. The suit was one in which the plaintiffs recovered a decree for Rs. 30 but they claimed to be entitled to a considerably larger amount representing the value of some bags of black-pepper and catechu which were consigned to them by their vendor and which were not delivered by the Railway Company. The suit was brought against the Railway Company. The terms of the contract under which the Railway Company carried the goods are to be found in a document headed

"Risk Note, Form B". In that document, a special contract limiting the liability of the Railway Company was made. And it was agreed between the parties that in consideration of the Railway Company accepting a lower freight than that which they were entitled to charge, the person who consigned the goods would absolve them from all liability for loss or damage to the goods. But then, inasmuch as the Railway Company is not in law entitled to divest itself of all liability, there was a proviso that the Company would be liable for the loss due to wilful negligence on the part of the Railway Company's servants or due to theft by the Company's servants or agents. The result is, when the plaintiffs sued on that contract which made the Railway Company *prima facie* not liable, the *onus* lay on them to show that they came within the proviso: because the contract which they entered into expressly absolved the Railway Company from the liability which was imposed upon them by the ordinary law except under certain particular circumstances in which their liability was preserved. Therefore, to succeed on that contract, they were obliged to show that they came within the particular exceptions which were provided against the freedom of the Railway Company from all liability. But they failed to show this and, therefore, failed in their action.

I am unable to accede to the argument which has been put before us by the learned Vakil for the plaintiffs that the *onus* lay on the Railway Company. That would be treating the contract in a way which, in my view, would be wrong because it would be treating the contract as though it were the converse of what it is.

Then it is said that there is no evidence to justify the learned Judge in coming to the conclusion to which he came. But there was evidence, as appears from the judgment, that the waggon containing these goods was found sealed at Sitarampur, that sometime before it came to the next station, the goods disappeared and that the Guard saw some bags lying on the line. I think the Judge is quite justified in inferring from the evidence that some person got into the waggon and threw out the bags with the intention of stealing them. That being so, the plaintiffs, to bring their case within the exception, had to prove that this was done by the servants or agents of the Railway Company. This the plaintiffs failed to do.

The result, therefore, is that the Rule must be discharged because, in my opinion, the judgment of the Court below is right.

CASPERSZ, J.—I agree.

Rule discharged.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1585 OF 1909.

May 7, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

Lala LILA RAM—DEFENDANT—PETITIONER

versus

Lala MUKAND RAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court-fee—Partition suit—Decree in accordance with award—Objections to award not considered—Revision application—Award attacked re *mode of partition—Court-fee payable—Court-Fees Act (VII of* 1870), *Sch. II, Art.* 17 *(VI)—Arbitration*—Ex parte *proceeding ordered by arbitrator against one party—Right of that party to file objections to award.*

In a partition suit, a decree was passed in accordance with an arbitrator's award. *A.*, one of the parties, was directed by that decree to pay a sum of money to the other side in cash. Actual partition of the joint property of the parties was also effected by the decree.

A. filed a petition for revision of the decree. In this petition he sought two reliefs, (*a*) that he was not liable to pay the sum of money, and (*b*) that the Court below accepted the award as valid without considering and disposing of his objections to that award, the main allegation being that the arbitrator did not allow *A.* a reasonable opportunity to put the case before him and that this had resulted in an unfair mode of partition being adopted.

A. paid an *ad valorem* Court-fee as regards the first relief (*a*) and a Court-fee of Rs. 10 as regards relief (*b*).

The right of the other parties to share the joint family property was not disputed; nor did *A.* urge in revision that any particular piece of property of a definite value should have been allotted on partition to him and not to the other parties:

Held, (1) that the petition for revision was properly stamped;

(2) that it was not possible to estimate relief (*b*) at a money value and, consequently, in respect thereof, a Court-fee stamp of Rs. 10 was sufficient.

Dharm Das v. *Ajudhia*, 70 P. R. 1881; *Mehtab Rai* v. *Gopal Rai*, 104 P. R. 1905; 152 P. L. R. 1905, *Hari Mohan Singh* v. *Kali Prasad Chaliha*, 33 C. 11, explained and distinguished.

The mere fact that *ex parte* proceedings have been taken against one party by an arbitrator is not sufficient to justify the summary rejection of the objections to the arbitrators' award filed by that party. Whether *ex parte* proceedings taken by the arbitrator

are justified or not, the award made by the arbitrator is one the validity or invalidity of which has to be considered by the Court.

The party, against whom *ex parte* proceedings are ordered by the arbitrator, has every right to an opportunity to file objections to the award which the Court is bound to consider, if they are filed within the time prescribed by law.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for révision of the order of the District Judge, Dera Ghazi Khan, dated the 6th April 1909 decreeing plaintiffs' claim.

Rai Bahadur Lala *Sukh Dial*, for the Petitioner.

Lala *Sangam Lal*, for the Respondent.

JUDGMENT.—The facts, so far as they are material to the decision of the question as to the amount of Court-fee leviable on the petition for revision before us, are fully stated in the referring order of Mr. Justice Johnstone. The arguments advanced by each side in support of its position are also summarised in the said order and nothing fresh of any importance has been urged at this hearing. After giving our most careful consideration to the decisions cited by the Pleader for the respondents, we think that the correct amount of Court-fee has been paid on this petition for revision. *Dharm Dass* v. *Ajudhia Pershad*(1) was a case in which the Court of first instance had awarded to the then plaintiffs, in accordance with the award of the arbitrators, property shown in the decree to be of the value of Rs. 1,45,200, and the object of the appeal was to have that decree set aside. The amount or the value of the subject-matter in dispute in that appeal was, therefore, clearly Rs. 1,45,200, and, therefore, Court-fees upon that amount were levied. In *Mehtab Rai* v. *Gopal Rai* (2), the suit was by the minor member of a joint Hindu family for separate possession, by partition, of his one-third share of the joint estate which was valued at Rs. 53,227-1-1, and as the suit clearly fell under section 7, sub-section (*iv*), clause (*b*) of the Court Fees Act, 1870, the Court-fee payable on the memorandum of appeal was held to be an *ad valorem* fee on the value of the share claimed. In *Hari Mohan Singh* v. *Kali Prasad Chaliha* (3), the decree passed in accordance with the award of arbitrators was to the effect that the plaintiff shall recover from the defendant the sum of Rs. 3,248 and it was consequently held that the memorandum of appeal was chargeable with an *ad valoren* Court-fee stamp on the said amount, inasmuch as that was clearly the subject-matter in dispute in appeal within the meaning of Article (1) of Schedule (I) of the Court Fees Act.

None of the above decisions, in our opinion, apply to the present case. Here the right of the respondents to share the joint family property is not disputed, nor does the petitioner urge in this Court that any particular piece of property of a definite value should have been allotted to him on partition and not to the respondents. He, no doubt, urges that he is not liable to pay the sum of Rs. 1,883-4-7, which he has been directed by the award to pay to the other side in cash; and so far as the decree sought to be revised embodies that part of the award, the petitioner has paid an *ad valorem* Court-fee upon the said amount. But, in respect of the rest of the decree as based on the award, his real complaint is that the Court below has accepted the award as valid without considering and disposing of his objections to that award, the main allegation being that the arbitrator has not allowed the petitioner a reasonable opportunity to put the case before him, and that this has resulted in an unfair mode of partition being adopted by the arbitrator. So far as this part of the subject-matter in dispute in revision is concerned, we think that it is not possible to estimate it at a money value. The case is, therefore, covered by Article 17, clause (VI), Schedule II of the Court Fees Act, and *qua* the relief sought by this petition for revision, apart from the relief as to the sum of Rs. 1,883-4-7 referred to above, a Court-fee stamp of Rs. 10 is, therefore, sufficient.

On the merits, the petitioner has the strongest possible case. As the District Judge has stated in his order, the arbitrator reported to the Court that the defendant, now petitioner before us, was trying to prolong the case by not producing his witnesses before the arbitrator, and the latter applied to the Court to warn the defendant to produce the evidence without delay. The District Judge accordingly warned the defendant on the 23rd January 1909; but in spite of that warning on the 5th February 1909, the defendant did not appear before the arbitra-

(1) 70 P. R. 1881.
(2) 104 P. R. 1905; 152 P. L. R. 1905.
(3) 33 C. 11.

tor, and proceedings were, therefore, conducted by the arbitrator *ex parte* and he submitted an award to the District Judge on the 6th March 1909. On the 19th March 1909, the defendant filed objections to the award; but the District Judge refused to consider those objections on the ground that the defendant was not entitled to urge them because the order for *ex parte* proceedings (whether one passed by the Court or by the arbitrator is not very clear) had not been set aside. The District Judge then passed a decree *ex parte* against the defendant-petitioner in terms of the award, and the present petition for revision seeks to have that decree set aside. The District Judge was obviously in error in declining to consider and dispose of the objections to the award filed by the petitioner. Whether the *ex parte* proceedings taken by the arbitrator against the petitioner were justified or not, the award made by the arbitrator was one of which the validity or invalidity had to be considered and decided by the District Judge; and the petitioner had every right to have an opportunity to file objections to the award, which objections were duly filed. Once the objections were filed within the time prescribed by law, the Court was bound to consider them, and the mere fact that *ex parte* proceedings had been taken against the petitioner by the arbitrator was not sufficient for the summary rejection of those objections. The objections went to the root of the arbitration proceedings and called in question not only the validity of the procedure adopted by the arbitrator, but also the correctness of some of the facts and the accounts on which the award was based. In our opinion, the District Judge acted with material irregularity and failed to exercise a jurisdiction vested in him by law in refusing to consider the petitioner's objections; and we accordingly accept this revision, set aside the decree of the District Judge, and send the case back to him for disposal according to law. Under section 72 of the Punjab Courts Act, we direct that the amount of Court-fee paid on this petition be refunded, the other costs being costs in the cause.

Revision accepted;
Case remanded.

CALCUTTA HIGH COURT.

PRIVY COUNCIL APPEAL No, 6 OF 1912.

February 29, 1912.

Present:—Mr. Justice Brett and
Mr. Justice Carnduff.

HARISH CHANDRA TEWARI—
PLAINTIFF—APPELLANT—PETITIONER

versus

THE CHANDPUR Co., LD.—DEFENDANTS—
RESPONDENTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), ss. 5, 12—Privy Council Appeal—Application for leave—Allowance of period occupied in obtaining copy of decree—Date of signing decree—Delay for which applicant not responsible—Application for copy made after period of limitation had expired—Misled by Full Bench ruling—Sufficient cause for delay in filing application.

Section 12 of the Limitation Act, 1908, has been made applicable to applications for leave to appeal to His Majesty in Council. Therefore, allowance must now be made for the period occupied in obtaining a copy of the decree.

There is no rule in the High Court providing that the Judges shall, at the time of signing decrees, note the date on which they sign so that in fact there is no definite record from which the date when a decree is signed can be accurately ascertained.

The principle underlying section 12 is that the applicant is only entitled to be excused for a delay for which he was not himself responsible.

Bechi v. *Ahsan-ullah Khan*, 12 A. 461, (F. B.), relied upon.

A judgment of the High Court against which the applicant sought to appeal to His Majesty in Council was delivered on July 7, 1911. The applicant stated on affirmation in an affidavit that the decree was signed by the Judges about a month after the date of the judgment and received by the Peshkar from the Bench Clerk on August 8, 1911, and it was not till then that the decree was available for copying. Application for a copy of the judgment and decree of the High Court was not made till January 26th, 1912, that is to say, more than 6 months after the date of the judgment, and the copy was delivered on the same day. Application for leave to appeal to His Majesty in Council was then made on January 30th, 1912.

Held, that the applicant, having failed to apply for a copy of the judgment and decree within the period of limitation, cannot be allowed to say that he was prevented from filing the application in time by reason of the fact that the decree was not signed and that, therefore, he was not entitled to a deduction of the period which expired between the signing of the judgment and the signing of the decree.

Bani Madhub Mitter v. *Matungini Dasi*, 13 C. 104, (F. B.), distinguished.

But as there were grounds to support the contention of the applicant that he was misled by the Full Bench ruling in *Bani Madhub Mitter* v. *Matungini Dasi*, 13 C. 104, the High Court, under section 5 of the Limitation Act, 1908, admitted the application.

HARISH CHANDRA TEWARI *v.* CHANDPUR CO. LD.

Petition for leave to appeal to His Majesty in Council from the judgment and decree of the High Court (Holmwood and Teunon, JJ.), passed in Regular Appeal No. 230 of 1907 on July 7th, 1911.

Babu *Karunamoy Bose*, for the Petitioner.

Babu *Jogesh Chandra Roy*, for the Opposite Party.

JUDGMENT.

BRETT, J.—The value of the property in the suit in respect of which this application is made for leave to appeal to His Majesty in Council is Rs. 21,206-10. The decisions of the two Courts are, however, concurrent and it will, therefore, be necessary for the applicant to satisfy us that his appeal raises a substantial question of law.

The question, however, which we have to determine first is whether the application has been made within the time limited by the law or whether it is barred by limitation.

The judgment, of this Court against which the applicant seeks to appeal, was delivered on the 7th July 1911, and the application was made on the 30th January 1912, that is to say, after an interval of six months and 23 days. The period fixed by Article 179, Schedule I of the Limitation Act (IX of 1908), within which such an application should be made, is six months from the date of the decree appealed against, and, unless the applicant is able to make out a case to avoid the bar of limitation, his application must necessarily be dismissed.

The case put forward by the appellant is as follows:—Though the judgment of this Court was delivered on the 7th July 1911, he says that the decree, which, as required by Order XX, rule 7, bears the same date as the judgment, was, in fact, not signed till about a month afterwards, and he has filed in support of his application an affidavit, the second paragraph of which runs as follows:—

"That the decree was prepared and signed by the Hon'ble Judges after about a month of the same (the date of the judgment, the 7th July 1911), and the decree, duly prepared and signed, was received by the Peshkar from the Bench Clerk on the 8th August 1911, and it was not till then that the decree was available for taking copies of the same".

The applicant relies on section 12 of the Limitation Act (IX of 1908) and on the Full Bench decision of this Court, in the case of *Bani Madhub Mitter* v. *Matungini Dasi* (1), to support the contention that the application, having been made within six months from the date when the decree was signed, was in time.

In dealing with the affidavit, we have to observe that it is not precise as to the date on which the decree was signed, nor does it explain the circumstances under which the decree was not available for the purpose of preparing a copy of it till the 8th August, nor what proof the applicant had that such was the fact.

Application for a copy of the judgment and decree was not made till the 26th January 1912, that is to say, till more than six months from the date of the judgment, and the copy was delivered the same day.

It cannot, therefore, be urged that in this case the applicant was prevented from obtaining a copy of the decree before the 8th August, for in fact he made no effort to obtain a copy till the 26th January following.

Only one day's delay having occurred in furnishing the copy of the decree, section 12 of the Limitation Act by itself cannot assist the applicant to avoid the bar of limitation.

The Full Bench decision of this Court on which the applicant relies, dealt with the question of limitation under section 12 of the Act as affecting appeals from decrees passed by two Munsifs in 1886. In that year the corresponding provision in the old Limitation Act of 1877 did not apply to applications for leave to appeal otherwise than as a pauper, and, therefore, did not apply to applications for leave to appeal to His Majesty in Council, and the judgment of the Full Bench at the time of its delivery certainly did not, and could not be taken to, apply to such applications.

It must also be noticed, that before the delivery of that judgment, the date of the signing of the decree had to be entered by Judges of the lower Courts in the order-sheet in accordance with the rules of the High Court, and after that judgment had been delivered, in order to assist further the Appellate Court, instructions were issued by the High Court to the Subordinate Courts directing the Judges of those Courts to note on the decree itself the date when it was signed. In those Courts, therefore, there

(1) 13 C. 104.

Accession No.

was and is a definite record of the date when the decree is signed.

In that judgment, the Full Bench held as follows:—

"In our opinion the fact that the decree was not in existence, that is, signed by the particular Judge, and could not, therefore, be copied until 23rd July, that, is six days after the date that it bears (*i.e.*, the date of the judgment), entitles the appellant to ask us to deduct those six days in addition to the eight days' (delay which occurred in obtaining a copy of the decree), and thus to hold that under section 12 (of the Limitation Act) the appeal has been presented within the prescribed period."

The contention advanced on behalf of the appellant is that, since section 12 of the Limitation Act has been made applicable to applications for leave to appeal to His Majesty in Council, that decision must be taken to apply to such applications as well as to appeals against the decrees of the subordinate Civil Courts: and that it entitles the applicant to claim a deduction of the days intervening between the delivery of judgment and the signing of the decree. In the present case if such an allowance be made, the application would apparently be in time.

In the case of *Bechi* v. *Ahsan-ullah Khan* (2), a Full Bench of the Allahabad High Court, in dealing with the effect of section 12 of the Limitation Act, held that "in computing the time to be excluded under section 12 of the Limitation Act from a period of limitation, the time requisite for obtaining a copy does not begin until an application for copies has been made. If, therefore, after judgment the decree remains unsigned, such interval is not to be excluded from the period of limitation unless, an application for copies having been made, the applicant is actually and necessarily delayed through the decree not having been signed." Dissent was then expressed from the decision of the Full Bench of this Court in the case of *Bani Madhub Mitter* v. *Matungini Dasi* (1).

In this High Court, the practice before the passing of the new Limitation Act was in accordance with the law to apply strictly the rule of limitation and not to make any allowance for the time occupied even in obtaining copies of the decrees. Since the passing of the new Act allowance for that period must now be made, and this has been so held by this Court in *Eastern Mortgage and Agency Co. Ld.* v. *Purna Chandra Sarbaguna* (3).

But in this Court there is no rule providing that the dates of signing the decrees shall be noted by the Judges on them at the time of signing, so that there is in fact no definite record from which the date when a decree is signed can be accurately ascertained. To extend the application of the Full Bench ruling of this Court to applications for leave to appeal to His Majesty in Council, in existing circumstances, would have the result of indefinitely extending the period of limitation, for there would be no record by which its limit might be ascertained.

There is, too, a marked point of distinction between the facts of the case now before us and the facts of the cases which were before the Full Bench of this Court in 1886. In one of those cases, the application for copy had been made before the decree had been signed, and in both cases the applications for copies had been made before the period of appeal reckoned from the date of the judgments had expired. In the case now before us, the application for the copy of the judgment and decree was not made till after the expiry of six months from the date of the judgment, that is to say, till after the period of limitation, if reckoned from the date of the judgment, had expired.

The Full Bench of the Court, in dealing with the question of limitation in 1886, considered what would be the effect if the decree were not signed till after the period of limitation had expired, but did not consider what would be the effect if the appellant had taken no steps to obtain copies of the decree within the period of limitation.

This point was considered by the Full Bench of the Allahabad Court and appears to be of considerable importance in the appeal before us.

In dealing with that point, the Allahabad Court held that the appellant was only entitled to be excused under section 12 of the Limitation Act for delay for which he was not himself responsible, and that appears to be the principle underlying that section.

We are not prepared to hold that the judgment of the Full Bench relied on by the

(2) 12 A. 261.

(3) [39 C. 510; 15 Ind. Cas. 497 *Infra*.

appellant is a binding authority on us in the present case.

We are of opinion that in the present case, the applicant is not entitled to ask us under section 12 of the Limitation Act to deduct the period which expired between the signing of the judgment and the signing of the decree because he, having failed to apply for a copy of the judgment and decree within the period of limitation, cannot be allowed to say that he was prevented from filing the application in time by reason of the fact that the decree was not signed.

The applicant further asks us to admit the appeal under the provisions of section 5 of the Limitation Act. His case is that he was misled by the judgment of the Full Bench of this Court into the belief that he would be allowed, under section 12 of the Act, to ask for a deduction of the period which elapsed between the date when the judgment was delivered and the date when the decree was signed. As this is the first occasion on which that point has been raised and there are grounds to support the contention that he was so misled, we think that, in the circumstances, we may accept this contention and under section 5 of the Act allow an extension of the period of limitation to cover the time between the date of the judgment and the date of signing the decree. At the same time, we desire to say that we grant this concession with considerable hesitation.

CARNDUFF, J.—I agree. The Full Bench decision of the Court on the construction of section 12 of the Limitation Act, must, I think, be distingnished on the ground that the rule which it lays down in respect of appeals from the decrees of the Subordinate Courts, is a rule which, regard being had to the circumstances and the practice here, cannot be applied to, and would surely not have been laid down by the Full Bench in connection with appeals from the decrees of this Court. For what we have to deal with under section 12 is a matter of exact computation and the material for making the deduction prescribed by the Full Bench for the *Mofussil* is altogether wanting in this Court. But the applicant may, I think, be excused for having failed to perceive this distinction and acted on the assumption that the recent alteration in the law would have the result of giving him the benefit of the deduction. And I find that, so far as can be ascertained, to statement that the signed decree was not received from the Judges before the 8th August is correct. No doubt, it is possible that it had, nevertheless, been signed before the 30th July, in which event the time limited by law, even if calculated from the date of signing, would have expired before the present application was filed. But it is highly improbable that there was such delay and, on the whole, the case seems to me to be one in which relief may, *pro hac vice*, properly be given under section 5 of the Act.

The value of the subject-matter of the suit in respect of which the present application is made is over Rs. 10,000, but as the judgments of both the Courts below are concurrent, it is necessary for us to determine whether the appeal raises any substantial question of law. The learned Pleader for the opposite party has admitted that he cannot contest the assertion made by the petitioner that the proposed appeal to England involves substantial question of law.

We have read through the judgment of this Court and we think that there is no doubt that the proposed appeal raises an important question of law as to limitation. We find that the Judges of this Court before whom the appeal came were not of the same opinion on this point.

In the circumstances, we are of opinion that the case is one in which a certificate ought to be granted for leave to appeal to His Majesty in Council.

Leave granted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 853 OF 1910.

May 21, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Rattigan.

JUMA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUBARAK KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Arbitration—Award—Order setting aside award for arbitrator's misconduct can be attacked in appeal against decree.

When an appeal is finally preferred against a decree of a Court of first instance, which Court has, in the course of the suit, set aside an award of the arbitrators on the ground of misconduct, the order setting

aside the award can be traversed in the appeal against the whole decree.

Ganga Prasad v. *Kura*, 28 A. 408; A. W. N. (1906) 64; 3 A. L. J. 168, dissented from.

Achutayya v. *Thimmayya*, 31 M. 345; 18 M. L. J. 228; 3 M. L. T. 315; *Sher Jang* v. *Maihun*, 72 P. R. 1881; *Musammat Bhoi* v. *Sher Baz Khan*, 59 P. R. 1875, followed.

Second appeal from the order of the Divisional Judge, Multan, dated 12th April 1910, confirming that of the District Judge, Multan, dated 14th November 1908, decreeing plaintiff's claim.

Mr. *Shah Nawaz*, for the Appellants.

Mr. *Fazl Elahi*, for the Respondents.

JUDGMENT.—This case has been presented as an appeal whereas, as a matter of fact, no appeal lies inasmuch as the value of the suit cannot be held to be Rs. 1,000 or upwards. We have been asked to treat it as an application for revision and we proceed to deal with it as such an application.

The suit is by mortgagors to obtain possession of certain property which they allege was mortgaged many years ago to the defendants. The lower Appellate Court has held that it having been shown that this mortgage was entered in the Settlement Papers of 1853 but not in the cursory Settlement of 1855, it must be presumed that it was executed sometime between those two dates and consequently within sixty years of the date of suit and so within the period of limitation.

Defendants, it must be noted, have never denied the fact of the mortgage nor that it was a mortgage with possession under the terms of which any surplus produce was to be credited towards re-payment of principal.

Both the Courts have held that the suit was within time and as they have decided this point on the evidence on the record as noted above, we consider that there is no ground for revision under the considerations submitted in the first ground.

We also consider that, considering the apparent value of the land and the very long time the mortgagees have enjoyed possession, the lower Courts were quite entitled to come to the conclusion, which they did, that the entire mortgage-money with interest had been paid off by the produce of the land. This being so, we see no ground for revision under the 3rd, 4th, and 5th grounds of appeal.

As regards the second point, however, we think that the lower Appellate Court was wrong in holding that no appeal lay from the order of the District Judge attributing misconduct to the arbitrators and setting aside the award. No doubt, there have been conflicting opinions expressed by the High Courts upon this point. In *Ganga Prasad* v. *Kura* (1), it was decided that no appeal lay from an order of the first Court setting aside an award of arbitrators on the ground of misconduct. This view was dissented from in a later judgment by a Bench of the Madras High Court reported as *Achuthayga* v. *Thimmayya* (2). We are inclined ourselves to take the view that the decision of the Madras High Court is the correct one. We find, however, that the point has been actually before two Benches of this Court, the judgment of the last of which is reported as *Sher Jang* v. *Maihun* (3). That, no doubt, was a decision based on section 591 of the Code of Civil Procedure, 1877. The Madras ruling was under section 591 of the Code of Civil Procedure of 1882. These sections are identical in the two Codes. Section 105 of the Code, now in force, paragraph 1, differs in no material particular from section 591 of the Codes of 1877 and 1882. In *Sher Jang* v. *Maihun* (3), it was clearly held, following a previous judgment of this Court [*Musammat Bhoi* v. *Sher Baz Khan* (4)], that an appeal does lie from an order setting aside the award of arbitrators when the whole decree is appealed against though there is no such appeal from such an order as an interlocutory order. We must take it, therefore, as the view of this Court, from which we see no reason to differ, that when an appeal is finally preferred against a decree of a Court of first instance, which Court has in the course of the suit set aside an award of arbitrators on the grounds of misconduct, the order setting the award aside can be traversed in the appeal against the whole decree. For this reason, we are constrained to hold that the order of the learned Divisional Judge to the following effect is incorrect:—"The first point I may note is the contention that the order of the District Judge, finding misconduct on the part of the original arbitrators, is incorrect. No appeal lies against an order of this description, so that point cannot be con-

(1) 28 A. 408; A. W. N. (1906) 64; 3 A. L. J. 168.
(2) 18 M. L. J. 228; 3 M. L. T. 315; 31 M. 345.
(3) 72 P. R. 1881.
(4) 59 P. R. 1875.

sidered." An appeal did lie to his Court and he is bound to decide the point.

We accordingly set aside the decree of the lower Appellate Court and return the case to him for decision of the point against which he has held that no appeal lay. No other point in the case is to be re-opened. The learned Divisional Judge will decide this point and pass such order on the whole appeal as may become necessary from such decision. Costs will be costs in the cause.

Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1379 OF 1910.

May 3, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Richardson.

AMAN GAZI—DEFENDANT—APPELLANT

versus

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—RESPONDENT.

Limitation—Suit by zemindar *for declaration of title and possession or alternatively for assessment of rent—Record-of-rights—Publication, date of—Commencement of period of limitation.*

On February 11th, 1895, the defendant set up a title before the Settlement Officer claiming to hold certain lands rent-free. No actual decision by the Settlement Officer was come to, but the Record of Rights, which was finally published on July 9th, 1906, contained entries to the effect that the defendant was a settled *raiyat*, and that no rent had been assessed in respect of those lands. A suit was subsequently brought within 12 years from the date of the publication of the Record of Rights, by the *zemindar* for a declaration of his title and for *khas* possession of the lands or in the alternative for assessment of rent:

Held, that the suit was not barred, as on the publication of the Record of Rights, it was open to the plaintiff to rely upon the entries therein as a tacit recognition of his right to have rent assessed at any rate within 12 years of this date.

Birendra Kishore Manikya v. *Roshan Khan*, 13 Ind. Cas. 518: 15 C. L. J. 203; 39 C. 453, distinguished.

Appeal from the decree of the District Judge of Tipperah, dated August 28th, 1909, modifying that of the Fourth Munsif of Comilla dated March, 1st, 1909.

Babu *Shashadhar Roy*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Govinda Chandra Dey Roy*, for the Respondent.

JUDGMENT.—This is one of the numerous suits brought by the Maharaja of Tipperah, in which he seeks for a declaration of his title as *zemindar*, to and for *khas*-possession of, the lands in dispute or in the alternative for assessment of rent.

The District Judge in the Court below has considered the question of limitation and has held that the suit is not barred under the provisions of the statute. The facts are, that the defendant on the 11th February 1895 set up a title before the Settlement Officer according to which he claimed to hold the lands in question rent-free. No actual decision by the Settlement Officer was brought to our notice: but the record-of-rights, which was finally published on the 9th of July 1906, contains entries to the effect that the defendant was a settled *raiyat* in the village, and that no rent had been assessed in respect of the lands in question. If the time when the tenant first made his claim is considered as the starting point of the period of limitation, the suit is barred, but it is not barred if we count the period from the date of the publication of the Record of Rights. The lower Court has held that the latter date is the one from which limitation must be counted and we consider that this is right. The claim made by the tenant cannot be said to have been allowed by the Settlement Officer. It may, perhaps, not be said to have failed as the question it raised was allowed to be left open for future determination. But on looking into the facts of the case, we cannot but consider that on the publication of the Record of Rights, it was open to the Maharaja to rely upon the entries therein as a tacit recognition of his right to have rent assessed at any rate within twelve years of this date. We have been referred to a recent decision in the case of *Raja Birendra Kishore Manikya* v. *Roshan Khan* (1). As regards that case, there does not appear to have been any question raised as to the effect of any entries in the Record of Rights. We, therefore, do not consider ourselves bound by that decision.

It is argued before us that the Settlement Officer had no jurisdiction to deal with a claim to hold land free of rent. As to this, it is enough to say that on the materials before us the entries in the Record of Right as finally published were made by a competent authority.

The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 13 Ind. Cas. 518, 15 C. L. J. 203; 39 C. 453.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 392 OF 1911.
August 8, 1911.
Present:—Mr. Justice Caspersz and Mr. Justice Sharfuddin.
LALIT CHANDRA CHANDA CHOWDHURY—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 190, 309, 529 (e), 530 (k) and 531—Assessors, opinions of, how to be taken—Magistrate—Cognizance—Jurisdiction—Complaint before one Magistrate of offences under Penal Code and Explosive Substances Act without Government sanction—Complaint before another Magistrate with sanction—Cognizance taken by second Magistrate without withdrawing case from first, if legal—Search under Explosive Act in presence of Superior Police Officers, if legal—Explosives Act (IV of 1884), r. 32 (1) (b) of Government Rules—Penal Code (Act XLV of 1860), s. 399—Explosives Substances Act (VI of 1908), ss. 4 (b), 7—Admission—Document in possession of accused.

The intention of section 309 of the Criminal Procedure Code is that the Assessors should state their opinions orally. They should not be allowed to put in written opinions.

A complaint was made by a Sub-Inspector of Police to a Sub-Divisional Magistrate of the offence of making preparation to commit a dacoity, under section 399 of the Penal Code. The facts stated in the complaint disclosed that the accused was also guilty of having bombs in his possession or control which was a preparation to commit dacoity. No cognizance could be taken of the latter offence under section 4 (*b*) of the Explosive Substances Act till Government sanction had been obtained as required by section 7 of the Act, but the Sub-Divisional Magistrate was informed that an application to Government had been made for the sanction. Subsequently, the Superintendent of Police put in a complaint before the District Magistrate with Government sanction. The District Magistrate then proceeded with the case:

Held, that although the case was not formally withdrawn from the file of the Sub-Divisional Magistrate, the District Magistrate had jurisdiction to take cognizance of the offence under the Explosive Substances Act, as the offence was not and could not be taken cognizance of by the Sub-Divisional Magistrate for want of Government sanction.

Jhumuck Jha v. *Pathuk Mandal*, 27 C. 798; *Golapdy Sheikh* v. *Queen-Empress*, 27 C. 979 followed in *Radhabullav Roy* v. *Benode Behari Chatterji*, 30 C. 449; *Emperor* v. *Sourindra Mohan Chuckerbutty*, 37 C. 412, 6 Ind. Cas. 8; 14 C. W. N. 512; 11 Cr. L. J. 217; *Moul Singh* v. *Mahabir Singh*, 4 C. W. N. 242; *Charu Chandra Das* v. *Narendra Krishna*, 4 C. W. N. 367; *Bishen Doyal* v. *Chedi Khan*, 4 C. W. N. 560 and *Jharu Jola* v. *Shukh Deo Singh*, 3 C. L. J. 87 at p. 89; 3 Cr. L. J. 209, distinguished.

Where a search was conducted, not under the Criminal Procedure Code, but under Rule 32 of the Government Rules under the Explosives Act, 1884, and at the search, Police officers of superior rank were present, including the Superintendent of Police himself:

Held, that the proceedings were legally conducted.

Unless it appears that proceedings wrongly held have, in fact, occasioned a failure of justice, they ought not to be set aside.

Sonatun Dass v. *Gooroo Churn Dewan*, 21 W. R. 88, Cr. referred to.

For a document to amount to an admission, it is not necessary that it should have been written by the person against whom it is sought to be used. Mere possession of the document would not ordinarily go for much; but it is sufficient if it be proved that the document has been in his possession, and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy.

Barindra Kumar Ghose v. *Emperor*, 37 C. 467 at p. 504; 7 Ind. Cas. 359; 14 C. W. N. 1114; 11 Cr. L. J. 453, followed.

The rule would apply more strongly where the document was received or written by the person against whom it is sought to be used.

Wright v. *Tatham*, 5 Cl. and F. 670 at p. 702; 2 Jur. 461; 47 R. R. 136, followed.

Appeal against the order of the Sessions Judge of Dacca, dated April 10th, 1911.

Babus *Manmatha Nath Mukherjee* and *Narendra Kumar Bose*, for the Appellant.

Mr. *Kenrick*, *K. C.*, Advocate-General, and Babu *Mahendra Nath Banerjee*, for the Crown.

JUDGMENT.—This is an appeal from a conviction under section 4 (*b*) of the Explosive Substances Act (VI of 1908), which provides that—"Any person who unlawfully and maliciously makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India, shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished. . . ."

The Sessions Judge of Dacca, differing from both the Assessors, has convicted the appellant, Lalit Chandra Chanda Chowdhury, and sentenced him to transportation for ten years. The two co-accused, Jyotindra Chandra Chanda Chowdhury and Harkumar Dhar, were acquitted, under section 289 (2) of the Criminal Procedure Code, there being no evidence against them.

We may observe, in passing, that the Assessors did not state their opinions orally, nor did the Sessions Judge record their opinions in the manner provided by section 309 of the Code. The Assessors were allowed

to put in written (pencilled) opinions, one of which is almost a judgment within the meaning of section 367 of the Criminal Procedure Code. The intention of section 309 has been defeated by the procedure adopted. Nevertheless, we must and shall consider the reasons which prevailed with the Assessors.

The case for the prosecution is that at 7-30 P.M. on the evening of the 5th September 1910, a search was conducted of the premises of the appellant, with the result that eleven bombs in a tin box, many post-cards and letters, a paper of bomb formulæ, a cypher code, three plans of houses, a list of 13 persons (with their dispositions in the event of a dacoity), four new torches and four swords were discovered. The two co-accused were in the *basha* or hut, where the principal articles, the bombs and correspondence, were found when the search commenced. The appellant was brought in under arrest during the search. The bombs were submitted to Government experts and classed as coming in the category of "fulminates." In this respect, the Assessors are in agreement with the Sessions Judge that the eleven bombs are explosives within the meaning of the Act, and we accept that conclusion. The same night, or, rather early on the morning of the 6th September 1910, a First Information was drawn up, the offence specified being that of making preparation to commit dacoity (section 399 of the Indian Penal Code). That case came, as a complaint, on the file of the local Sub-Divisional Magistrate of Munshigunge, and still remains on his file. But on the 9th November 1910, the Superintendent of Police put in another complaint before the Additional District Magistrate of Dacca, together with the Government sanction, or consent, required by section 7 of the Explosive Substances Act (VI of 1908). On this complaint and sanction, the proceedings, resulting in the present appeal, were initiated, continued and concluded.

The learned Vakil for the appellant has urged (*i*) that the entire proceedings, including the trial in the Court of Session, were bad in law, because the case was taken cognizance of by an officer (the Additional District Magistrate) who had no jurisdiction in that behalf; (*ii*) that the original case was commenced in the Court of the Sub-Divisional Magistrate of Munshigunge who alone had, and even now has, jurisdiction in the matter; (*iii*) that the original case, in connection with the intention specified in section 4(*b*) of the Explosive Substances Act, must be deemed to be one under section 399 of the Penal Code, and as such triable by Jury; (*iv*) that the search of the appellant's premises was illegal, not being warranted by any section of any law; (*v*) that the First Information was not a true and lawful First Information; (*vi*) that the conviction of the appellant is wrong on the merits.

The questions of law argued on the hearing of this appeal are substantially two in number, having reference, respectively, to the initiation of the case before the Additional District Magistrate of Dacca and the legality of the search and the First Information at Munshigunge.

The first contention of the learned Vakil for the appellant is that the Additional District Magistrate could not take any cognizance of a case already on the file of the Sub-Divisional Magistrate of Munshigunge, and, in support of this position, reliance is placed on the cases of *Jhumuck Jha* v. *Pathuk Mandal* (1), *Golapdy Sheikh* v. *Queen-Empress* (2), followed in *Radhaballav Roy* v. *Benode Behari Chatterjee* (3), *Emperor* v. *Sourindra Mohan Chuckerbutty* (4), *Moul Singh* v. *Mahabir Singh* (5), *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (6), *Bishen Doyal Rai* v. *Chedi Khan* (7) and *Jharu Jola* v. *Shukh Deo Singh* (8). We do not question the correctness of these authorities. The facts of the present case are altogether different. Cognizance was taken by the Sub-Divisional Magistrate on a complaint of the offence under section 399 of the Indian Penal Code. That complaint was made by the Sub-Inspector. Admittedly, cognizance was not taken on the First Information. No cognizance was taken, or could be taken, of the offence under section 4 (*b*) of the Explosive Substances Act till Government sanction or consent had

(1) 27 C. 798.
(2) 27 C. 979.
(3) 30 C. 449.
(4) 37 C. 412 at p. 416; 6 Ind. Cas. 8; 14 C. W. N. 512; 11 Cr. L. J. 217.
(5) 4 C. W. N. 242.
(6) 4 C. W. N. 367.
(7) 4 C. W. N. 560.
(8) 3 C. L. J. 87 at p. 89; 3 Cr. L. J. 209.

been obtained and the Superintendent of Police had preferred his complaint. The Sub-Divisional Magistrate waited for the sanction, as will appear from his order-sheet, but it never reached him because his superior officer, the Additional District Magistrate, received it and took cognizance.

The Munshigunge Magistrate had taken cognizance upon a complaint by a Sub-Inspector. The facts stated in the complaint disclosed that the accused was in possession of bombs which was a preparation to commit dacoity. This fact of possession was mentioned by the Sub-Inspector in his complaint, and it was a necessary element for the purposes of section 399 of the Indian Penal Code. If, as it is said, the Munshigunge Magistrate took cognizance of the offence under the Explosive Substances Act, could he issue process against the accused under that Act? He could not, as the Government had not given its consent. After a Magistrate takes cognizance of an offence, he is empowered either to issue process against the accused, or order an inquiry under section 202 of the Criminal Procedure Code. Could this Magistrate have issued any process against the accused under the Explosive Substances Act, or ordered an inquiry? We think not, as he had no authority to do so. It seems that the Sub-Divisional Magistrate was informed that an application to Government had been made, and as the facts constituted an offence under the Explosive Substances Act also, he waited for the sanction, but this cannot be regarded as taking cognizance under that special law.

It is urged by the learned Vakil that the same facts and evidence are involved in both the cases, but the answer to this argument is that the one fact of vital importance, namely, that the bombs were of the kind mentioned in section 4(*b*) of the Explosive Substances Act, was not known till after the Chemical Examiner's report (dated the 16th September 1910) had been received. The Sub-Divisional Magistrate could not address his mind to this fact, which was not known on the 6th September 1910 when he took cognizance on the complaint of the Sub-Inspector. Again, the distinction between a case of making preparation to commit dacoity (section 399 of the Indian Penal Code) and a case of having in possession or under control any explosive substance (section 4 (*b*), Act VI of 1908) is that, in the former case, the possession of bombs may be one of several means to the end; in the latter case, it is the offence itself, provided the necessary intent is proved. Such an act of possession of bombs may be said to constitute an offence falling within two separate definitions of the law, but, though the Sub-Divisional Magistrate might have inquired into two such offences, he was unable to do so, and the Additional District Magistrate had jurisdiction by reason of the complaint made to him and the Government consent to that jurisdiction being exercised.

A distinction is also sought to be made between the taking cognizance of an offence, and proceeding to try it, the latter expression being used in section 7 of the Explosive Substances Act. The distinction, if it can exist, disappeared when the Additional District Magistrate took cognizance and proceeded to inquire into the case. The first contention, therefore, is overruled. We hold that the present case was properly initiated and the trial of the appellant was a good trial.

The second contention is equally devoid of foundation. The search was conducted, not under the Code of Criminal Procedure, but under rule 32 of the Government Rules under the Indian Explosives Act, 1884 (see pp. 396, 397, Vol. IV, General Statutory Rules and Orders, Ed. 1910). At the search, on the 5th September 1910, Police officers of suprior rank were present, including the Superintendent of Police himself. The proceedings, therefore, were legally conducted. Similarly, although the First Information did not form the basis of the case now pending before the Sub-Divisional Magistrate, it was really the earliest information in the case, because no offence had been disclosed until the search resulted in the finding of the bombs and other articles. We have not treated the First Information as evidence aginst the appellant for the reason that the present case was otherwise initiated, on the 9th September 1910, four days later. It may be added, with reference to section 529 (*e*), section 530 (*k*), and section 531 of the Code, that, unless it appears that the proceedings wrongly held have, in fact, occasioned a failure of justice, they cannot be set aside. This case would have been committed

for trial even if inquired into by the Munshigunge Magistrate, and the same Sessions Court would have tried it. In *Sonatun Dass* v. *Gooroo Churn Dewan* (9), where objection to the jurisdiction of a Court was not seriously taken, and the petitioner failed to show that he had been in any way prejudiced, the High Court declined to interfere. In the case before us the objection was, for the first time, taken in this Court... .....

[After discussing the merits of the case, their Lordships continued:—]

The next question is whether the lodging and its contents were in the conscious possession of the appellant. It has been already stated that he had been residing there for some time before, and up to the 5th September 1910. It is in evidence (page 112) that the co-accused Jyotindra actually gave M. Dundas a *dao* wherewith to force open the box (Exhibit 1): this he would hardly have done if he had been aware of the dangerous contents of that box. From this fact, and from the fact that, in consequence of information received from the co-accused, the appellant, Lalit, was immediately pursued and brought, the inference seems a fair one to make that the appellant was then the responsible person in possession of the lodging. The correspondence found in the principal hut also shows that the appellant had his residence there, but, before we examine the papers, it will be necessary to consider the evidence of the three witnesses who speak to the handwriting of the appellant.

The three witnesses to the handwriting of the appellant are Nos. 7, 8 and 9. Of these, Doctor Ajodhya Ram Deb Roy saw the appellant writing because he used to read with Mahesha, the distant nephew of the witness, who, it may be noted, is the brother-in-law of Amulya Krishna De, to whom the label, on the canister of bombs, purported to have been addressed. The witness was not in a very favourable position to scrutinize the handwriting of the appellant, but he used to "see" (this may mean "examine," but the point is not clear) the boy's answers to examination papers. We are not disposed to place implicit reliance on the evidence of Doctor Ajodhya, but of his truthfulness we entertain no doubt. The next witness, Pandit Mukundananda Siroratna, is an entirely satisfactory and, admittedly, a truthful witness. He is the Head Pandit of the school where the appellant studied, and the appellant's work came directly under his observation. He is a careful and cautious man, and we have no hesitation in accepting his opinion as to the Bengali handwriting of the appellant. He has identified the principal documents found at the house search as having been written by the appellant. The third witness, Manomohan Dey, describes himself as a *talukdar* and servant. He says he saw the appellant write at the house of Hari Churn Ghose, who is the mother's first cousin's son of the witness, and at the house of the witness himself whose nephew's private tutor used to instruct the appellant. The evidence of Manomohan Dey is no better than that of Doctor Ajodhya.

We have compared for ourselves, the various Exhibits in this case. Among other resemblances, the shape of the "M" is very characteristic, but we do not base our judgment on any such resemblances unless they receive support from the evidence of the witnesses, particularly that of the Pandit. The identity of the handwriting in this case elucidates two matters, (*a*) the conscious possession, and (*b*) the criminal intent, of the appellant, and in this connection we may refer to two reported cases.

In *Barindar Kumar Ghose* v. *Emperor* (10), the learned Chief Justice observed:—"But to be an admission, it is not necessary that a document should have been written by a person against whom it is sought to be used: it is sufficient if it be proved that the document has been in his possession, and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy. Unless this be done, the document cannot be used as proof of its contents. What conduct would properly give rise to such an inference must necessarily depend on the circumstances of each case. Mere possession of letters would not ordinarily go for much, and the value of such possession must largely depend upon whether it can be shown that their contents have been recognized and adopted by the replies they may have elicited, or the conduct they may have inspired. If no such con-

(9) 21 W. R. 88 Cr.

(10) 37 C. 467 at p. 504; 14 C. W. N. 1114; 7 Ind. Cas. 359; 11 Cr. L. J. 453.

sequence can be traced, their value must necessarily be discounted."

In other words, as explained in *Wright* v. *Tatham*(11), the question is whether the person (here, the appellant) has in any manner *identified himself* with, or, in other words, has by any act, speech, or writing, manifested an acquaintance with and knowledge of the contents of all or any of these letters. The rule would apply more strongly where, as here, some of the papers and letters were received by, and others written by, the person against whom they are sought to be used.

The papers exhibited in this case may be considered in eight groups:—

(*i*) There is the label (Exhibit III) on the canister containing the eleven bombs. The Pandit (witness No. 8) deposed that this paper is in the handwriting of the appellant. We accept his opinion, though we should hesitate to arrive at any independent conclusion in the matter on the comparison of handwritings we have made for ourselves. The writer of Exhibit III intended to mislead anyone into whose hands the canister might fall. It was known to the appellant that his former schoolfellow, Amulya, whose name appears as the addressee on the label, was dead: yet he prefixed *sree* to his name. Similarly, the mention of Dacca, as the place from which the person "Kamini" was sending the canister, was calculated to conceal the residence of the appellant at Munshigunge, in the event of the article being discovered on its way to some other destination.

(*ii*) The next group consists of the signatures of the appellant on his two books. These are admitted, and have been used for the purpose of comparison with his other alleged signatures in English.

(*iii*) We come now to the 29 post cards and two letters on the wire-file and marked Exhibit VIII-1 to VIII-31. All these are, admittedly, genuine, and, being for the most part communications to the appellant, they indicate that he was living in the *basha* where they were found. Exhibit VIII-5, however, is an application by the appellant for a post in the Tramway Company. Exhibit VIII-6 is a letter to one Monmohun Sutradhar which is couched in very guarded language and bears the construction that the appellant and his friends were engaged in some secret enterprise: thus the writer says,—"I will shortly join the work of which I told you. See that you do not waver. Moreover, procure, if you can, a few articles for yourselves which you will carry in your own hands. The procession will be out on the 13th-14th." No attempt has been made to assign any innocent meaning to this mysterious missive, and its presence among the private correspondence of the appellant is significant of the life he was leading.

(*iv*) Then there are the six documents which were found under the mat of the *taktposh*. Of these, Exhibits XVII—XIX were written by the appellant, but not despatched. Exhibit XIX betrays much anxiety and restlessness on the part of the writer: it is impossible that such a letter could have been manufactured for the purpose of implicating the appellant in the serious offence for which he has been tried: it is a private letter on personal and domestic matters. The others, Exhibits XVII and XVIII, are on the same lines as the six post cards which witness No. 6 (the sub postmaster of Kathadia Simulia) suspected and of which he kept a copy. This part of the case will be considered later on but, here, it may be observed that if Exhibits XVII and XVIII were forged, the six post cards, also, which are missing, or, at any rate, one of them, might equally well have been prepared to bolster up the story of the sub-postmaster. There remain Exhibits XX and XXI, which are mere school boy exercises: it would have been absurd and impracticable to manufacture such writings: also, Exhibit XXII, a letter addressed to the appellant at Munshigunge; it refers to marriage as being full of responsibilities and reproaches him for his wandering habits. This paper also could not have been made up for the purposes of a criminal charge.

(*v*) Eight important papers were discovered in a fold of the *hogla* mat under which the six documents, already noticed, were found. They were in a packet, but not tied up. On Exhibit IX were written some bomb formulæ, with a diagram. The eleven bombs were not of the description indicated in this paper, and the inference is that the appellant obtained the bombs from some one else working on a different system. The

(11) 5 Cl. & F. 670 at p. 702; 2 Jur. 461; 47 R. R. 136.

Pandit (witness No. 8) identifies the writing on Exhibit IX as that of the appellant. Exhibit X is a simple cypher code, but it is not complete in the matter of vowels, and there is no evidence that it was ever used or could be effectively used. Exhibits XI—XIII are plans of houses which the Pandit cannot attribute to the appellant, but which are highly suspicious and have not been accounted for. It is a fair inference that the houses delineated were to be made the object of some attack. The next, Exhibit XIV, is identified by the Pandit as in the writing of the appellant: it contains a list of 13 names with the disposition of these persons when engaged in a dacoity. On the same paper is a seditious poem as to which the Pandit is certain that it was written by the appellant. This, also, could not have been made up for the purposes of a criminal case. The same remark applies with greater force to Exhibits XV and XVI, which are post-cards addressed to the appellant. Their presence among the other papers is most significant: they are, no doubt, mysterious, and upbraid the appellant for being absent on an important occasion, but it would have been idle, if not impossible, to forge such writings to be introduced among the other papers.

(*vi*) Three post-cards from the appellant, Exhibits XLII—XLIV, were found in the house of Jiban Krishna Bhadra, one of the names in Exhibit XIV, the surname, Bhadra, being prefixed in the address on Exhibit XLII. This peculiarity, also, appeared on the six post-cards spoken to by the Sub-Postmaster (No. 6) whose evidence we shall presently examine. Exhibit XLII contains instructions how to find the Munshigunge lodging of the appellant, which was evidently a kind of meeting place.

(*vii*) Two letters, Exhibits XLVI and XLVII, were found in the house of Ramani Mohan Ghose, another of the names in Exhibit XIV. In Exhibit XLVII the surname Ghose is prefixed as in Exhibit XLII. These letters were, admittedly, written by the appellant: in Exhibit XLVII the writer speaks of a great danger approaching.

(*viii*) The last group consists of two letters, Exhibits 7 and 8 (Exhibit VIII-17 being a reply), written by the appellant to the Pleader Sailendra Chandra Banerjee, one of the search witnesses (No. 20), who produced them.

In our opinion, the papers we have just examined satisfy the requirements explained in the reported cases to which we have alluded. The appellant has been shown to have *identified himself* with all the papers found at the house search of his premises. The argument based on the collocation of the various papers admits of no satisfactory answer in favour of the appellant. The contention on his behalf that the incriminating papers were manufactured for the purposes of this prosecution, is untenable, and we have no hesitation in rejecting it as opposed to the evidence.

We proceed to consider the evidence of the Sub-Postmaster (witness No. 6), who has deposed that on the morning of the 4th September, he received six post cards addressed in the same hand, and in the same style, to certain persons, and inviting them to join the writer (signing himself as "Choudhuri") in some expedition. The witness says he made a copy (Exhibit XXXIV) of five of the post cards and sent a copy of that copy to the Munshigunge *Thana* through the village watchman. The paper said to have been so sent runs thus (Exhibit 6):—

"Five letters to the following effect addressed to the undermentioned persons have been distributed at Rautbhog. 1. Gopal Krishna Basu; 2. Manasha Charan Biswas; 3. Ramani Mohan Ghose; 4. Jiban Krishna Bhadra; 5. Bimala Charan Deb.

(Illegible)

5-9-1910

12 A.M.

Munshigunge"

"I have told everything at the interview. I have fixed Monday next for our auspicious work. You will, therefore, oblige me by coming to my place before evening on that day and joining in the auspicious work and giving encouragement. To write to you in detail is but to waste time.

Yours,

Choudhhri."

It is manifest that Exhibits XVII and XVIII are to the same effect as the copy we have re-produced. The names of five out of the six addressees appear in Exhibit XIV (the disposition list for a dacoity).

If the story told by the Sub-Postmaster be true, the appellant sent intimation to his associates to join him in the perpetration of some dacoity on the night of the 5th September 1910. Exhibits XVII and XVIII were never despatched. The former seems to be unduly detailed for a circular letter, but it would appear from its wording that the writer, the appellant, was not, by any means, certain that his friends would come when wanted. He beseeches Jiban Krishna Bhadra not to disappoint him and to bring others: he questions the strength of mind of his friends. The second letter, Exhibit XVIII, is much shorter, as follows:—

"My dear Ghose,—Do you remember what I said to you? The day fixed for that work is Monday next. Come just before dusk. Don't forget.

Yours,
Choudhuri."

It may be argued that Exhibit XVIII was a draft of which the Police took advantage and concocted the story of the six post-cards; but, if so, why was not at least one post-card produced and supported by the testimony of the Sub-Postmaster who, on this hypothesis, was in league with the Police? If wholesale forgeries were being committed, one more would not have made any difference. The absence of the appellant at the moment when the search was begun may be accounted for by his going to meet the friends he expected at Katakhali (see Exhibit XVII). The slipshod procedure of the Sub-Postmaster in communicating the intelligence to the Police may be explained by his being a postal official bound neither by rule nor inclination to assist the Police. His attitude was one of benevolent neutrality. The six post-cards were not in themselves seditious: the Sub-Postmaster was obliged to deliver them to the addressees. We have read his evidence carefully: it bears the impress of truth.

Among the letters we have mentioned, two were written by the appellant to the search witness (No. 20), Sailendra Chandra Banerjee (Exhibits 7 and 8), and one, Exhibit VIII—17, was a reply to the appellant. Upon these and the evidence of Sailendra Babu is founded the argument which appears to have chiefly weighed with the Assessors. There is no doubt that Sailendra Babu was a good friend to the appellant who, after a disagreement with the Head Master of the Rautbhog school, wished to enter the first class of the school owned by Sailendra Babu and went so far as to promise to get other boys to join the latter establishment. Sailendra Babu answered diplomatically (Exhibit VIII-17). The appellant, however, did not succeed in entering the school of his desire. Sailendra Babu had reason to suspect the loyalty of the appellant, and he warned him that his lodgings might be searched and advised him to leave Munshigunge at once. But, in point of fact, the appellant did not go away, though he was traced to Dacca (page 403), on or about the 27th August, a week before the search took place. Nothing is more natural than to suppose that the appellant was acting under orders, and that he had brought the box, with the canister of the eleven bombs, from Dacca, a day or two before the 5th September. The box was temporarily in the lodging of the appellant. The bombs were of a different formula and not of the kind which would have been prepared in accordance with the directions in Exhibit IX. The appellant, though watched, was not being "shadowed." From the information received, the Police had reason to believe that bombs and suspicious papers would be discovered: hence the search. The contention that the appellant would not have dared, or found opportunity, to conduct his operations from a house close to the Munshiganga Police station is not conclusive, for, in the case of *Barindra Kumar Ghose* v. *Emperor* (10), the accused had their centres in the town and suburbs of Calcutta, and it should be borne in mind that the premises of the appellant were situated in the quarters inhabited by respectable persons and resorted to by *bona fide* students. The vernacular saying is proverbial that "it is always darkest under the lamp." After the most anxious consideration, we have come to the conclusion that the argument of improbability which influenced the Assessors is not sound. Their other reasons have been considered in the course of this judgment.

In re MOSES AMADO TAYLOR.

From all that we have said, it follows that this appeal must be dismissed. The conviction and sentence are affirmed.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF THE COLONY OF SIERRA LEONE.

January 26, 1912.

Present:—Lord Macnaghten, Lord Mersey and Lord Robson.

in re MOSES AMADO TAYLOR.

Solicitor—Professional misconduct—Two remedies open—Recourse to both—Contempt of Court—Irregularity—Forgery—Intention to defraud—Substituting name of another witness in subpœna—Striking name off the Roll—Charges upon which Solicitor was not heard.

If a Solicitor on behalf of his client has recourse to another tribunal and a different process, in order to get what one Court had decided he was not entitled to have, the Solicitor does not commit any contempt of the first Court.

Therefore, where a plaintiff who had been refused a warrant for the detention of the defendant by a Civil Court straightway started a criminal process on the same subject-matter, and, by means of allegations to which the Civil Court attached no credit, obtained his warrant from a different Court, almost as a matter of course, his conduct does not necessarily involve any punishable contempt of the Civil Court, because he is not restricted by law to a single form of remedy and may pursue all the legal remedies appropriate to his grievance.

The appellant, a Solicitor, was desirous of securing the attendance of two witnesses on behalf of his client. *sub pœnas* were issued upon them and duly served. It turned out that the witnesses said they knew nothing about the case, so the appellant asked them to return the *sub pœnas* to him, which they did. He then struck out their names and substituted for them the names of two other witnesses:

Held, that the appellant was not guilty of forgery, as there was no intent to defraud on the part of the appellant, and that at the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment.

The appellant's name was struck off the Roll of Barristers and Solicitors of the Supreme Court on charges of contempt and forgery and for his conduct in other professional matters upon which he was not heard. The Privy Council set aside the order and restored his name to the Roll.

Appeal by special leave from three orders of the Supreme Court of the Colony of Sierra Leone, dated September 3, 1908, May 7 and 10, 1909.

Sir *R. Finlay, K. C.*, Messrs. *Daniel Warde* and *Parikh*, for the Appellant.

The *Attorney-General* and Mr. *Rowlatt*, Contra.

JUDGMENT.

LORD ROBSON.—The appellant, Moses Amado Taylor, is a native of Freetown in the Colony of Sierra Leone and a Barrister of the Honourable Society of Gray's Inn, where he was called to the Bar in June 1907. He was afterwards enrolled as a Barrister and Solicitor of the Supreme Court of the said Colony, and he now appeals from three orders of that Court.

By the first of those orders, dated the 3rd September 1908, he was fined £100 and costs for an alleged contempt of Court; by the second, dated the 7th May 1909, he was fined £20 in respect of an alleged forgery in the case of *Rex* v. *Ganson* and by the third, dated the 10th May 1909, his name was removed from the Roll of Barristers and Solicitors of the said Supreme Court.

On the 6th May 1908, the appellant, acting professionally for one Michael Huggins, commenced an action in the Circuit Court of the Protectorate wherein the plaintiff Huggins, who was a native railway pointsman in the service of the Sierra Leone Government, sued one George Wright, who was a foreman platelayer in the same employ, for damages for an alleged assault by shooting on the 30th January 1908 at Kangahun, in the Protectorate. When the action was begun, Huggins had been dismissed from his employment, and on the 20th June, the appellant wrote to Wright saying that if his client had not been peremptorily dismissed from work, he would have advised him to drop the matter, and offering at the same time to settle it if Wright would agree to pay his client's wages for the six months' employment he had lost (amounting to about £10) and costs. He further stated if these terms were refused, he would apply for the Governor's fiat to have the action tried in Freetown before he (Wright) left the Colony.

No notice was taken of this letter.

On the 22nd August 1908, the Appellant applied to the Acting Chief Justice under section 2 of the Debtor's Ordinance, 1883, for a warrant for the arrest of Wright

on the ground, which was true, that he was about to leave the Settlement. The appellant at the same time stated that if Wright would settle on the terms before suggested, his client would be satisfied. The Acting Chief Jusice refused this application because, as he states in his judgment delivered on the 3rd September 1908, he "saw that all he (appellant) wanted was to get some money out of Wright and to use the warrant as a lever."

On the 24th August 1908, an application was made on the information of Huggins to one of the Police Magistrates, Mr. Vergette, at Freetown for a warrant, for the arrest of Wright upon a criminal charge of assault, with intent to murder, on the 30th January 1908, and a warrant was issued accordingly. As the Magistrate who granted it had no jurisdiction over matters arising in the Protectorate, except under the authority of the fiat of the Governor, which was wanting in this case, this warrant was in excess of his jurisdiction. Afterwards, in the proceedings for the contempt, the Magistrate stated that—

"In granting the warrant, I was misled by the information, which did not go to show that the offence was committed in the Protectorate; it was brought to me while I was on the Bench."

The information was silent as to the place where the alleged assault was committed, but it so happens, however, that the warrant itself explicitly states that the offence took place at Kangahun in the Protectorate, a circumstance which must have been communicated by the appellant or Huggins. There does not appear, therefore, to have been any concealment or deceit on the part of the applicant, though there may have been inadvertence on the part of the Magistrate. The warrant was duly executed, and on the 25th August 1908, Wright was brought before the Magistrate. The Appellant appeared for Huggins, the prosecutor, and at once asked the Court to remand Wright so that he (the appellant) might apply to His Excellency the Governor to obtain a fiat to give the Magistrate jurisdiction. The Magistrte had, under the circumstances, no jurisdiction at all, and very properly refused that application, whereupon Wright was discharged.

On the 27th August 1908, a summons was issued by the acting Chief Justice and served on the appellant, calling on him to appear and show cause why an attachment should not issue against him for contempt of the Circuit Court of the Protectorate in causing Wright to be illegally arrested "in gross contempt and defiance of the refusal of the Judge of the said Court on the 22nd August 1908, to issue a warrant for the arrest" of Wright.

The summons was heard on the 29th and 31st August 1908 by the Acting Chief Justice, who called and examined Wright and the Magistrate, Mr. Vergett. The sole question then to be determined was whether or not the prosecution and arrest of Wright was a contempt of Court. The Acting Chief Justice came to the conclusion that it was. He was of opinion that the appellant and Huggins resorted to the criminal proceedings and procured the illegal arrest as a mere lever to get the money they were demanding from Wright.

"The whole proceeding" said the learned Judge "was simply an abuse of a process of Justice," and he adds:—

"I am satisfied that the contemnors, in initiating their criminal proceedings, were influenced by the intention of defying me for having refused them the civil warrant of arrest they applied for, and Taylor in particular had this object in view, for when I refused him the warrant, he became impudent and threatened to complain to the Secretary of State."

. . . . . .

"Even if the warrant had been valid, a contempt would have been committed, and the illegality of the warrant only intensifies the contempt."

It was the recourse, which this Solicitor had on behalf of his client, to another tribunal and a different process, in order to get what the learned Judge had decided he was not entitled to have, which constituted, in the learned Judge's view, the essence of the contempt.

It is true that the learned Judge found as a fact that the appellant was not acting

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in good faith, but the sense in which that charge is put forward needs some explanation. It is not suggested, or certainly there is no evidence to support such a suggestion, that Huggins did not believe in the justice of his claim and did not so instruct his lawyer. It was, indeed, pointed out by the learned Judge that the alleged assault was seven months old, and that if the contemnors had been acting in the interests of justice, they would have taken their proceedings earlier, but mere delay in such circumstances can scarcely be advanced as a proof that the proceedings were fraudulent. It may be that the alleged contemnors have made themselves liable to proceedings at the instance of Wright; that is a question on which their Lordships express no opinion whatever, and have no adequate means of forming one; it may be that the conduct of the appellant may turn out to be open to strong animadversion from other points of view than that of contempt of Court, but for the purposes of the present proceeding, it has not been proved, and cannot be assumed, that the proceedings before the Magistrate were tainted by any fraud on the the part of the appellant.

The question is, therefore, narrowed down to the bare ground stated in the summons, namely, whether, under the circumstances, procurement of the warrant and the arrest consequent thereon constituted in law a contempt of the Supreme Court. Their Lordships think they did not. Where a plaintiff, who has been refused a warrant for the detention of the defendant by a Civil Court, straightway starts a criminal process on the same subject-matter, and, by means of allegations to which the Civil Court attached no credit, obtains his warrant from a different Court, almost as a matter of course, he undoubtedly runs several risks of a serious character. He is not, however, restricted by law to a single form of remedy. He may pursue all the legal remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the Civil Court, whatever may be its other consequences.

The next order complained of, that of the 7th May 1909, arose out of the case of *Rex* v. *Ganson and others* in the Supreme Court, in which the appellant was retained to defend three of the accused. He was desirous of securing the attendance of two witnesses, Ashley and Gittens, who were prison warders, and applied to the Master of the Supreme Court for *sub pœnas* for them. The *sub pœnas* were accordingly issued on the deposit by the appellant of the conduct money, or allowance usual for witnesses of that class, (there being no fees payable), and were duly served by the bailiff. It turned out that the witnesses named said they knew nothing about the case, so the appellant asked them to return the *sub pœnas* to him, which they did. He then struck out the names of Ashley and Gittens, and substituted for them the names of two labourers, Lamina and Sorie. The *sub-pœnas*, so altered, were served by the appellant on Lamina and Sorie, and one of them, Lamina, was called and gave evidence. On these facts being disclosed at the trial, the learned Chief Justice ordered Lamina's *sub pœna* to be impounded.

Proceedings were subsequently taken against the appellant in the Police Court at Freetown on the charge that he had forged the *sub pœnas* delivered to Lamina and Sorie.

The facts above stated, which were never in dispute, and which constituted the whole case against the appellant on this head, were then duly proved, with one additional circumstance worthy of note. It appeared on cross-examination of the Deputy Master and Registrar of the Supreme Court, who is also Under-Sheriff, that the appellant called on him on 27th February 1909 for a *sab pœna* for one Anderson. At that time the other *sub pœnas*, including those for Ashley and Gittens, had been issued, and the Deputy Master admitted that the appellant told him that he wanted some other witnesses substituted. He clearly referred to a proposed substitution of names in the existing *sub pœnas*. The Deputy Master never told him that new *sub pœnas* would have to be taken out. He made no protest or objection. It did not seem to strike him as being in any way a serious matter, though, possibly enough, if any one had paused to think about it, it would have been recognised as an irregularity.

The appellant was committed for trial, and on the 1st May 1909, the Attorney-General preferred an information against the appellant charging him with (1) altering two copies

of a *sub pœna* with intent to defraud, (2) serving the copies, so altered, with intent to defraud, and (3) uttering forged *sub pœnas*, with intent to defraud, knowing that they were forged.

The case came on for trial before the Chief Justice on the 3rd and 7th May 1909. Some of appellant's colleagues at the Bar made a representation to his Honour, pointing out that the effect of his pleading to the information would be a conviction for an indictable offence, the consequence of which would be the removal of his name from the Roll of the Inns of Court in London. His Honour, therefore, on the application of the appellant's Counsel, consented that a plea should not be taken, the prisoner admitting his guilt and submitting to a fine of £ 20, which was paid.

Their Lordships are of opinion that the facts alleged against the appellant did not suffice to establish the very serious offence with which he was charged. The evidence does not show or suggest any intent to defraud on the part of the appellant, and, indeed, there seems to have been no motive, so far as he was concerned, which could give rise to any such intent. At the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment.

A fresh proceeding was then immediately instituted against the appellant to have him struck off the Roll of Barristers and Solicitors of the Supreme Court of the Colony, and on the 10th May 1909, the Chief Justice made an order to that effect. This is the third order complained of. It is founded entirely on the two alleged offences already dealt with, and must stand or fall with them. It is true that the Chief Justice in giving his reasons for this order refers to the appellant's "conduct in other professional matters" as rendering him unfit to be on the Rolls of the Court, but no such matters are specified for the information of their Lordships, nor has the appellant been heard upon them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed; that the order of the 3rd September 1908, should be discharged, and the sum of £ 100 and the costs paid thereunder by the appellant be returned to him; that the order of the 7th May 1909, be discharged, except in so far as the same accepts the offer of the appellant to pay the sum of £ 20; and that the Order of the 10th May 1909, be discharged, and the name of the appellant restored to the Roll of the Supreme Court of the Colony of Sierra Leone.

No order is made as to the costs of this appeal.

Solicitor for the Appellant: Mr. *T. D. Metcalfe.*

Solicitors forthe Respondent: Messrs. *S. Ommanney and Rendall.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 201 OF 1912.

May 17, 1912.

Present:—Sir George Knox, KT., Judge.

DURGA DUTT—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Procedure—Sessions case—Inquiry by Magistrate—Evidence—Framing of charge—Cross-examination.

In every inquiry into a Sessions Court, a Magistrate is bound, before he draws up a charge, to take all such evidence as may be produced (1) in support of the prosecution, (2) on behalf of the accused and (3) as may be called for by the Magistrate. If the Magistrate does not take that evidence, he errs unless he can justify his procedure on the ground that the evidence of such and such witness is obviously irrelevant or that he considers the fact in issue between the parties proved one way or the other by the evidence already produced.

A Magistrate is further bound, if the complainant or the officers conducting the prosecution or the accused applies to him, to issue process to compel the attendance of witnesses, to issue such process and as a matter of consequence to take the evidence thus caused to be produced unless the Magistrate records reasons to show that it is unnecessary to compel the attendance of the witnesses.

As each witness out of the classes mentioned above is examined, the accused is at liberty to cross-examine him.

Application for revision against an order of the Magistrate of Cawnpore, dated the 1st of April 1912.

Mr. *Dillon* (with him Mr. *Wallach*), for the Applicant.

Mr. *Sital Prashad Ghose* (with him Mr. *Satya Chandra Mukerji*), for the Complainant.

JUDGMENT.—This is an application for the revision of an order passed by the Joint Magistrate of Cawnpore, on April 1st, 1912.

The Magistrate was asked to cancel a charge-sheet, which he had drawn up against

the petitioner. He was also asked to take the evidence of witnesses which the accused wished to produce before him. He declined to cancel the charge and he also declined to take the evidence. Ordinarily, this Court is most unwilling to interfere with interlocutory orders; in the present case, however, it is abundantly clear that the Court below has not adopted the procedure prescribed by law. It has followed a procedure of its own and it seems better that in an important and elaborate case like the present, the Court should be put back so far as possible upon the proper procedure, *viz.*, that prescribed by law. My experience is that when Courts follow arbitrary procedure of their own invention, difficulties and confusions are sure to arise. In the present case, the accused, according to a charge-sheet, which has been drawn up by the Joint Magistrate, is charged with committing criminal breach of trust in respect of a sum of Rs. 46,085. A case of this kind is obviously one, which should be tried by a Court of Session and not by a Magistrate. In saying this I must not be understood to interfere with the powers of a Magistrate as given in section 213 of the Criminal Procedure Code. I have not heard the merits of the case and I know nothing further about it beyond this that according to the complaint the accused is supposed to have been entrusted with money and to have committed breach of trust over a very large sum. As soon as this was known to the Court, or perhaps I should rather say to the prosecution, the case should have been pushed on in the channel provided by Chapter XVIII of the Criminal Procedure Code. It was, on the face of it, not a case for trial in the form provided by Chapter XXI. I cannot conceive any Magistrate of experience holding the opinion that the case was not one which ought to be tried by a Court of Session.

The Magistrate in his order of 1st April says that in this case the ordinary procedure of a warrant trial was followed. I venture to doubt this, but I am not concerned with going into the question further, as I hold that the case is one in which the procedure given in Chapter XVIII should have been adopted. It is interesting to note here, that the complainant was represented in this Court by a Vakil of great ability and experience who admitted that the case is one in which the procedure allowed by Chapter XVIII should have been followed. The point I have to see is whether there has been material irregularity in the procedure by refusing to summon the witnesses of the accused and framing the charge before their evidence and whether as a result of such refusal it is expedient that the order of the 1st of April should be altered. In every inquiry into a sessions case, a Magistrate is bound, before he draws up a charge, to take all such evidence as may be produced (1) in support of the prosecution, (2) on behalf of the accused and (3) as may be called for by the Magistrate. If he does not take that evidence, he errs, unless he can justify his procedure, on some such ground as, let us say, the evidence of such and such a witness produced is obviously irrelevant or that he considers the fact in issue between the parties proved one way or the other by the evidence already produced. A Magistrate is further bound, if the complainant, or the officer conducting the prosecution or the accused applies to him, to issue process to compel the attendance of witnesses, to issue such process and, as a matter of consequence, to take the evidence thus caused to be produced. Here there is one exception provided by law, the Magistrate can record reasons showing that it is unnecessary to compel the attendance of witnesses in question and can in such a case decline to issue process. As each witness, out of the classes mentioned above, is examined, the accused is at liberty to cross-examine him. From the wording of section 208, it seems abundantly clear that the intention of the Code was that as each witness was examined, he should be then and there cross-examined and re-examined and allowed to go to his home. The Code has considerations for witnesses and their convenience, but this consideration is not, I regret, always shared by Magistrates.

The procedure under Chapter XXI is very different. Sections 208 and 256 have only to be compared to establish this. From time to time the Court may, when it is necessary under section 342, put such questions to an accused as it considers necessary. When the Court has taken all the evidence produced by either complainant or accused and examined all the witnesses compelled to

attend by process, examined the accused for the purpose of enabling him to explain the circumstances appearing in the evidence against him, then, and not till then, is a Magistrate authorized to frame a charge. The procedure here differs in this point also from the procedure laid down in Chapter XXI. A charge under Chapter XXI can be framed long before this point is reached in a case, and one of the reasons, in my opinion, for this difference is again the convenience of witnesses. But for this, however, witnesses would be and too often are harassed by being kept days and days waiting for a cross-examination. In the case before me, I understand that there were one or more witnesses who would have been produced by the accused and who were in the Court precincts. I understand that no application was made to the Magistrate before the charge was drawn up to issue process to compel the attendance of any witness. I also understand that the accused was prepared to cross-examine each witness immediately after his examinntion. But as the affidavit shows, those who appeared on behalf of the accused, being cognizant that it was the usual practice of this learned Magistrate not to allow any cross-examination before he frames a charge-sheet or till such time that the examination-in-chief of all witnesses for the prosecution is over, they did not press their right to cross-examine at that stage. If such be the practice of the learned Magistrate in inquiries into cases triable by a Court of Session, the practice is contrary to law and must be avoided in future. The accused put in a special application before the charge was framed to call a number of prosecution witnesses for a short cross-examination. The learned Magistrate, so the affidavit goes on, asked the Counsel for the accused not to put more than six to eight questions to each witness. All this was quite irregular. The learned Magistrate had no power to curtail the cross-examination of witnesses, except as provided either in this Code or in the Evidence Act. The result of these departures from procedure has been that the accused considers himself prejudiced and I think he has ground for so considering. In any case, as I have already said, it is expedient that the inquiry should, as far as possible, be put on to the lines laid down by the law. I cancel the charge-sheet. I set aside the orders of the 1st of April. Under the peculiar circumstances of the case, opportunity should now be given to the accused to exercise the right conferred on him by para. 3 of section 208, provided that right is exercised at an early date. As the omission to issue process under section 208, para. 3, appears to have been partly due to the procedure adopted by the learned Magistrate, I think he would have been wiser to follow the precedent of this Court and not the precedent which he says he has followed.

Application allowed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CRIMINAL No. 167 OF 1911.

January 4, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

HARBANS SAHAI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Evidence—Statements made by witness in course of departmenta linquiry, whether privileged—Evidence Act (I of 1872), ss. 123, 124, 125, 155, 162, 163—Court bound to call for statements—Allowing accused to cross-examine witnesses on them.

The statements made by witnesses in the course of a departmental inquiry into the conduct of Police officers are not privileged under sections 123, 124 or 125 of the Evidence Act, when those witnesses are subsequeutly examined in a Criminal Court on a charge against the Police officers of taking illegal gratification and they fall within the ordinary rales of evidence as laid down in sections 155 and 162 of the Evidence Act.

Empress v. *Ramadhan*, 2 Bom. L. R. 329, followed.

The Magistrate is bound to call for them under section 162 of the Evidence Act and to allow the accused to cross-examine the witnesses under section 155 on the statements made whether they are in favour of the accused or against them.

The provisions of section 163 entitle the prosecution to make use of them if they turn out to be not in favour of the defence.

Rule upon the Deputy Commissioner of Ranchi to show cause why the statements, made by some of the prosecution witnesses at the departmental inquiry into the conduct of the accused before the prosecution against them had been started, should not be produced at the trial of the accused upon a charge of taking illegal gratification under section 161 of the Indian Penal Code.

Those witnesses had stated in the Court of the Deputy Magistrate who was trying the

case against the accused that they had made statements in the course of the departmental inquiry. The accused then prayed for the production of those statements which had been recorded. But the Police officers in whose custody the statements were kept said that they were privileged under sections 123, 124, 125 of the Evidence Act, and the statements were not called for by the Court.

Babus *Atulya Charan Bose* and *Nagendra Nath Ghose*, for the Petitioner.

JUDGMENT.—The question that arises upon this Rule is whether the statements made by witnesses in the course of a departmental inquiry into the conduct of Police officers are privileged under sections 123, 124 or 125 of the Evidence Act, when those witnesses are subsequently examined in a Criminal Court on a charge against the said Police officers of taking illegal gratification, or whether they do not fall within the ordinary rules of evidence as laid down in sections 155 and 162 of the Evidence Act. It appears to us clear that they are not so privileged, and we are supported in that finding by the decision of the Bombay Court in the case of *Empress* v. *Ramadhan Maharum* (1). The reasons which are given by the Judges in that case apply exactly to the present case. In that case, the Sessions Judge refused to allow the question to be put to the departmental superior of the accused as to where he got his information, because he was of opinion that the Superintendent was protected by sections 124 and 125 of the Indian Evidence Act, because he had evidently regarded the communication as made to him in official confidence, more especially as at the time the case was being investigated as an attempted fraud on the public revenue, and the learned Judges of the Bombay Court held that the Sessions Judge was wrong in disallowing the question. Now the reasons which the Sessions Judge erroneously held precluded him from allowing this question are precisely the reasons which have been held by the lower Court in this case to preclude it from sending for the documents in question and putting questions to the witnesses upon them. Because there was a departmental inquiry in the District Superintendent of Police's office, therefore, the Magistrate thinks that these are either unpublished official records relating to affairs of State, or that they are communications made to the District Superintendent in official confidence, or that they are sources of information which the Police officer cannot be compelled to disclose. Now, it cannot be said that any of these sections applies to the statements of these witnesses. Clearly, they are not unpublished records relating to any affairs of State. Section 123 has been held to apply to the deliberations of the Parliament, proceedings of the Privy Council, communication between public officials in the discharge of public duty and the like, and not even Government remarks with regard to the conduct of public officials have been considered to be strictly privileged, so that the statements made by witnesses before the departmental superior of the accused cannot possibly be considered to be unpublished records relating to any affairs of State. The permission of the District Superintendent was not, therefore, in any way necessary for the production of these papers; and if any permission had been necessary, that permission would have been that of the Inspector-Genaral of Police of the Province and not of any local superior.

Then, as regards sections 124, it cannot be said that when witnesses come before a Police officer and make accusations against one of his subordinates that those communications are made in official confidence so that when the accused is on his trial, he cannot ask to know what his accusers say. It seems to us that the public interest would suffer much more by the concealment of these statements than by their disclosure.

Section 125 obviously has no application. It is not pretended that those statements were the source from which the District Superintendent obtained his information that any offence had been committed.

The statements not being privileged the Magistrate was bound to call for them under section 162 of the Evidence Act, and to have allowed the accused to cross-examine the witnesses under section 155 on the statements made whether they were in favour of the accused or against him. As the provisions of section 163 clearly entitle the prosecution to make use of them if they turn out to be not in favour of the defence, the danger which the

(1) 2 Bom. L. R. 329.

Magistrate appears to apprehend in his explanation does not really exist.

The Rule must be made absolute and the lower Court must take steps to have the documents referred to in para. 7 of the petition produced, and the determination of the trial will be postponed until this is done, and the Magistrate has fully considered the effect of the answers made by the witnesses upon cross-examination on these documents, when he should hear the parties and proceed to decide the case in accordance with law. In the meantime, the petitioners will remain on the same bail. *Rule made absolute.*

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 11 OF 1912.

January 17, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sundara Aiyar.

NARAINASAWMY NAICKEN AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107 (4), 496—Bail—Right to be released.

The provision in section 107, clause (4), of the Criminal Procedure Code, that a Magistrate before whom a person is sent under that section "may in his discretion detain such person in custody until the completion of inquiry", is not subject to or controlled by section 496 of the Criminal Procedure Code. The latter section does not give an absolute right to bail to any person, who is not charged with a non-bailable offence and should be read along with other provisions of the Code giving a special right of detention to a Court.

Chidambarum Pillay v. *Emperor*, 31 M. 315; 3 M. L. T. 311; 7 Cr. L. J. 360, referred to.

Mewa Lal v. *Emperor*, 11 C. W. N. 415; 5 Cr. L. J. 194 and *Raghunandan Pershad* v. *Emperor*, 32 C. 80; 8 C. W. N. 779; 1 Cr. L. J. 775, distinguished.

Petition, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to release the petitioners in Miscellaneous Case No. 2 of 1912 on the file of the Joint Magistrate, Pollachi (Criminal Miscellaneous Petition No. 1 of 1912), on the file of the Sessions Court of Coimbatore.

Mr. *T. Rangachariar*, for the Petitioners.

Mr. *M. D. Devadoss*, Contra, for the Public Prosecutor.

ORDER.—This is an application for bail. The petitioners were arrested by the Police under section 151, Criminal Procedure Code, on the ground that the Police apprehended that they were about to commit housebreaking and theft. The petitioners were produced before the Sub-Magistrate of Udumalpet. He was of opinion that proceedings should be instituted against the petitioners under section 107 of the Criminal Procedure Code to take security from them for keeping the peace and sent them up to the Joint Magistrate of Pollachi. The Joint Magistrate, before whom proceedings under section 107 are pending, considered it necessary to detain them in custody pending the proceedings, and he rejected their application to release them on bail. The Sessions Court of Coimbatore also dismissed an application made to it for bail. It is contended before us that the Joint Magistrate was bound to release the petitioners on bail and that he had no discretion to refuse to do so. It is also urged that if he had such discretion, the circumstances of the case did not justify his refusal of bail. The Joint Magistrate has given very good reasons for his opinion that it was necessary to detain the petitioners in custody until the completion of the inquiry under section 107 and the Sessions Judge has concurred in that opinion. We are unable to say that the discretion has been exercised wrongly, if the Magistrate was not bound to discharge the petitioners on bail. The question, therefore, for our decision is whether he was bound to do so. Mr. Rangachariar for petitioners relies on section 496 of the Criminal Procedure Code which according to him entitles any person, (other than a person accused of a non-bailable offence), who appears or is brought up before a Court, to be released on bail. We agree that the petitioner would be entitled to bail under this section, if there were no other section disentitling him to it, but section 107, clause (4), provides that a Magistrate before whom a person is sent under that section "may in his discretion detain such person in custody until the completion of inquiry hereinafter prescribed." The petitioner in this case was admittedly a person sent under the section to the Joint Magistrate. The clause expressly gives power to the Magistrate to detain the person in custody until the completion of the inquiry. The contention on behalf of the petitioner is that this provision must be taken to be qualified by

section 496. It is argued for the Crown, on the other hand, that the general provision in section 496 must be taken to be subject to the special provision contained in clause (4) of section 107. Mr. Rangachariar contends that the rule laid down in section 496 is intended to give an absolute right of bail in all cases where an accused person is in custody, whether under an order of Court or otherwise, but this contention appears to us to be untenable. Section 344 lays down that in cases where it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may by a warrant remand the accused, if in custody. The explanation to the section provides that if sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand. It will be observed that the explanation refers to cases where further evidence may be obtained by a remand, the object of the remand being to obtain further evidence. It cannot be held that an accused person is entitled to bail where he is remanded under this provision, for to allow bail in such a case would frustrate the very object for which the remand is ordered by the Court. A similar observation would apparently apply where an order for remand is made under clause 2 of section 107. It cannot, therefore, be held that section 496 gives an absolute right to bail to any person who appears or is brought up before a Court and is not charged with a non-bailable offence, but it must be read along with any other provision giving a special right of detention to a Court, and clause 4 of section 107 gives such special power. That provision may be compared with section 337, clause (3), which gives a Magistrate tendering a pardon to an approver the power to detain him in custody until the termination of the trial by the Court of Session or High Court. The power is qualified by restricting it to cases where an approver is not on bail, but no such qualification is made in section 107. It is, no doubt, true that a person charged with a non-bailable offence is, except in cases falling within sections 334 and 167, entitled to bail, but the same considerations are not necessarily applicable to the two cases. The object of detaining in custody a person charged with an offence is generally to secure his appearance for being dealt with according to law on the charge made against him, and the taking of bail would secure that object ; but in cases of proceedings under section 107 taken for the purpose of preventing a person from committing a breach of the peace, the Legislature may have regarded it as necessary to take steps to prevent him from doing so before the Magistrate decides whether it is necessary to take security from him. This object would not be secured by merely securing his appearance at the inquiry to be made under the section There may be cases where a person charged under section 107 may appear to be so dangerous a character that it would be desirable to detain him in custody until the inquiry against him is completed. Mr. Rangachariar points out that no provision for such detention is made, where a person charged under section 107 is not sent up to the inquiring Magistrate by another Magistrate, but the inquiring Magistrate himself orders the arrest of the person charged. It is, no doubt, true that section 114 only empowers the Magistrate to order the arrest of the person concerned, and does not provide that he may detain him in custody until the completion of the enquiry ; but assuming that a person so arrested is entitled to be released on bail under section 496, we do not think that this anomaly is sufficient to justify us in not giving effect to the clear words of section 107, clause (4), which entitles the Magistrate to detain the person concerned in custody in cases to which that clause is applicable. The question is not covered by any previous decision. It was left expressly undecided in *Chidambaram Pillay* v *Emperor* (1). In *Mewa Lal Thakur* v. *Emperor* (2), all that was held was that bail cannot be demanded from a person against whom proceedings under section 107 are contemplated but no proceedings have been drawn up or issued. In *Raghunandan Parshad* v. *Emperor* (3), the Calcutta High Court held that, except in the special

(1) 31 M. 315; 3 M. L. T. 311; 7 Cr. L. J. 360.
(2) 11 C. W. N. 415; 5 Cr. L. J. 194.
(3) 32 C. 80; 8 C. W. N. 779; 1 Cr. L. J. 775.

circumstances referred to in clauses 3 and 4 of section 107 and which were admittedly not applicable to that case, the law did not empower a Magistrate to detain a person in custody until the completion of the inquiry and that the Magistrate was bound to grant bail. On the whole, we are of opinion that in this case the Joint Magistrate had the right to refuse to enlarge the petitioner on bail and we, therefore, dismiss this petition.

Petition dismissed.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 114 OF 1912.
April 12, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Imam.
MOBARAK ALI—ACCUSED—APPELLANT
versus
EMPEROR.

Forgery—Using forged document—Presumption—Guilty knowledge—Interest in establishing contents of document—Conduct—Filing of document, if user—Penal Code (Act XLV of 1860), ss. 471, 474—Convictions under both sections, whether legal—Charge under ss. 465, 471—Conviction under ss. 466, 471, if legal.

The fact that a man who files a document is interested in establishing its contents, does not raise a presumption that he filed it knowing it to be forged.

Conduct is the principal criterion of guilty knowledge.

Where a man filed a document upon which he relied but when it was discovered that the document had been forged, he fled away:

Held, that his conduct was in no way consistent with his innocence.

The filing of a document as the basis of a plaint or as a necessary sequel to the pleas in the plaint is itself an user; and it then becomes incumbent on the person using it to show that he filed the document in all good faith believing it to be genuine.

Ambika Prasad Singh v. *Emperor*, 35 C. 820; 8 Cr. L. J. 398, explained.

Convictions under sections 471 and 474 of the Indian Penal Code cannot stand together.

Queen v. *Nuzur Ali*, 6 N. W. P. H. C. R. 39, followed.

Where a charge is laid against an accused under section 465 read with section 471, Indian Penal Code, he cannot be convicted and sentenced under section 466 read with section 471.

Appeal against the order of the Sessions Judge of Noakhali, dated January 10th, 1912, convicting the accused under sections 471 and 466, Indian Penal Code, and also under sections 474 and 193 and sentencing him to rigorous imprisonment for five years under the first charge.

Mr. *A. Rasul*, Counsel, and Babu *Jyotish Chandra Sarkar*, for the Appellant.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is an appeal from the judgment and sentence of the learned Sessions Judge of Noakhali who, agreeing with both the assessors, convicted the appellant Mobarak Ali under section 471 read with sections 466, 474 and 193, Indian Penal Code and sentenced him under section 471 read with section 466 to rigorous imprisonment for five years and passed no separate sentence under section 474 and section 193.

It appears that the accused, as the plaintiff in Suit No. 245 of 1910, filed a certified copy of a decree of the Munsif dated *Sraban* 1302 and in the certified copy filed by him he altered *Sraban* 1302 to *Sraban* 1301. The alteration is clear and apparent on the face of the document, and it is not now disputed. Now it is alleged by the prosecution that the only object in making this alteration was to establish that his mortgage was prior to that of the defendants, and that was the plea he took in his plaint, and the list of documents by which the plaint was to be supported contained this copy of the decree as the first document on the list and obviously it was the basis of the claim made in the plaint. It was verified on affidavit by the accused himself as the plaintiff. As a matter of fact, he did not file the document till the 26th August, the plaint having been filed on the 16th July. But the forgery was not discovered till the 6th December when the defendant having taken advice from the *Muktear* who appears to have been concerned on behalf of the accused in the suit of 1897, that gentleman on referring to his note-book found that the proper date of the decree was 1302. The defendant Abdul Aziz thereupon brought the matter to the notice of the Court and the Court called upon Mobarak Ali to make a statement. That statement is Exhibit 7. In that statement Mobarak Ali took the responsibility for making over this decree to his Pleader, Babu Susil Chandra Chatterjee, for filing it on his behalf in Suit No. 730 of 1910, and said that the document was entered as the principal one in the list of documents. It will be observed that he says nothing there as to his brother Hasan

Ali, lately deceased, whom he now suggests may have made the alteration.

The first point taken in appeal is that there is nothing to raise any presumption of guilty knowledge on the part of the accused. The learned Judge says rather vaguely in one part of his judgment that it has been held that the fact that a man is interested in establishing the contents of a forged deed raises a presumption that he filed it knowing it to be forged. The learned Judge has not given us any reference and we are unable to accept this proposition. It is a proposition which is far too wide. The authorities, on the contrary, are that there must be the using of a document by a person who knows or has reason to believe that it is forged. The element of fraud or dishonesty must be present in the mind of the accused.

Now, we are unable to accept the plea of the accused that his brother Hasan Ali was in any way responsible either for the forgery or the user. It is a very easy thing to make charges against a dead man, but those who make them certainly must be very careful to support them with the strongest evidence. No evidence whatever is produced to show that Hasan Ali had anything whatever to do with the user or the forgery of this document. On the contrary, the Legal Practitioner engaged in the case denied that he had anything to do with it. The inference which is sought to be drawn from the statement is that Hasan Ali was a cleverer man than his brother and was in fact a *Pundit*. We think that this is the strongest reason to suppose that he would not have committed this somewhat obvious forgery. However, though the forgery appears to us when our attention is drawn to it to be pretty obvious, it did pass muster with the ministerial officers of the Court, one of whom tells us that having examined the document, he saw nothing suspicious about it, and also with the *Muktear* who ought to have remembered that the decree was in 1302. He also was deceived. However, the defendant himself was suspicious of fraud and he told the *Muktear*, and the *Muktear* then looked up his notes and discovered from his professional notes that the decree was really in 1302. A true copy was then procured and the fraud was discovered. Being confronted with this, the accused dropped the case and did not appear again. His Pleader says that he went to him and made some statement about having forgotten the date. But he omitted to do what any honest man would have done, namely, instruct his Pleader to state that as he found his case was based upon a forged document, he withdrew it and would not rely upon the document. He did nothing of the kind. From first to last he appears to have relied on the document, and when he was found out, he merely fled away. We cannot hold that his conduct is in any way consistent with his innocence and conduct is the principal criterion of guilty knowledge.

Then ,the second point arises. We are asked to hold, on the authority of the case of *Ambika Prasad Singh* v. *Emperor* (1), to which one of us was a party, that the mere filing of a document in Court without tendering the same in evidence does not constitute user of it within section 471, Indian Penal Code. This head-note, as has been pointed out by Carnduff, J., in a more recent unreported case, is entirely misleading; and speaking for myself as one of the Judges who was a party to that decision, I must say that it never entered into my mind to lay down such a proposition which would obviously be contrary to the statute law on the subject. What we did hold was that there was no evidence that these receipts had been used fraudulently or dishonestly by the accused. They were produced by a third party in a case under section 144, Criminal Procedure Code. They were not documents upon which the decision of the case depends in the sense that the documents filed with the plaint are the basis of a Civil suit, and the evidence that the accused himself had anything whatever to do with these documents was very weak. He did not attempt to assert their genuine character after they had once been impugned, and under those circumstances, we were unable to hold that there had been any user. The case obviously depended upon its own facts as most criminal cases do. But the filing of a document as the basis of a plaint or as a necessary sequel to the pleas in the plaint is, in our opinion, itself an user, and it then becomes incumbent on the person using it to show that he filed the document in all good faith believing it to be genuine. We have already held that in this case it cannot be held that the accused so filed this document.

(1) 35 C. 820; 8 Cr. L. J. 398.

Lastly, there is the point of law as regards the charges. We agree with the proposition that was laid down in the case of *Queen* v. *Nuzur Ali* (2) that convictions under sections 471 and 474, Indian Penal Code, cannot stand together. The two things must be charged in the alternative; obviously, one being the use as genuine of a document he knows to be forged and the other being the possession of such document with intent to use it. It must, therefore, be taken that the charges under sections 471 and 474 are in the alternative and that there cannot be convictions for both. The conviction, therefore, under section 474 in this case must be set aside. But this is immaterial as no separate sentence has been passed.

Then we come to the fact that the charge, although it mentioned the certified copy of a decree of a Court of Justice as the forged document, is laid under section 465 read with section 471 and that was never amended in the Sessions Court. The learned Judge speaks of the charges as amended as well as a fresh charge framed by the Court under section 193; but we find that the amendment to which he refers is merely one of date, that the offence was committed between the 26th August and 6th September instead of between 16th July and 26th August as charged by the Magistrate. That being so, we are of opinion that it was not open to the learned Judge to convict and sentence the accused under section 466 read with section 471. The accused is entitled to the benefit of this somewhat fortunate error for him, and he could not receive a greater punishment than that which the law provides under section 465.

We must, therefore, alter the conviction under section 471 read with section 466 to one under section 471 read with section 465 and reduce the sentence to one of two years' rigorous imprisonment under section 465. With this modification, the appeal is dismissed.

It is unnecessary for us to say anything about the conviction under section 193 which depends on the false verification of the plaint. If the document relied on is false, then the verification is also false.

Conviction altered.

(2) 6 N. W. P. H. C. R. 39.

PUNJAB CHIEF COURT.

CRIMINAL MISCELLANEOUS No. 39 OF 1912.

May 10, 1912.

Present:—Mr. Justice Chevis.

EMPEROR—PROSECUTOR

versus

RAJA SON OF ILM DIN—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *ss.* 337, 339 (3)—*Pardon—Approver—Sanction of High Court for prosecution of approver, how to be obtained—Practice—Motion in open Court.*

Where it is desired to obtain the sanction of the High Court to prosecute an approver for giving false evidence after the grant to him of a pardon, under section 337, Criminal Procedure Code, the proper procedure is for the Crown to move the High Court by motion made in open Court and not by letter of reference. No orders can be passed on a letter of reference.

Crown v. *Bulaka Singh*, 10 P. R. 1904, Cr.; 1 Cr. L. J. 793, followed.

Case referred by the Deputy Commissioner, Gujrat District, with his letter No. 560, dated 25th March 1912, requesting that sanction under section 339 (3) of the Criminal Procedure Code, be accorded for the prosecution of Raja, son of Ilm Din, *Gujar*, of Khawaspur.

Mr. *C. Bevan-Petman*, Government Advocate, for the Crown.

Mr. *Lakshmi Narain*, for the Respondent.

JUDGMENT.—In this case the District Magistrate has, by letter addressed to the Registrar of this Court, requested sanction to the prosecution for the offence of giving false evidence of a man to whom a pardon under section 337 of the Criminal Precedure Code was given.

As has been ruled in *Crown* v. *Bulaka Singh* (1), the proper procedure in such cases is for the Crown to move this Court by motion made in open Court and not by letter of reference. No orders can be passed on this reference. If application on behalf of the Crown is made in due form to this Court, orders will be passed upon it in the usual manner.

(1) 10 P. R. 1904 Cr.; 1 Cr. L. J. 793.

JAGGU AHIR v. MURLI SHUKUL.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION PETITION No. 52 OF 1912.
May 14, 1912.
Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.
JAGGU AHIR—APPLICANT
versus
MURLI SHUKUL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 526—Transfer—High Court, power of—Jurisdiction—'Criminal case,' meaning of.

The expression "Criminal case" in section 526 of the Criminal Procedure Code, includes a proceeding initiated under section 145 of the Code. The High Court has, under section 526, power to transfer such proceeding from one Court to another subject, of course, to all the conditions under which a transfer can be made.

In re Arumuga Tegundan, 26 M. 188; *Lolit Mohan Moitra* v. *Surja Kanta Acharjee*, 28 C. 709; *Gurudas Nag* v. *Gaganendra Nath Tagore*, 2 C. L. J. 614; 3 Cr. L. J. 83; *Queen-Empress* v. *Mutasaddi Lal*, 21 A. 107; *Queen-Empress* v. *Mona Puna*, 16 B. 661; *Jhoja Singh* v. *Queen-Empress*, 23 C. 493, referred to.

In re Pandurang Govind Pujari, 25 B. 179, dissented from.

Mr. *Benode Behari*, for the Applicant.

Mr. *M. L. Agarwala*, for the Opposite Party.

JUDGMENT.—The question referred to is whether the High Court has jurisdiction, under section 526 of the Code of Criminal Procedure or under the Letters Patent, especially section 22, to transfer from the Court of one Magistrate to the Court of another Magistrate a proceeding under section 145 of the Code of Criminal Procedure.

There is a conflict of authority on the point. In *In re Pandurang Govind Pujari* (1), it was held that the High Court had no power, under section 526 of the Code, to transfer a proceeding under section 145 of the Code from one Court to another. The reason given is that such a proceeding is not a "criminal case" within the meaning of section 526; that a criminal case means a case arising out of and dealing with *some crime already committed* and does not include proceedings taken for the prevention of a crime. The Madras High Court, in *In re Arumuga Tegundan* (2), dissented from the Bombay case. The learned Judges said:—"We have no doubt of our power to transfer this case both under section 526 of the Code of Criminal Procedure and clause 29 of the Letters Petent. If a case under section 145 of the Code of Criminal Procedure is not a "criminal case", it is difficult to conceive what it is. With all respect, we are unable to agree with the decision of the Bombay High Court *In re Pundurang Govind Pujari* (1)". In *Lolit Mohan Moitra* v. *Surja Kanta Acharjee* (3), Ghose, J., held as follows:—

"An investigation under section 145 of the Code of Criminal Procedure is an inquiry within the meaning of clause (*a*) of section 526 of that Code.

A Magistrate trying a case under section 145 is a Criminal Court within the meaning of the Code.

The expression "criminal case" in section 526 means a case over which a Criminal Court has jurisdiction.

It is doubtful whether the High Court has power under section 526 to transfer cases other than those in which a person is charged with an offence.

The High Court may under section 15 of the Charter Act transfer a case under section 145. Taylor, J., held as follows:—

The expression "case" and "criminal case" are not co-extensive. The phrase "criminal case" is used in a limited sense and does not apply to every case cognizable by a Criminal Court. It is doutbful whether the High Court has power under section 526 to transfer cases which do not relate to matters which may strictly be described as criminal as relating to a crime or offence under the law. The power, however, exists under section 29 of the Letters Patent wherein the phrase "criminal case" appears to be used without the distinction which apparently exists in the Criminal Procedure Code in respect of cases tried by a Criminal Court as opposed to Civil cases.

In *Gurudas Nag* v. *Gaganendra Nath Tagore* (4), Rampini and Mookerji, JJ., held that a proceeding under section 145 of the Code of Criminal Procedure was a "criminal case" and expressly dissented from *In re Pudurang Govind Pujari* (1).

Our answer to the question turns upon the meaning we give to the phrase "criminal case" in section 526 of the Code of Criminal Procedure. There is nothing in the section to lead us to infer that the phrase means a "criminal case" arising out of an offence which has already been committed. Had that been

(1) 25 B. 179.
(2) 26 M. 188.
(3) 28 C. 709.
(4) 2 C. L. J. 614; 3 Cr. L. J. 83.

the intention of the Legislature, it could have easily expressed it in apt words and would not have used an expression of a larger connotation. We are of opinion that it includes proceedings taken under section 145 for the prevention of a crime.

A Magistrate who conducts those proceedings does so as a Criminal Court under the provisions of the Code of Criminal Procedure and it cannot be said that he performs the function of an Executive Officer. The expression "criminal case" in clause (8) of section 526 need not necessarily be taken to have been used in the narrow sense of a criminal case arising out of an offence already committed.

The High Court is the higest tribunal in these Provinces and one of its important functions is to supervise the work of all the Criminal Courts subordinate to it and there is no reason why the Legislature should deem it fit to limit the power of the High Court to transfer only such "criminal cases" as arise out of the offences already committed and for that purpose should use a phrase of a more general import.

Besides, such a limitation can serve no useful purpose. The contention of the learned Counsel for the opposite party that the expression "an accused person", which occurs in section 526 of the Code, indicates that the phrase "criminal case" refers only to such cases as arise out of the offences which have already been committed, is without force. That expression has been used in a larger sense, *i.e.*, the person over whom a Criminal Court exercises jurisdiction. Banerji, J., in *Queen-Empress* v. *Mutasaddi Lal* (5), said:—"The Code of Criminal Procedure contains no definition of an 'accused person' but it was held by the Bombay High Court in *Queen-Empress* v. *Mona Puna* (6) that the term 'accused' means 'a person over whom a Magistrate or other (Criminal) Court is exercising jurisdiction.' The same view was taken by the Calcutta High Court in *Jhoja Singh* v. *Queen-Empress* (7). I see no reason to put a different interpretation on the words 'an accused person, in section 437.'

It was further urged that proceedings under sections 176, 488 and 491 of the Code of Criminal Procedure can hardly be called criminal case, notwithstanding the fact that they are conducted under the Code of Criminal Procedure and this shows that every proceeding held under the Code is not a criminal case. In our opinion, this contention is without substance. We are inclined to hold that, in the absence of anything to the contrary, every case over which a Criminal Court exercises jurisdiction under the Code is a "criminal case" for the purposes of that Code.

On a careful consideration of the wording of section 526 of the Code of Criminal Procedure, the policy of the law and the cases to which we have referred in this judgment, we hold that the expression "criminal case" in section 526 includes a proceeding initiated under section 145 of the Code and that the High Court under section 526 has power to transfer it from one Court to another Court subject, of course, to all the conditions under which a transfer can be made.

In this view of the case, it is unnecessary to consider the effect of section 22 of the Letters Patent upon the power of the High Court to transfer a proceeding under section 145 of the Code of Criminal Procedure.

(5) 21 A. 107.
(6) 16 B. 661.
(7) 23 C. 493.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 191 OF 1912.
(CRIMINAL REVISION PETITION NO. 153 OF 1912.)

May 3, 1912.

Present—Mr. Justice Sundara Aiyar.

YEDITHA SUBBAYA—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 114, 403—Criminal Procedure Code (Act V of 1898), ss. 236, 237—Criminal breach of trust—Absence of trust—Presence at wrongful pledging—Offence—Abetment—Altering charge and finding.

Entrustment to accused is a necessary element of the offence of criminal breach of trust under section 406, Indian Penal Code.

A jewel was entrusted to *A.* who gave it to *B.* for being pledged to some person. *C.*, who was aware that the jewel did not belong to *B.*, took *B.* to a money-lender and induced him to give a loan to *B.* on the pledge of the jewel. Both *B.* & *C.* acted at the instance of *A.* *C.* was charged with and convicted of the offence of criminal breach of trust:

Held, (1) that *C.* was not guilty of the offence of criminal breach of trust under section 406, Indian Penal Code, read with section 114, as the latter section applied only where the act, at the doing of which

the abettor was present, would itself amount to an offence;

(2) that though *C.* was charged with the offence of breach of trust, he could, without altering the charge, be convicted, under sections 236, 237, Criminal Procedure Code, of abetment of criminal breach of trust.

Reg. v. *Chand Nur*, 11 B. H. C. R. 240; *Padmanabha Panji Kannaya* v. *Emperor*, 33 M. 264; 11 Cr. L. J. 49; 5 Ind. Cas. 145; 7 M. L. T. 79; 20 M. L. J. 84, referred to and explained.

Petition, under sections 435 and 439, Criminal Procedure Code, praying the High Court to revise the judgment of the Joint Magistrate of Rajahmundry, in Criminal Appeal No. 12 of 1912, confirming the conviction and sentence passed on accused by the 2nd Class Magistrate of Kotrapeta in C. C. No. 189 of 1911.

Mr. *G. Vencatramiah*, for the Petitioner.

Mr. *J. L. Rosario*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—The petitioner in this case was the 3rd accused in Calendar Case No. 189 of 1911 on the file of the second class Magistrate of Kotrapetah. The 1st accused was a dancing girl and the 3rd accused is said to have kept her. The facts on which the prosecution was based were that the complainant lent a jewel to the 1st accused and this jewel was subsequently pledged by the 2nd and 3rd accused to the 6th prosecution witness. The money obtained by the pledge was apparently appropriated by the 2nd accused. The jewel was given to the 2nd accused by the 1st accused for being pledged. There can be no doubt that the 2nd and 3rd accused had no right to pledge the jewel. Both Courts have found as a fact that the 3rd accused was aware that the jewel did not belong to the 2nd accused and that he introduced the 2nd accused to the 6th prosecution witness as a relation of his in order to induce the witness to give a loan to the 2nd accused on the pledge of the jewel. Both of them acted at the instance of the 1st accused who gave the jewel. On these facts, the lower Courts have convicted the 3rd accused of criminal breach of trust.

It is contended that the conviction cannot be upheld as there was no entrustment of the jewel to the 3rd accused Entrustment to the accused is, according to section 406, Indian Penal Code, a necessary element of the offence of criminal breach of trust. It is urged by the learned Public Prosecutor that by combining with the 1st and 2nd accused to pledge the jewel to P.W. No. 6, the 3rd accused would be guilty of abetment of criminal breach of trust and that as he was present at the act of pledging, he would also be guilty of the principal offence itself under the provisions of section 114 of the Penal Code. That section enacts:—"Whenever any person, who being absent would be liable to be punished as an abettor is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence." I doubt whether under this section the principal offence would be committed where one of the elements of the offence is a particular relationship between the abettor and a third person which is absent in the case. The act of pledging may, no doubt, be taken to have been committed by the 3rd accused also in consequence of his presence at the time when the 2nd accused did the act. The language of the section, no doubt, lends itself to the argument that whenever a person is guilty of an abetment, his presence at the commission of the offence would make him guilty of the principal offence. But the section, I think, would really be applicable only where the act at the doing of which the abettor is present would itself amount to an offence. Now the mere pledging would not be an offence by itself. Another equally essential element is the entrustment.

I am inclined to think that the mere presence of the 3rd accused at the act of pledging would not make him guilty of the principal offence of criminal breach of trust. But I see no reason why he should not be held to be guilty of abetment of criminal breach of trust. The facts charged against him were that he was a party to the pledging of a jewel which was entrusted to the 1st accused. On these facts, a charge of abetment of criminal breach of trust could have been framed against him. I think the provisions of sections 236 and 237 of the Criminal Procedure Code are applicable to such a case. It was a question whether, on the facts alleged, the accused would be guilty of criminal breach of trust or of the abetment of that offence. Both charges could have been framed against him on the facts alleged by the prosecution and in such a case, it is open to the Court under section 237 to convict the accused of the abetment of criminal breach of trust though no charge was framed against him for that offence.

Mr. Venkataramiah relies on two cases in

support of his argument that a person can in no case be convicted of the abetment of an offence when he was not charged with it, but only of the principal offence. The first of these cases is *Reg.* v. *Chand Nur* (1). The offence charged against the accused there was murder. The learned Judge recognized that the question must be decided by a consideration of the provisions of section 238 and he rested his judgment on the ground that the facts necessary to prove abetment would not be included in the facts required to prove the principal offence. And the facts charged against the accused were only those that were required for the principal offence of murder. The learned Judge says: "That section, (*i.e.*, the section corresponding to section 236 of the present Code), applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives notice to the accused of all circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case, where the circumstances embodied in the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, the principle no longer applies because notice of the former does not necessarily involve notice of all that constitute the latter. The section is not intended to apply to a collateral offence. It is not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself. When a man is accused of murder, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it which may be quite distinct from the circumstances constituting the murder itself."

Similar observations may be applied to section 236 also. It is quite true that if the facts are not the same, the accused cannot be convicted for another offence the elements of which are not all included in the offence charged against him. Ordinarily, the facts required to prove the abetment would not be included in the facts constituting the principal offence. The abetment would precede the commission of the principal offence itself where it consists in the abettor being a party to a conspiracy or in instigating the principal offence or helping in the commission of it. If he be present at the commission of the offence itself, he would ordinarily be guilty of the principal offence. The abetment, therefore, would be complete before the principal offence is committed and the facts constituting the abetment need not be proved in order to prove the principal offence. No doubt, in order to bring home the offence to any particular accused, the facts preceding may be adduced in evidence which by themselves may make him the abettor. But when the charge is of the principal offence only, it cannot be said that he has to meet facts which occurred before the principal offence. I entirely accept the law as laid down by the learned Judge. The other case, *Padmanabha Panji Kannaya* v. *Emperor* (2), really also proceeds on an application of the principles of sections 236 and 237 to the facts of that case. The offence charged there was forgery. The observations I have made with regard to the acts constituting the abetment of such an offence would show that these acts may not precede the commission of the act which makes the offence itself and a person who is charged only with the principal offence is not called upon to meet a charge which relates the acts done before it. I do not think that the learned Judge who decided the case intended to lay down a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence The question is what were the facts charged. If on these facts, two charges could be framed, namely, the commission of the principal offence and the abetment, then by virtue of the provisions of section 237 the accused may be convicted of the offence of abetment though it was not charged separately against him. The Act lays down no specific provision with respect to the question to be decided here. But the principle is laid down in sections 236 and 237 and applying the principle I must come to the conclusion that in this case the accused may be convicted of the abetment of the criminal breach of trust.

I accordingly alter the finding into one of guilty of the offence of abetment of criminal breach of trust. I see no reason

(1) 11 B. H. C. R. 240.

(2) 33 M. 264; 7 M. L. T. 79; 5 Ind. Cas. 145; 11 Cr. L. J. 40; 20 M. L. J. 84.

to interfere with the sentence. This petition is, therefore, dismissed.

Petition dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1192 OF 1911.

March 12, 1912.

Present:—Mr. Justice Shah Din.

RAM CHAND—COMPLAINANT—PETITIONER

versus

JAI DIAL AND ANOTHER—ACCUSED—RESPONDENTS.

Cheating—Judgment-debtor raising money on the mortgage of his house already sold in execution of decree—Penal Code (Act XLV of 1860), s. 420—Discharge—Re trial—Criminal Procedure Code (Act V of 1898), s. 439.

To constitute the offence of cheating, it is not necessary that the deception should be by express words; it may be by conduct or implied in the nature of the transaction itself.

Khoda Bux v. *Bakeya Mundari*, 32 C. 941; 9 C. W. N. 1006; 2 Cr. L. J. 764, followed.

A., a judgment-debtor in an execution case, applied under Order XXI rule 83 of the Civil Procedure Code, 1908, for permission to raise the amount of the decree by a private transfer of his house which had already been sold in auction. The application was rejected by the Court and yet he induced a person to advance him money on a mortgage of the house in question on the representation that he was empowered to effect the mortgage in order to pay off the decretal amount due to the decree-holder. *A.* received a portion of the money himself and induced the mortgagee to pay the rest to the decree-holder, but allowed the sale to be confirmed by the Court and subsequently received from the executing Court the sale-proceeds stating that he had paid the decree-holder out of his own pocket:

Held, that a *prima facie* case of the offence of cheating under section 420, Indian Penal Code, existed against *A.*

Petition, under section 439 of the Criminal Procedure Code, 1898, for revision of the order of the Sessions Judge, Lahore Division, dated the 8th August, 1911, confirming that of the Magistrate 1st Class, Lahore District, dated 29th June 1911, discharging the respondents.

Lala *Lajpat Rai*, for the Petitioner.

Mr. *Nand Lal* and Pandit *Jowala Pershad*, for the Respondents.

JUDGMENT.—After hearing arguments, I think that the order of the Magistrate discharging Jai Dial, respondent, of an offence under section 420, Indian Penal Code, was wrong and must be set aside. The Magistrate has overlooked the fact that the application made by Jai Dial in the execution case on the 8th March 1910, under Order XXI, rule 83, of the Civil Procedure Code, praying for permission to raise the amount of the decree by a private transfer of his house, which had already been sold by auction, was rejected by the executing Court the same date, and yet he (Jai Dial) induced the widow, *Musammat* Radhi, to advance Rs. 1,000 to him on the mortgage of the house in question on the representation that he was empowered to effect the mortgage in order to pay off the decretal amount due to the decree-holder, Thakar Das. From the order of the executing Court, dated the 21st February 1910, it is clear that under Order XXI, rule 89, Civil Procedure Code, Jai Dial was permitted to pay into Court, within the time prescribed by law, the amount of the decree together with a sum equal to 5 per cent. of the purchase-money and the 21st March was fixed as the date for passing final order. On the 21st March, Jai Dyal effected the mortgage in question in direct contravention of the order passed on his application, dated the 8th March 1910, and after having himself received Rs. 253 from the mortgagee and having got the latter to pay the balance of the mortgage-money, namely, Rs. 747 to the decree-holder, he did not put in an appearance in Court either on the 22nd or the 23rd March, with the result that on the last mentioned date, an order was passed by the executing Court confirming the auction sale and rejecting the judgment-debtor's application of the 25th February, on the ground that the necessary deposit had not been made within 30 days from the date of the sale. The decree-holder, Thakar Das, appeared in Court on the 23rd March, and stated that he had duly received the amount of the decree and asked for execution proceedings to be consigned to the record room. This was accordingly done; the sale of the house in favour of the auction-purchaser was confirmed and as a result, the motgagor, *Musammat* Radhi, secured no mortgage rights of any kind in the house under her mortgage-deed of the 21st March 1910. On the 17th August 1910, Jai Dial made an application in Court asking for payment to him of the sale-proceeds of the house, stating that he

had paid the decree-holder out of his own pocket. This application was accepted and the money was paid to him. Subsequently, the mortgagee appears to have asked Jai Dial several times to re-pay him the mortgage-money together with interest and damages, but up to the present moment, nothing has been paid to her or to her son, the present petitioner. The Magistrate appears to me to have entirely overlooked the proceedings in the executing Court and also the subsequent conduct of Jai Dial, and I have no hesitation in holding that his order of discharge is improper.

I accordingly set aside the order of the Magistrate, and send the case back for further inquiry by another Magistrate. The Magistrate who will try the case should keep in view the principle laid down in the case of *Khoda Bux* v. *Bakeya Mundari* (1), namely, that to constitute the offence of cheating, it is not necessary that the deception should be by express words, but it may be by conduct or implied in the nature of the transaction itself.

Revision allowed—Cause remanded.

(1) 32 C. 941; 9 C. W. N. 1006; 2 Cr. L. J. 764.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 249 OF 1911.

October 3, 1911.

Present:—Mr. Eales, J. C.

ALIMUDDIN—APPLICANT

versus

MEAH JAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 423 (b) (2), 439—Appeal—Power of Appellate Court—Accused convicted of one offence and acquitted of another—Conviction and acquittal based on same evidence—Power of Appellate Court to alter conviction—Revision—High Court's power to interfere with acquittal.

The accused was prosecuted under section 497 of the Penal Code. The trying Magistrate held that adultery was not proved but he found the accused guilty of insult likely to provoke a breach of peace under section 504 of the Code. On appeal, the Sessions Judge held that no offence under section 504 had been committed but he was of opinion that the charge under section 497 was sustainable. The Sessions Judge, however, held that he had no power to interfere with the acquittal of the accused under section 497:

Held, that the Sessions Judge had power under section 423, Criminal Procedure Code, to interfere in the case.

If he was of opinion that accused had committed adultery, the Sessions Judge could alter the conviction to section 497 of the Penal Code, as the conviction under section 504 and the acquittal under section 497 were based on the same evidence.

If the acquittal on the one charge and the conviction on the other are based on identically the same facts, the Appellate Court has power to change the section and convict the accused of the right offence.

Appanna v. *Mahalakshmi*, 8 M. L. T. 313; 7 Ind. Cas. 861; 1 M. W. N. 474; 11 Cr. L. J. 534, followed.

King-Emperor v. *Luchmun*, 31 C. 710, *Queen-Empress* v. *Judoonath*, 2 C. 273, distinguished.

As a general rule, the High Court will not, in revision, interfere with an order of acquittal but it has the power to do so and this power may be properly exercised in certain circumstances.

Po Han and Nga To v. *Nga Tha Le Ni*, U. B. R. (1897-1901) I, 91, followed.

Mr. *S. Mukerjee*, for the Applicant.

Mr. *Mitter*, for the Respondent.

Mr. *H. M. Lutter*, Government Prosecutor, for the Crown.

JUDGMENT.—This is an application for revision of the orders passed by the Sessions Judge, Mandalay Division, in which he, after reversing the conviction of the accused under section 504, Indian Penal Code, refused to deal with the charge under section 497, Indian Penal Code.

The applicant in this case, Ali Muddin, who was the complainant originally, prosecuted Meah Jan along with five other men under sections 497, 498, 500 and 109 of the Indian Penal Code, the first accused, Meah Jan, with having committed adultery with his wife, Fatima, and the others with abetting the act of adultery by Meah Jan and also in the alternative with defamation.

The facts show an extraordinary phase of Mahomedan social life in Burma. Ali Muddin married Fatima who is now 44 years of age from 22 to 30 years ago. They are both Chittagonian Mahomedans. Some years ago, Ali Muddin took a Burman wife. It would appear that Fatima, his wife, resented this and left him. It is stated that there was a *tillak* but this was not proved. Ali Muddin fell out with a fellow countryman, Meah Jan, and there was, as is usual, a good deal of litigation between them. Whatever were his motives it is difficult to say, but eventually it would appear that accused, Meah Jan, went in company with Fatima from Kamaing to Mogaung where the accused, Meah Jan,

was bringing a case against Ali Muddin. Meah Jan denied he took her himself till Abdul Aziz, who is Fatima's son-in-law, handed her over to Meah Jan to escort to Mogaung. While on the way there and back, there cannot be the slightest doubt but that Meah Jan had every opportunity of having connection with Fatima. They were in the boat alone for three nights and were left alone there, and it is urged that this is sufficient evidence to prove that adultery did take place. Nevertheless, the Sub-Divisional Magistrate, Mr. Barnard, who wrote a long and carefully considered judgment, came to the conclusion, taking all the circumstances into consideration, that adultery was not committed. He had the witnesses before him ; Fatima appeared in Court ; she is a woman of 44, which in the case of a native woman of her class, is the time when the youthful charms have usually departed. The Magistrate made no distinct order of acquittal but he states, after considering all the evidence, the "age of the woman, and the circumstances under which she went to Mogaung, and the time she left Kamaing with the accused, *i.e.*, in broad daylight, I arrived at the opinion that sexual intercourse was not in the mind of the accused, Meah Jan, when he took Fatima down with him to Mogaung, nor did he commit it, and that, therefore, I could not convict him under the charge of adultery which I had framed against him."

This, as the Sessions Judge remarks, is equivalent to an acquittal under section 497 of the Indian Penal Code, but instead of this the Sub-Divisional Magistrate found him guilty of insult under section 504, Indian Penal Code. In the special circumstances of the case, I do not think that the conviction of insult likely to provoke a breach of the peace was so unsuitable as the Sessions Judge thought it, but there seems to be some doubt in the Sessions Judg's mind that Ali Muddin was present at Mogaung and, if he were not, obviously the charge of insult must fall through.

On the other hand, it is a fact that flaunting about with another man's wife has led to innumerable duels in other countries besides India, and after all section 504, though it seems somewhat inadequate, is not so ridiculously out of place as the Sessions Judge thought.

The Sessions Judge was of opinion that the charge under section 497 was sustainable, and he called upon the accused to show cause why the charge against him should not be re-tried.

The case was argued before him by Mr. Mitter, but no notice was sent to the other side whose defence was not heard. The Sessions Judge set aside the conviction under section 504 and found that practically accused had been acquitted of adultery, and he did not think that he had any right to interfere with the acquittal.

Against this order, he has applied to this Court. The case being one of some importance, I asked the Government Prosecutor to appear in support of the finding of the Sessions Judge.

Mr. S. Mukerjee (senior) appeared for the applicant, Mr. Mitter for the respondent, and Mr. Lutter for the Crown.

It was urged by the applicant that this Court had repeatedly interfered in cases of this sort, and the learned Counsel quoted several unreported cases in which the Court had held that this Court could interfere and had interfered and ordered a re-trial, although no appeal had been filed by the Local Government and the time for appealing had not lapsed. The cases quoted by the learned Advocate for the applicant are—

Mi Hla So, Nga Lu Gyi v. *Nga Than* and *Maung Ngwe Pyaing* (1); *Me So* v. *Mi Shwe Ma* (2); *Nga Pwin* v. *Po Min* (3).

My learned predecessor has held that this power of interference under section 439 is one which can and should be exercised in Upper Burma. There is a ruling by Mr. Burgess, *Maung Sein* v. *Maung Hmo* (4), in which doubts were expressed whether a case can be taken up on revision so long as an appeal lies, and there are several cases quoted in which the High Courts in India have repeatedly held that the Courts will not ordinarily interfere. In a

(1) J. C. U. B. Crl. Revision No. 718 of 1910 (unreported).
(2) J. C. U. B. Crl. Revision No. 126 of 1910 (unreported).
(3) J. C. U. B. Crl. Revision No. 125 of 1908 (unreported).
(4) U. B. R. 1897-01, I, 103.

recent case (unreported) *Nga Kan Gyi* v. *Nga Po Tha* (5), the whole matter was argued before me.

In the case of *Thandavan* v. *Perianna* (6), the Madras High Court held that an appeal against an acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged. This extreme view has not been upheld by the other High Courts, but both Allahabad and Bombay have upheld that ordinarily the High Court will not exercise its powers of interference in such cases. It seems to me quite clear that the wording of section 439 does give this power to the High Courts, and my learned predecessors, Twomey and Shaw, JJ., have both held the power exists, and have repeatedly exercised it, and it would seem that though not directly mentioned that this power can well be used in Upper Burma in view of the fact that the Upper Burma Criminal Justice Regulation has largely increased the powers of interference in ordinary appeal cases with regard to the enhancement of sentences.

The Advocate for the applicant then drew attention to the facts. He has pointed out that it is not necessary now to prove the actual acts of sexual intercourse in order to prove adultery. This view has been held in the case of *Queen-Empress* v. *Madhub Chundar Giri Mohunt* (7). He pointed out that in this present instance not only were there ample opportunities for sexual intercourse but these opportunities had been created deliberately by the parties themselves, Meah Jan and Fatima.

On behalf of the Crown, Mr. Lutter pointed out that under section 423 (*b*) (2) of the Code of Criminal Procedure, the Sessions Judge had ample power in the present case to have given force to his own opinions and to have convicted the accused under section 497. He quoted a recent ruling of the Madras High Court which is I find exactly on all fours with the present case, namely, the case of *Appanna* v. *Mahalakshmi* (8). Here the High Court has clearly laid down that in the present case the Sessions Judge, if he finds the accused not guilty on the one charge and he has been wrongly acquitted on another, may act under this section and convict the accused on the charge which he thinks has been proven, although an actual acquittal has been entered in the lower Court. In the Madras case, an acquittal was actually entered on the first charge. Mr. Lutter urged that the question whether the Court had power to take up the case in revision, therefore, did not arise in the present case, but that the Sessions Judge was able to have dealt with the case himself, and that the case should now be sent back to him for disposal according to law.

For the respondent, Mr. Mitter urged that in the various rulings of the High Courts of India, *King-Emperor* v. *Luchmun Singh* (9), *Queen-Empress* v. *Judoonath* (10), the High Courts had held that interference with acquittal is not called for, but all these cases quoted differ from the present one, because in them there was no conviction at all and the accused was acquitted on all charges.

First, as regards the question of the power to interfere on revision.

I entirely concur with the opinion of my learned predecessor in the case, *Po Han* and *Nga To* v. *Nga Tha Le Ni* and *Mi Tu* (11), in which it was held that "as a general rule, the High Court will not interfere with an order of acquittal, but it has the power to do so, and there can be no doubt that this power may be properly exercised in certain circumstances."

I agree, however, that in the present case, this question does not arise, and that the Sessions Court had power, under section 423 of the Code of Criminal Procedure read with section 13 of the Schedule of the Criminal Justice Regulation, to interfere, as there was a conviction in the case and the accused was convicted on the same set of facts on which he was acquitted on the other charge.

This, I think, is the crucial point of this case. If the acquittal on the one charge and the conviction on the other are based identically on the same facts, it appears to me that the Sessions Court in appeal

(5) J. C. U. B. Crl. Revision No. 339 of 1911.
(6) 14 M. 363.
(7) 21 W. R. 13 Cr.
(8) 8 M. L. T. 313; 7 Ind. Cas. 861; 1 M. W. N. 474; 11 Cr. L. J. 354.
(9) 31 C. 710.
(10) 2 C. 273.
(11) U. B. R. (1897-1901), I, 91.

has power to change the section and convict the accused of the right offence.

Now to deal with the facts, I am bound to say after a careful perusal of the proceedings of the lower Court, I am not at all convinced that the Township Magistrate was not right in acquitting the accused of the offence of adultery. It is very well to talk about opportunities for committing this offence, and to say that near relationship would not prevent incest. On the other hand, there is good reason to believe that it was true that Fatima's son-in-law handed her over to the care of Meah Jan. I do not think it likely that a son-in-law would deliberately blacken his wife's face by encouraging his wife's mother to commit adultery. But the main fact which appears to me to render adultery exceedingly unlikely is that the Chittagonian woman in question was of the mature age 44. I do not think that a native woman of 44 belonging to the class of the complainant's wife would be very attractive from a sexual point of view, and it must be recollected the Magistrate who has great experience of the country had Fatima before him when he passed the order and distinctly drew attention to her age. Moreover, it is quite clear that this is not an odinary case of adultery. The charge seems to me to be Ali Muddin's reply to the complaint made by Meah Jan.

In these circumstances, I am not at all sure that there is any advantage to be gained by remanding the case to the Sessions Court, as I do think that there is a good deal of force in the deliberate finding of the Magistrate that no adultery was committed or intended, and, therefore, refuse to interfere.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 247 OF 1912.

March 18, 1912.

Present:—Mr. Justice Kensington.

SUNDAR SINGH AND ANOTHER—CONVICTS PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Riot—Constable struck while quieting riot—Discrepant evidence—Penal Code (Act XLV of 1860), ss. 147 and 332.

Where a public servant is struck with a stick while trying to quiet a riot, but the evidence as to who actually struck him is discrepant, it is not necessary to frame a separate charge under section 332, Penal Code, against any one of the rioters in particular.

Petition for revision, under section 439 of Criminal Procedure Code, of the order of the Sessions Judge, Hissar, dated 16th January, 1912, confirming that of the Magistrate, 1st Class, Hissar, dated 21st December 1911, convicting the petitioners.

FACTS.—The accused in this case were *challaned* under sections 147, 332, Indian Penal Code, and section 120 of the Railways Act. The facts of the case as alleged by the prosecution stated briefly are, that a party of *Nuts* consisting of five men and four women came to Gadrana (the village of the accused) and performed their performance of singing, &c. During the performance, the accused, with the exception of Gurdit Singh, began to behave indecently towards the *Nut* women. Not approving of this, the *Nuts* stopped their performance and left the village. Near the village well, the five accused, Jang Singh, Jagat Singh, Sundar Singh, Hira and Chanan, with some other villagers, came to the *Nuts* and requested them to stop at their village for the night, but the *Nuts* refused to do so. When the *Nuts* came near Raman Station, they were confronted by Jang Singh who asked them to return to their village but the *Nuts* did not agree to do so. In the meanwhile, the other five accused came thither and asked the *Nuts* to return to their village and on the *Nuts* refusing to comply with their desire, all the accused began to maltreat the *Nut* men and women and said that they would forcibly take back their women. Upon the *Nuts* raising a hue and cry, some gang-men who were doing their work close by came to the spot and one of them went to fetch the Police constable. Nidhan Singh and Hira, constables, soon came to the spot and asked the accused to desist from molesting the *Nuts* whereupon Hira and Jagan Singh fell upon Nidhan Singh, constable. In the meantime, several other persons arrived thither and all the accused with the exception of Jang Singh were arrested and sent up for trial.

In re CLARIDGE.

Mr. *Nand Lal*, for the Petitioners.

JUDGMENT.—This is a petition for revision on behalf of two only out of six men sentenced by the lower Courts. So far as the petitioner Sundar is concerned, I see no reason for interference. The circumstances of the whole affair are rather strange, but there is nothing to differentiate the case of Sundar in particular and I am not prepared to say that the lower Courts have come to an altogether wrong conclusion on the facts. It may be taken that Sundar joined in a disreputable riot for which he has been properly punished. His petition is dismissed.

The case of the other petitioner Hira is not quite the same. This man alone among the rioters has been given an additional sentence of three months' imprisonment in respect of violence to a constable. There is no doubt that the constable, also named Hira, received a somewhat violent blow from a stick in the face while trying to quiet the riot, but the evidence to show that this blow was struck by the petitioner is very discrepant. The principal witness Girdhari made two statements, ascribing the blow in his first statement to Jang Singh and in his second to Hira, and there is altogether a good deal of doubt whether any one really knew exactly how the constable came to be struck.

The attack on him was the one serious feature in the case, and it seems to me that the proper course was to hold all the rioters equally responsible. There was no necessity for framing a separate charge under section 332, Indian Penal Code, against any one of the men in particular, the attack on the constable being the main incident of the affair, which was otherwise of no great importance.

Hira's conviction and sentence will stand under section 147, Indian Penal Code, but the revision is so far allowed in his case that his separate conviction under section 332, is set aside with his additional sentence thereunder of imprisonment for three months.

Revision partly allowed.

BOMBAY HIGH COURT.

ORIGINAL CRIMINAL JURISDICTION.

February 2, 1912.

Present:—Sir Dinsha Davar, Judge.

In re G. W. CLARIDGE.

Contempt of Court—Pending trial—Comments by paper likely to prejudice fair trial—Humorous comments—Repetition of objectionable epithet—Punishment—Apology—Practice.

It amounts to a contempt of Court to make comments on a pending case, when the comments can in the least be taken to have the effect of prejudicing the fair trial of an accused person.

When during the pendency of a trial, a serious charge made against an accused person is treated by a journalist as a humorous event on which the public are invited to laugh, it is a matter that must be dealt with seriously.

The repetition by a paper of an offensive epithet against an accused person under trial is quite as objectionable as the original assertion of that epithet.

To talk humorously of an accused person's ill-health and to make light of a serious matter is a most objectionable practice on the part of a journalist.

The power of committing a citizen or a journalist to jail or of inflictiug a fine on him for contempt of Court, or punishing him in any other way, such as making him pay costs, should be exercised with the greatest caution.

Contempt matters are matters not between parties but are matters between the respondents and the Court and the Court can accept an apology which it considers sufficient.

Mr. *Raikes*, for the Applicant.

JUDGMENT.—One Mahomed Khan of Hoti is the third accused in a case that has been committed by the Chief Presidency Magistrate for trial at this Sessions and Monday next has been fixed for the trial of that case.

On the 5th of February, his Counsel applied to me for a Rule against Messrs. G. W. Claridge and A. E. Claridge, who are the publishers of a weekly newspaper known as "The English Mail", calling upon them to show cause why they should not be committed for contempt or why such other order as to the Court may seem fit should not be made against them. The learned Counsel drew my attention to 2nd paragraph in the column of "Bombay Notes" in the issue of the 19th of January of that newspaper, and a Rule was granted which has been argued before me to-day.

The respondents have put in an affidavit in which apology is tendered, "if the Court is of opinion that any part of the paragraph would prejudice the Khan of Hoti." This the respondents have no right to ask. The

In re CLARIDGE.

Court's opinion would not be expressed till after the respondents had done what they may be advised to do or what they may think fit to do at the arguments of the Rule. However, on my pointing this out to Mr. Binning, the learned Counsel for the accused, he, with great wisdom, has tendered an unqualified apology for the publication. I accept the respondents' explanation in their affidavit and I absolve them from all intention to prejudice the trial of this accused. But the consideration of this question does not depend on mere intentions. It depends on what the probable effect of a publication of this kind would be on the trial of the accused, which is still pending. Knowing that this Rule was coming on, I have been looking at the authorities, the principles of which have been enumerated in Oswald on Contempt of Court, 3rd edition, beginning with page 91, and the authorities leave no doubt that the Court will resent any comment on a pending case, where these comments could in the least be taken to have the effect of prejudicing the fair trial of an accused person.

Mr. Binning has pointed out to me that this is one of a number of paragraphs which form the subject-matter of columns of humorous writing. The column is not composed of all humorous paragraphs. On the contrary, as pointed out by the learned Counsel for the accused, the column begins with a very melancholy subject —the death of the late Duke of Fife—and the third paragraph, that immediately follows the second paragraph in question, deals with a very very sad accident that took place at Mahableshwar in connection with a well-known Jewish family at Bombay.

But assuming that this was a part of the humorous columns of the newspaper, I emphatically disapprove of any journalist treating a pending criminal trial as a forthcoming humorous event in Bombay. Comments on pending trial are at all times most objectionable. But when a serious charge made against an accused person is treated as a humorous event on which the public are invited to laugh, I think it is a matter that must be dealt with very seriously.

Now, what are the comments in the paragraph? Are they likely to prejudice a fair trial of the accused person or are they not? I assume that when a paper is published in Bombay, it is likely to be read by any member of the public. It must be remembered that nine citizens of Bombay will have to be empanelled to try this case. Is it likely to have an effect on their minds? Take, for instance, the sentence beginning with this:—" The prosecution story was long and circumstantial." The use of the word "circumstantial" is most unfortunate, because it involves an inference that the story commended a certain amount of credibility by its being circumstantial even if actual proof was absent. Leaving that aside, we have the accused referred to as" a very clumsy Lothario," and the learned Counsel for the respondents says that this is only a repetition of what somebody else said. I think that a repetition of an offensive epithet against an accused person under trial is quite as objectionable as the original assertion of that epithet; besides which I am not aware that anybody in the course of his or her deposition before the Magistrate, has used the words "clumsy Lothario" in connection with the third accused. Assuming that somebody did use these words in the course of the inquiry before the Magistrate, a journalist has no business to repeat the epithets which are likely to influence the public mind adversely to the accused.

The last and the worst offence is that the accused made the most of his ill-health and appeared in Court on a sofa and secured the privilege of being under arrest in his own house. The Magistrates' Courts do not extend privileges to the accused but they give them their rights, and, when the Magistrate made the order referred to, I take it he had good grounds for believing that that order was necessary in respect of the accused, having regard to his health. To make light of a serious matter of the kind and to talk humorously of an accused person's ill-health is, to say the least of it, a most objectionable practice on the part of journalists.

Having said this, it follows that the only conclusion I can come to is that the publication of the paragraph in question is a contempt of Court. It must be remembered, and I do remember, that the power of committing a citizen or a journalist to jail or of inflicting a fine on him, or punishing him in any other way such as making

him pay costs, is, as stated in the English cases cited before me, rather an arbitrary power in the hands of the Court. That power should be exercised with the greatest of caution.

In this case, the respondents, both of them, have acted like gentlemen. They have realized that it is possible that the publication was not what should have appeared in their paper, and they have explained the circumstances under which that objectionable paragraph got in. I am quite willing, under the circumstances, to take all that into consideration and absolve them from any intention wilfully to commit any contempt of Court or to prejudice the third accused in his trial. The unqualified apology tendered by Mr. Binning on behalf of the respondents is, I think, under the circumstaces sufficient for the Court. Contempt matters are matters not between parties but are matters between respondents and the Court, and I do not propose to deal harshly with the respondents. I accept their apology and make no order on the Rule so far as any punishment to them is concerned. I think the third accused in this case was perfectly justified in drawing the Court's attention to the publication of the paragraph in question. He was perfectly justified in coming to this Court and asking the Court to take notice of this publication, and under the circumstances, he is entitled to be placed in the same position in which he would be if the publication had not been made. He has incurred costs which I think the respondents must pay.

I discharge the Rule and make no order on the Rule except that the respondents do pay the costs of the third accused in the case before me. These costs to be taxed by the Taxing Master as on the original side.

Rule discharged.

Attorneys for the Applicant: Messrs. *Payne & Co.*

Attorneys for the 'English Mail': Messrs. *Smethan Byrne & Co.*

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 1700 OF 1911.

February 3, 1912.

Present:—Mr. Justice Chevis.

SADDA SINGH—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Revision—Serious discrepancy in evidence for the prosecutin—Failure of both Courts to take notice thereof—Power of High Court to set aside conviction on revision—Criminal Procedure Code (Act V of 1898), *s.* 439.

A conviction based on evidence containing a serious discrepancy of which no notice was taken by the lower Courts may be set aside on revision.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Lyallpur, dated 17th November 1911, confirming that of the Magistrate, Samundri, dated 17th October 1911, convicting the petitioner.

Mr. *Nihal Chand*, for the Petitioner.

JUDGMENT.—On 5th October, 1911, *Musammat* Ram Kaur lodged a complaint at *Thana* Samundri, in which she charged Sadda Singh with a criminal assault.

On the same day, Sadda Singh's mother lodged a charge of assault against *Musammat* Ram Kaur's husband and three other men in Court at Lyallpur.

The latter case has been dismissed. In the former case, the Magistrate has convicted, though from his judgment it would seem that he is inclined to believe the story of Sadda Singh's mother having been beaten, and to attribute Sadda Singh's offence to a desire to take revenge for the assault on his mother. I do not think it at all likely that both the charges are true.

Mussammat Ram Kaur's story is that she had gone into Sadda Singh's cotton to ease herself, and that Sadda Singh came up, and seized her by the arm, and tried to throw her down but in vain; that she cried out and Bawaria, *Jat*, and Phumman, *Kashmiri*, came up, and then Sadda Singh ran off.

This story is supported by Bawaria and Phumman. But though they were examined on 9th October 1911, *i.e.*, only five days after the assault, Bawaria says he went into the cotton a short distance, and Phumman did not go, while Phumman says he went into

the cotton, and Bawaria did not go. This seems to me a serious discrepancy, but neither the Magistrate, nor the District Magistrate, who dismissed the appeal, has taken the least notice of it. I am not inclined to attach undue weight to petty discrepancies, but considering the short time that had elapsed, I can scarcely attribute this discrepancy to want of memory or call it a petty one.

The evidence in support of the charge is scanty and also discrepant, and I accept the application, and reverse the conviction and sentence, and acquit the petitioner. The fine, if paid, will be refunded.

Petition accepted.

BOMBAY HIGH COURT.
ORIGINAL CRIMINAL JURISDICTION.
February 13, 1912.
Present:—Sir Dinshaw Davar, Judge.
EMPEROR—PROSECUTOR
versus
C. W. KING—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 353—High Court—Trial—Accused ill—Power to dispense with attendance in Court.

Under the provisions of section 353 of the Criminal Procedure Code, a High Court has the power to dispense with the attendance of an accused, during his trial before the High Court, on the ground of his ill-health.

Messrs. *Inverarity* and *Raikes*, for the Applicant.

Mr. *Strangman*, Advocate-General, for the Crown,

JUDGMENT.—With reference to Mr. Inverarity's application to dispense with the attendance of the third accused from the Court during the trial, I have now had the advantage of seeing the learned Chief Justice and the other Judges who presided at the recent Tribunal which tried the Nasik Conspiracy case, and I have ascertained that that Court dispensed with the attendance of one of the accused, who was suffering from appendicitis, under the powers which they held were by implication conferred on High Courts by section 353 of the Criminiminal Procedure Code. That is a precedent which I have no hesitation in following in this case. Section 205 of the Criminal Procedure Code empowers a Magistrate to dispense with the attendance of the accused in cases where he issues a summons and it seems to me that it could not have been the policy of the Legislature that the High Court should not have similar powers in all proper cases.

Major Gordon-Tucker has stated in his evidence that it would be unsafe to bring the third accused backwards and forwards into Court, that he is suffering from dilatation and fatty degeneration of the heart, accompanied by anuerism, and that it is dangerous to his life that he should be brought into Court and kept here during the trial which promises to extend over many days' hearing. This evidence is not challenged by any cross-examination.

Under these circumstances, I will dispense with the attendance of the third accused in Court till the further order of this Court. In the meanwhile, all prosecution witnesses who have to identify the third accused must do so now before he is removed from the Court.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 965 OF 1910.

April 22, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

C. S. ADINARAYANA IYER—APPELLANT

versus

K. KRISHNAN AND OTHERS—RESPONDENTS.

Ejectment suit—Possessory title of plaintiff good against all but the true owner.

In an ejectment suit, the plaintiff's possessory title, in the absence of a better title proved by the defendant, holds good against all the world except the true owner.

Narayana Row v. *Dharmachar*, 26 M. 514; *Shi Gopal* v. *Ayesha Begam*, 29 A. 52: 3 A. L. J. 775; A. W. N. (1906) 264 and *Perry* v. *Clissold*, (1907) A. C. 73; 76 L. J. P. C. 19; 95 L. T. 890; 23 T. L. R. 232, referred to.

Second appeal against the decree of the Subordinate Judge's Court of South Malabar at Palghat, in Appeal Suits Nos. 492 and 493 of 1909, presented against that of the District Munsif of Tirur, in Original Suit No. 154 of 1908.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *K. P. Govinda Menon*, for 1st Respondent.

Mr. *C. V. Anantakrishna Iyer*, for 2nd and 3rd Respondents.

JUDGMENT.—This second appeal relates to the plaintiff's right to recover two of the items included in a demise made in favour of the family of defendants Nos. 1 to 10. The items with which we are concerned are Nos. 2 and 4. Of these, item 2 is in the possession of the 17th defendant. The case of the demisees is that they were evicted from this item in pursuance of a decree obtained by a stranger and that as they lost possession of the item, in taking the account between the plaintiff and them, the proportionate rent of this item must be deducted. The 17th defendant who was subsequently made a party is the person in possession of this item and he contends that he obtained possession of this item from the Thomarakavu *davaswam* which he says is the *jenmi*. The 4th issue in the suit raised the question whether the demisees lost possession of the property in the suit referred to by them and the 3th issue raised the question of the 17th defendant's title to hold the land independently of the plaintiff on the ground that the land belonged to another *jenmi*. The District Munsif found the 4th issue against the demisees, his view being that the 2nd item was not one of the properties from which they were ejected in the suit referred to by them, Original Suit No. 33 of 1901, on the file of the District Munsif's Court of Tirur. He found also that the 17th defendant was not entitled to hold on a different title although he dealt very briefly with that question. On appeal, the Subordinate Judge reversed the finding of the District Munsif on the 2nd issue and held that the demisees were ejected from item 2 in Suit No. 33 of 1901. He recorded no finding on the 17th defendant's right to hold it as land belonging to a different *jenmi*. According to the case of the plaintiff himself, the 17th defendant did not come into possession of this land under the demise sued on. He seems, no doubt, to have contended that the demisees were guilty of collusion in allowing the 17th defendant to obtain possession; still, it is not possible to hold that he contended that the 17th defendant's possession was under the demise sued on. The suit as against the 17th defendant must, therefore, be regarded as one based on title and the plaintiff would not be entitled to a decree without proving his title and possession within 12 years prior to the suit and the case would be governed by Article 142 of the Limitation Act. If the plaintiff's demisees were in possession within 12 years prior to the suit, that would no doubt be sufficient to prove his possession in law within 12 years of the suit. The 17th defendant's own possession admittedly commenced only in 1903. The Subordinate Judge having failed to record any finding on the question of the 17th defendant's *jenmi's* title and of the plaintiff's title to recover land from the 17th defendant, we must ask him to record a finding on the question whether the plaintiff is entitled to recover the land from the 17th defendant on the basis of his title, and, if so, whether he was in possession of the land, either directly or through his tenants, within 12 years prior to the suit.

With respect to the 4th item, the plea of the demisees is that they were not put in possession of it. The 16th defendant claimed to be a mortgagee under the demisees on an oral mortgage and admitted the plaintiff's right to recover possession and claimed payment only of the mortgage amount due to

him. The 18th defendant was the person who appealed against the Munsif's decree for surrender of the properties including this item. His right was derived under a hypothecation document executed by the demisees, and he is in possession of the item. The District Munsif found that although possession was not given to the demisees, the demisor, in accordance with his promise contained in the *kanom*-deed, subsequently put him in possession, causing the person who was actually in possession at the date of the demise to surrender the item to the demisees. The Subordinate Judge reversed this finding. In doing so, he has referred only to the oral evidence let in by the plaintiff and has made no reference to the valuable evidence contained in Exhibits E. and VI, hypothecation documents executed by some of the demisees two years after the date of the demise, Exhibit VI being in favour of the 18th defendant himself. Both these documents state that the executants were in possession of this item as well as other items included in the demise. It is, of course, possible that this admission was made by mistake but *prima facie* the statement is one which it is the duty of the demisees to explain. The question, no doubt, is one of fact as urged by Mr. Ananthakrishna Aiyar, but as the finding is based purely on the oral evidence in the case and the more important documentary evidence has not been referred to by the Subordinate Judge, we think, in the circumstances, that he should be asked to record a fresh finding on the question.

The Subordinate Judge is requested to submit his findings on the evidence on record within one month from the date of the receipt of this order. Seven days will be allowed for filing objections.

In pursuance of the order contained in the above judgment, the Subordiate Judge of South Malabar at Palghat submitted the following

FINDINGS:—I am directed to submit findings on the following issues :—

Whether the plaintiff is entitled to recover the land, item No. 2, from the 17th defendant on the basis of his title, and, if so, whether he was in possession of the land, either directly or through his tenants within, 12 years prior to the suit ?

Whether the demisor put the demisees in possession of the land, item No. 4, in accordance with his promise contained in the *kanom*-deed ?

First issue:— * * * * *
Second issue:— * * * * *

I find that the demisee Avomma was put in possession of the land, item No. 4, in accordance with the promise contained in the *kanom*-deed V and its *kychit* A.

This second appeal coming on for final hearing after the receipt of the finding of the lower Court, the Court delivered the following

JUDGMENT:—We accept the finding of the Subordinate Judge on the second issue sent down by us, namely, whether the demisor put the demisees in possession of the land, item No. 4, in accordance with his promise contained in the *kanom*-deed.

On the first issue, he has found that item No. 2, was not the *jenm* of Gopala Menon and is, therefore, not the *jenm* of plaintiff and that the plaintiff was not in possession as *jenmi* either directly or through tenants at any time. But he proceeds to find that Gopala Menon and the plaintiff were in possession through Avomma, though not as *jenmi*, till the execution of the decree in Original Suit No. 33 of 1901, that is, till 16th August 1902. The demise by Gopala Menon to Avomma was in the year 1893 and this suit was brought in the year 1908. The plaintiff, as purchaser of the rights of Gopala Menon in the property, would be entitled to a decree for the eviction of the 17th defendant whose possession dates only from 1908, unless it be proved that Gopala Menon was in some way holding under the Thomarakavu *devaswam*. Of this apparently there is no evidence at all on record. The Subordinate Judge says that the 17th defendant suggested that Gopala Menon might have been a sub-demisee under Neelakantan Nambudiri. The Subordinate Judge was content to accept this suggestion. But, in our opinion, he was not entitled to do so, unless there was some evidence on record to support it. The Subordinate Judge, no doubt, finds that Gopala Menon's *jenm* title has not been proved. But in the absence of any better title proved on behalf of the *devaswam*, Gopal Menon's possessory title which passed to the plaintiff is sufficient to entitle the plaintiff to a decree in ejectment against the 17th defendant, a posses-

ory title being good against all the world except the true owner. See *Narayana Row* v. *Dharmachar*(1); *Shi Gopal* v. *Ayesha Begam* (2) and *Perry* v. *Clissold* (3). The result is that the decree of lower Appellate Court must be modified and that of the District Munsif must be restored. The appellant's costs in this and in the lower Appellate Court will be paid in equal proportions by the 17th and the 18th defendants.

Appeal allowed.

(1) 26 M. 514.
(2) 29 A. 52, 3 A. L. J. 775; A. W. N. (1906) 264.
(3) (1907) A. C. 73; 76 L. J. P. C. 19; 95 L. T. 890; 23 T. L. R. 232.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1061 OF 1909.
June 1, 1912.
Present:—Mr. Justice Kensington and Mr. Justice Chevis.
KAMAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
SUMAND KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Gift—When gifted property reverts to the collaterals of the donor.

Gifted property does not revert to the collaterals of the donor so long as there are any descendants, male or female, of the donee in existence.

Khajindra Nath Das v. *Nanak Chand*, 24 P. R. 1909; 2 P. W. R. 1909; 218 P. L. R. 1908; 1 Ind. Cas. 13; *Lachhman* v. *Bhagwan Sahai*, 68 P. R. 1911; 160 P. L. R. 1911; 10 Ind. Cas. 277, followed.

Second appeal from the order of the Divisional Judge, Jullunder Division, dated 26th August 1909, reversing that of the Subordinate Judge, 2nd class, Jullunder, dated 30th March 1909, dismissing the claim.

R. S. Pandit *Sheo Narain*, for the Appellant.

Lala *Balwant Rai*, for the Hon'ble Mr. *Shadi Lal*, for the Respondents.

JUDGMENT.—The genealogical tree is to be found on page 8 of the paper-book. The dispute relates to certain land which Jia, a sonless proprietor, gifted to his son-in-law Kadu. On 3rd September 1896, Kadu gifted some of the land to his daughter *Musammat* Akko and on the same date he gifted some more land to Kamma, husband of another daughter *Musammat* Chuhri. On 11th November 1897, he executed a Will in favour of Nabi Bux, son of another daughter, *Musammat* Natho, declaring him to be his adopted son and heir, and on 15th May 1901, he had some of the land mutated in favour of Nabi Bux on the strength of an oral gift.

The plaintiffs, collaterals of Jia, brought declaratory suits to protect their reversionary rights alleging that Kadu had no power to make these alienations, but while these suits were pending Kadu died, and the present suit, which is one for possession, was then brought.

The first Court dismissed the suit, but the learned Divisional Judge on appeal held that the general rule was that in the absence of lineal male heirs of the donee, the land reverted to the donor's line and so decreed the claim. The defendants appeal to this Court.

Eleven issues were framed by the first Court but the appeal can be decided with reference to one point only. There are no male lineal heirs of the donee Kadu in existence except Nabi Bux, who certainly is a male and a direct descendant, but even he is only a daughter's son. The contention for the plaintiffs is that as the donee has left no heirs in the male line of descent, the property gifted reverts to the donor's collaterals. The defendants, on the other hand, rely on certain recent rulings and urge that so long as there are any direct descendants of the donee in existence, tho property does not revert.

Prior to *Sita Ram* v. *Raja Ram* (1), the rulings of this Court were to the effect that a donee became absolute owner, and that if he left no descendants, the property passed to his collaterals and not to the collaterals of the donor. Vide *Moluk* v. *Musammat Dyan* (2); *Fouja* v. *Kasu* (3); *Gogan* v. *Taloka* (4); *Dasaunda Singh* v. *Partab Singh*(5); *Ditta* v. *Muhammad Baksh* (6); *Jowahir Singh* v. *Amrik Singh* (7); *Mangat* v. *Wazir Singh* (8); *Atra* v. *Umra* (9), in which rulings the heirs of the donee were preferred to the heirs of the donor. But ever since *Sita Ram* v. *Raja Ram* (1), the existence of the custom of reversion to the line of the donor in the absence of descendants of the donee has been recognized.

(1) 12 P. R. 1892.
(2) 2 P. R. 1874.
(3) 122 P. R. 1879.
(4) 163 P. R. 1882.
(5) 53 P. R. 1882.
(6) 146 P. R. 1884.
(7) 9 P. R. 1885.
(8) 82 P. R. 1885.
(9) 1 P. R. 1886.

The only question for us to decide is whether the property reverts in the presence of female descendants of the donee or of males who are descendants through females such as a daughter's son.

In *Khagindra Nath Das* v. *Nanak Chand* (10), it was held by a Division Bench (Reid and Robertson, JJ.) that the donor's collaterals could not oust the female descendants of the donee in the direct line. In *Lachhman* v. *Bhagwan Sahai* (11), the same view was held by another Division Bench (Shah Din and Chevis, JJ.). The same view is also held in a Single Bench decision, Civil Appeal No. 407 of 1911 (Rattigan, J). These rulings all hold that the property gifted does not revert so long as there are any descendants, male or female, of the donee in existence.

We see no sufficient reason for not following these rulings. We hold, therefore, that the plaintiffs cannot get possession in the presence of the daughters and the daughter's son of the donee. We, therefore, accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

(10) 218 P. L. R. 1908; 24 P. R. 1909; 2 P. W. R. 1909; 1 Ind. Cas. 13.

(11) 68 P. R. 1911; 160 P. L. R. 1911; 10 Ind. Cas. 277.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 382 AND 383 OF 1909.

April 11, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Wallis.

IN NO. 382

TACHOOR POONKUZHI ILLATH KESAVAN UNNI, MINOR, BY HIS GUARDIAN, HEAD CLERK OF THE DISTRICT MUNSIF'S COURT, MANJERI—APPELLANT

versus

NICHOLAS AND OTHERS—RESPONDENTS.

IN NO. 383.

TACHOOR POONKUZHI ILLATH DEVAKI ANTHERJANAM—APPELLANT

versus

NICHOLAS AND OTHERS—RESPONDENTS.

Malabar Law and Usage—Nambudris—*Affiliation by* Illom *consisting of one male and two females—Issue begotten by another* Illom *for the first* Illom—*Status of female issue of the offspring.*

According to the usages among the *Nambudris* of Malabar, the members of an *Illom* consisting of one male and two females cannot validly affiliate another by requiring a member of another *Illom* to marry and beget issue for the first *Illom* unless he or the lady proposed to be married to him is previously made legally an heir of the aforesaid *Illom*.

The female issue born of the marriage would be validly affiliated if the said condition is fulfilled.

Quære:—Whether the affiliation is valid without the said condition precedent?

Second appeals against the decrees of the Subordinate Judge's Court of South Malabar at Calicut, in Appeal Suits Nos. 531 of 1908, and 609 of 1908, presented against the decree of the Court of the District Munsif of Manjeri, in Original Suit No. 308 of 1908.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *J. L. Rosario*, for the Respondents.

JUDGMENT.—There were three members in the Tachoor Poonkuzhi Illom, Narayanan and two women. They executed Exhibit IV in favour of one Damodaran whereby they constituted Damodaran their heir and stipulated that Damodaran should marry and beget issue for their Illom to succeed to the Tachoor Poonkuzhi Illom on the death of Narayanan. Damodaran married accordingly, and the 6th defendant, a female child, was born as the result of the union. Narayanan's wife having subsequently given birth to a male child, there were differences amongst the parties and a release was executed in Narayanan's favour by Damodaran, on his own behalf and on behalf of the minor 6th defendant, and by his wife, whereby they renounced all interest in the properties of the Tachoor Poonkuzhi Illom in consideration of a sum of Rs. 18,000 partly paid and partly promised by the father of the plaintiff in this suit. The plaintiff's father who advanced this sum at the request of Narayanan, obtained a mortgage from Narayanan and the two women of his Illom. The mortgage is impugned as invalid and several questions are argued. But before dealing with them, it is essential to know whether Exhibit IV is valid and operates to affiliate the offspring of Damodaran whether male or female. It appears to have been assumed in the Courts below that the affiliation was valid. No case has been cited to us where the question has been decided when the affiliation was made not by the sole surviving member of the Illom but as here by a male member and the two women. Our attention was drawn to two cases where the affiliation

was made by two women but no question was then raised or decided as to the validity of such affiliation and it may be that those cases stand on a special footing as only one of the women might have been regarded as entitled to the Illom property. Before disposing of the second appeal, we think it necessary to have findings on the following issues:—

(1) Whether according to the usage amongst Nambudris, the members of an Illom, consisting of one male and two female members, may validly affiliate another by requiring a member of another Illom to marry and beget issue for the first Illom?

(2) Whether female issue born of such marriage would be validly affiliated as members of the first Illom?

Fresh evidence may be taken on both sides. The Judge should examine witnesses he may see fit to call in addition to the evidence which the parties may adduce. The findings should be submitted within three months from this date and seven days will be allowed for filing objections to the said findings.

In compliance with the order (after recording and discussing evidence contained in the above judgment), the Subordiate Judge of South Malabar at Calicut submitted the following

FINDINGS:—My findings on these issues referred to me for trial are:—

(1) That according to the usage amongst the Nambudris, the members of an Illom, consisting of one male and two female members, cannot validly affiliate another by requiring a member of another to marry and beget issue for the first Illom unless he or the lady proposed to be married to him is previously made legally an heir of the aforesaid Illom; and.

(2) that the female issue born of the marriage would be validly affiliated if the condition laid down by me in connection with the fist issue is fulfilled.

These second appeals coming on for final hearing on Thursday and Friday the 21st and 22nd days of March 1912, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT:—The Subordinate Judge has now returned a finding on the first issue remitted to him to the effect that according to the usage amongst the Nambudris, the members of an Illom, consisting of one male and two female members, cannot validld affiliate another by requiring a member of any other Illom to marry and beget issue for the first Illom unless he or the lady proposed to be married to him is previously made legally an heir of the aforesaid Illom. It is argued for the appellant that the evidence shows that such an affiliation can legally be made independently of the condition precedent laid down by the Subordinate Judge and reliance is placed on the decision of the late Saddar Court in the case of *Tottakara Alluttar Manakal Narrain Nambudripad* v. *T. M. Trivikrama Nambudripad*, quoted in the case of *Vasudevan* v. *Secretary of State for India*(1). We, however, do not think it necessary to decide the question, as, in the present case, the condition precedent has been complied with. The judgment both of the District Munsif who tried the case and of the Subordinate Judge who heard the appeals and also the order of this Court calling for a finding, proceeded on the footing that all the then members of the Tachoor Poonkuzhi Illom "constituted Damodaran as heir " by Exhibit IV. No question as to this was referred to the Subordinate Judge. Damodaran, therefore, had an interest in the property of Tachoor Poonkuzhi Illom. The issue of the marriage which he contracted for the benefit of that Illom also on birth obtained an interest therein under Exhibit IV. It has been found by the the Courts below that at the time when Exhibit G was entered into, a state of things existed in that Illom which made it for the advantage of all concerned including the present appellant (6th defendant) that Damodaran and his wife and child (6th defendant, appellant in Appeal Suit No. 383) should separate from that Illom. Exhibit G was executed, no doubt, primarily to carry out arrangements contemplated as liable to arise when Exhibit IV was executed, but it may also, we think, be regarded as evidencing and part of a family arrangement in the nature of a partition entered into by all the persons who at the time of its execution had an interest in the property of the Illom either originally, *i. e.*, Narayanan, his wife and widowed daughter-in-law, or by virtue of Exhibit IV, that is, Damodaran and his

(1) 11 M. 157 at p. 175.

wife and child. It is found that full consideration was paid for execution of Exhibit G. We do not think that there is any reason to regard Exhibit G as invalid, or as not binding on the appellant (6th defendant) whose father Damodaran executed it on her behalf as well as on his own. There is also no reason for regarding Exhibit B as in any way invalid. It was executed by Damodaran and his wife and the 6th defendant as well as by Narayanan and his wife and widowed daughter-in-law. The 5th defendant (appellant in S. A. No. 382) was born long after the execution of Exhibit G and it is not open to him to say that he is not bound by it.

We, therefore, dismiss both the second appeals with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1135 OF 1910.

May 23, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Rattigan.

DAULAT RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

SOBBA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), ss. 11, 12, 12(a) 12 (c), thirdly—Right of vendee to resist—Pre-emptor himself debarred by s. 11 from claiming pre-emption—Right of only some owners to sue under s. 12 (c) thirdly.

A vendee, in order to resist a suit for pre-emption, must show that he has himself a right to purchase the property which is equal to, or superior than, the right of the person who claims to pre-empt it. A person, who is, by virtue of section 11 of the Act, entirely debarred from any right of pre-emption, cannot claim that under section 12 he has, as a defendant, a right of pre-emption which enables him to defeat the right of a person to whom the Act gives the right of claiming pre-emption. Therefore, a vendee, who is debarred under section 11 from claiming pre-emption as a plaintiff, is not entitled to resist a suit for pre-emption as defendant on the ground that as the next heir of the vendor he has a superior right to that of plaintiff under section 12 (*a*) of the Act.

Section 12 (*c*), *thirdly*, does not require that either *all* the owners should sue *jointly*, or only *one* of them should sue in respect of his individual and several right. Under it, even *some*, out of many owners, can sue, while the rest elect to stand aside without taking any action in the matter.

Second appeal from the order of the Divisional Judge, Ferozepore. Division, dated 30th of August 1910, reversing that of the Subordinate Judge, 1st class, Ferozepore District, dated 9th December 1909, dismissing the plaintiff's claim.

The Hon'ble Rai Bahadur *Shadi Lal*, for the Appellants.

Lala *Lajpat Rai*, for the Respondents.

JUDGMENT.—This judgment will determine both this further appeal and the further appeal in case No. 1136 of 1910, the points involved in them being identical.

The facts are fully set forth in the judgment of the lower Appellate Court and need not be repeated. Mr. Shadi Lal, on behalf of defendants-vendees, attacked the judgment under appeal upon the following three grounds:—

(1) That the vendees, though debarred under section 11 of the Punjab Pre-emption Act, from claiming pre-emption as plaintiffs in a suit, were nevertheless entitled to *resist* a suit for pre-emption as defendants on the ground that as the next heirs of the vendor, they had a superior right to that of plaintiffs under section 12 (*a*) of the said Act;

(2) that plaintiffs, who were some only of the owners of the estate, were not entitled to claim the benefit of section 12 (*c*) *thirdly* of the said Act, as these provisions applied only to cases in which either *all* the owners sued jointly, or one owner sued in respect of his individual and several right; and

(3) that the evidence on the record proved that plaintiffs had acquiesced in the sale and had waived any right of pre-emption they might have had.

In our opinion, there is no force in any of these grounds. The first is admittedly covered by authority, [see *Mahmud* v. *Nur Ahmad* (1) and *Thakur Das* v. *Sohawa Singh* (2)], and after hearing Mr. Shadi Lal's arguments to the contrary, we now say no more than that we agree entirely with the views expressed in these judgments. A vendee in order to resist a suit for pre-emption must show that he has himself a right to purchase the property which is equal to, or superior than, the right of the person who claims to pre-empt it, and a person who is, by virtue

(1) 70 P. W. R. 1907; 101 P. R. 1907.

(2) 23 P. R. 1908; 123 P. L. R. 1908; 50 P. W. R. 1908.

of section 11 of the Act, entirely debarred from any right of pre-emption, cannot, in our opinion, claim that under section 12 of the Act (which is expressly made subject to the provisions of section 11), he has, as a defendant, a right of pre-emption which enables him to defeat the right of a person to whom the Act gives the right of claiming pre-emption.

The second ground urged by Mr. Shadi Lal is so hopelessly untenable that we need not discuss it at length. Where there are several owners in the estate and one sells his interest therein, it is open to all the other owners to sue for pre-emption *jointly*. And it is further conceded that each of such other owners can claim to pre-empt the property. That being so, we fail to see any reason for holding that two or more of such owners should be debarred from bringing a joint suit for pre-emption simply because one or more of their body elect to stand aside and take no action in the matter. We cannot believe that it was the intention of the Legislature in such cases to encourage multiplicity of suits by compelling such owners as desired to pre-empt the property to institute a number of separate suits.

We have no hesitation in deciding against appellants upon the first and second points.

Lastly, there is the question of waiver of acquiescence, and here we entirely agree with the District Judge, Lala Achru Ram, and the Divisional Judge that the evidence adduced by defendants in support of this contention is far too vague and unsatisfactory to establish the plea. It is *possible* that some of the proprietors led the vendees to believe that no opposition would be offered to a sale in their favour by Thakur Das, but we are not satisfied that plaintiffs actively misled the vendees into so thinking, and we cannot upon such meagre evidence hold that plaintiffs have lost a right which is given to them by statute. In this connection the Divisional Judge was right in laying stress upon the fact that the deed of sale was not attested by any proprietor of the village. If defendants' story is true, it would have been no difficult task for them to secure the attestation of some leading *lambardar* whereas the two witnesses who attest it are entire strangers to the village.

We hold accordingly that plaintiff's suits for pre-emption have been rightly decreed and we dismiss this and the connected appeals. But as plaintiffs contested the amount of the consideration-money and failed to prove that it was not fixed in good faith, and as they were slow to enforce their rights of pre-emption, we direct that the parties shall bear their own costs throughout.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1403 OF 1910.

April 25, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

ETTAKKAMANA MANHOLI GOVINDAN NAIR—APPELLANT

versus

AMAYA MANGALATH PUTHIA VEETIL GOVINDAN NAIR AND OTHERS —RESPONDENTS.

Malabar Law and Usage—Demise—Demise by junior member of Tarwad—*Onus of proof that demise was on behalf of* Tarwad—*Judgment of Court—Finding based on document and on statement of witness—High Court —Second appeal—Document found not to support the conclusion—Remand.*

There is no presumption that when a junior member of a Malabar *tarwad* makes a demise, he does so on behalf of the *tarwad*. The onus of proving that he acted on behalf of the *tarwad* lies on the party affirming it.

Where the finding of a Subordinate Court is based on documentary evidence as well as on the statement of a witness and the High Court, on second appeal, finds that the documentary evidence does not support the conclusion, it will not act on the assumption that the Court of fact would have come to the same conclusion apart from the document, but will remand the case for a fresh finding on the question.

Second appeal against the decree of the District Court of South Malabar in Appeal Suit No. 984 of 1909, presented against the decree of the Additional District Munsif of Calicut, in Original Suit No. 596 of of 1908.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant.

Mr. *J. L. Rosario*, for 1st and 5th Respondents.

Mr. *K. P. Govinda Menon*, for 4th Respondents.

JUDGMENT.—There are two Nair houses, Edoli and Edasseri; they are both branches of

the Manholi house. There are properties belonging to the Manholi house as well as to the Edoli and Edasseri branches. The question in contest in the suit was whether the property in dispute belonged to the Manholi house or to the Edoli branch. Defendants Nos. 1 to 4 are the demisees under a *kanom* which was made by Chennan Nair, who admittedly belonged to the Edoli branch. The plaintiff is the present senior member of that branch. It is also admitted that Chennan Nair was not at the time of the demise (Exhibit A) the *Karnavan* of the Manholi house. The contention of the defendants is that the property was demised by Chennan Nair on behalf of the Manholi house. There is no presumption when a junior member makes a demise that he does so on behalf of the *tarwad*. The onus, therefore, of proving that Chennan Nair acted on behalf of the *tarwad* is on the defendants. The learned Judge in the lower Appellate Court apparently placed the onus on the plaintiff, for he says "the plaintiff has, in my opinion, failed to prove that the property in suit belongs to the Edoli Tavazhi and that he has a right to maintain the suit." It is, no doubt, true that he records a finding that the property belongs to the Manholi house, but the judgment leaves room for doubt whether the Judge would have come to this conclusion on the evidence in the case apart from his view as to the onus. Moreover, in answer to the plaintiff's contention that from the year 1876 the property has been demised by members of the Edoli branch, the Judge observes "this can hardly be the case as the Edoli Tavazhi, it appears, only came into existence about 30 years ago." The Judge apparently makes this observation as to the time when the Edoli Tavazhi came into existence from the finding of the District Munsif's Court of Calicut in Original Suit No. 245 of 1901—Exhibit B. But it is, to say the least, doubtful whether that observation can be treated as evidence in this case, for there both branches were fighting in the same interest to defeat a creditor, who had attached certain properties as belonging to the Edasseri branch. Besides, the observation itself seems to show that the members of the Edoli and Edasseri Tavazhis dealt with each other as members of a common undivided *Tarwad* only till 1867, and that till about 1879 the outside public treated the Edoli and Edasseri Tavazhis having community of interest with each other. This seems to show that as between the members of the family themselves, the two branches did not treat each other as persons having a community of interest after 1867. At any rate, we cannot treat this observation as affording any substantial basis for the Judge's view that the Edoli Tavazhi came into existence only from 1879. Here, again, it is true that the 5th defendant states in his evidence that the *kanom* of 1876 was made by the *Karnavan* of the Manholi house, that is to say, that the Chennan Nair who made the demise was the *Karnavan* of the whole house and, therefore, not a member of the Edoli branch. But when a conclusion is based on documentary evidence as well as the statement of a witness and the documentary evidence is found not to support the conclusion, it is not safe to assume that the Court of fact would have come to the same conclusion apart from that document. The Judge has not referred to two documents which appear to be of the same importance, Exhibits G and G1, which show that a decree obtained against Chennan Nair the demisor was discharged, not by the *Karnavan* of the Manholi house but by the plaintiff, the *Karnavan* of the Edoli branch. The only material documentary evidence on the side of the defendants to support the view that the property belongs to the Manholi house is the fact that the *patta* for the plaint lands stands in the name of the 5th defendant and the plaintiff jointly. We must hold that the judgment is vitiated by the errors we have pointed out, and we must request the present District Judge to return a fresh finding on the 4th issue. If he finds that issue in the plaintiff's favour, he will also record findings on the 2nd and 3rd issues. The findings will be on the evidence on record and will be submitted within one month from the re opening of the Court after the Christmas holidays. Seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of South Malabar submitted the following

FINDINGS:—It is directed by the High Court that a finding be returned on the 4th issue in the suit, *viz.*, "Is not the plaintiff entitled to maintain the present suit as he is only an Anandiravan in the *tarwad*?"

The *jenmi* of the property in dispute, Chathanath Nambudri, demised it to Chennan Nair in 1876 and the subsequent renewal is in his name. It is not disputed that Chennan Nair was junior to the 5th defendant nor that plaintiff is the representative of Chennan Nair and head of the Edoli branch of the Manholi *tarwad* of which the 5th defendant is the *Karnavan*. If the property belongs to the Edoli branch, plaintiff admittedly has the right to sue. But the contention of the 5th defendant in the suit is that the property belongs to Manholi and that that Chennan Nair demised it on behalf of the *tarwad*. The burden of proving these contentions is upon the 5th defendant, but no documents have been produced to show that the title to the property is with the Manholi house and the only documentary evidence to support this contention is the *patta* which stands in the name of the 5th defendant and the plaintiff jointly. There is nothing to show the state of affairs with regard to the property before 1876, but it is possible that the property was once common property of the Manholi *tarwad*. It has been found (*vide* Exhibit B) that a division has occurred in the Manholi *tarwad* and that by lapse of time the commuutiy of interest, which once linked its two branches, the Edasseri and Edoli Tavazhis, has been severed. It is probable that when this separation took, place the Edoli branch took some of the *tarwad* property as its share. There is documentary evidence (*vide* Exhibits G and G1) on the side of the plaintiff to show independent dealing by the Edoli branch with property part of which was common *tarwad* property. It is unlikely that the *Karnavan* of the Manholi *tarwad*, if he had any claim to the property so dealt with, would not have been made a party to those proceedings. For the 5th defendant reliance is placed on the written statement of the present plaintiff in Original Suit No. 466 of 1901 (Exhibit I)as an admission that Chennan Nair granted the demise (Exhibit A) on his own account and that the *tarwad* was not concerned in the transaction. But it is probable that this plea was made by the plaintiff to support the 5th defendant with whom he was then colluding, and it may be noted that such pleas previously put forward by the plaintiff were unsuccessful and apparently made to defeat creditors. The plea of the 5th defendant in the present suit that the demise was taken *benami* in the name of Chennan Nair for the *Karnavan* of the Manholi *tarwad* appears to have no satisfactory evidence to support it. The prior demise, of which Exhibit A is a renewal, is dated 1876 and no evidence is forthcoming to show that any previous demise stood in the name of a *Karnavan* of the Manholi *tarwad*. On the other hand, the Edoli Tavazhi would appear to have held possession of the property in dispute since 1876. Stress was laid by the Vakil for the 5th defendant on the fact that plaintiff does not make his claim in the plaint as *Karnavan* of the Edoli tavazhi, but if there has been division, it does not matter whether the plaintiff describes himself as *Karnavan* of Manholi or Edoli, and in paras. 3 and 4 of the plaint I find that refereuce is simply made to "the *tarwad*" of the plaintiff. On consideration of all the real evidence available, my finding on this issue is that it has not been proved that the property in dispute belongs to the Manholi *tarwad* and that plaintiff is entitled to maintain the suit.

2. On the 2nd and 3rd issues, *viz* ,—

(2) to what rent is the plaintiff entitled, and

(3) who are liable for the payment of rent, findings are also required. There is no dispute as to the amount of rent, and I find on the second issue that the plaintiff is entitled to the rent claimed by him. On the third issue, the 1st defendant pleaded certain payments to Koru Nayar (5th defendant), but it has not been shown that the 1st defendant paid rent to the 5th defendant after due inquiry believing that the rent was due to him and the plaintiff cannot be held to be bound by these payments. The 2nd defendant disclaimed all responsibility for the land and the plaintiff, who abandoned his claim against him in the lower Court, has not clearly proved that he is liable for any rent. The 3rd and 4th defendants, who are subtenants under the 1st defendant, do not deny their liability. I find, therefore, on the 3rd issue that the 1st, 3rd and 4th defendants are liable for the rent due to the plaintiff.

This second appeal coming on for final hearing after the return of the finding from the lower Appellate Court upon the issues

referred by this Court for trial, the Court delivered the following

JUDGMENT:—The finding is objected to by the respondent. It is, no doubt, true, as pointed out by the learned Vakil for the respondent, that the District Judge has made a mistake in supposing that the two *tavazhis*, the Edasseri and Edoli, became completely divided and have now no community of interest. On the other hand, it is admitted that there are properties belonging in common to both branches, although there are also properties belonging separately to each branch. But it is difficult to say in the circumstances of the case that this mistake vitiates the conclusion arrived at by the Judge. Although there are some properties belonging to both branches in common, each branch does hold separate properties; and the question is whether the property in question belongs to both together or only to the Edoli branch. The documents in the defendant's favour on that point have been considered by the District Judge, namely, the *patta* which is in the names of both branches and Exhibit J; and the argument to be derived from the *patta* would be met in exactly the same manner whether there are some properties owned in common by both branches while other properties are held separately or whether the two branches are completely divided. We, therefore, accept the finding and set aside the decree of the lower Appellate Court and restore that of the District Munsif with costs here and in the lower Appellate Court.

The time for redemption is extended to three months from this date.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1104 OF 1910.

May 30, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Rattigan.

Musammat RAHMTAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

FATEH MUHAMMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Kassars *of* Tahsil *Chakwal, District Jhelum—Childless proprietor—Will in favour of sister—Collaterals of 6th degree whether can contest the alienation.*

Among *Kassars* of *tahsil* Chakwal in the Jhelum District, a childless proprietor can devise the whole of his ancestral property to his sister in the presence of his collaterals in the 6th degree.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 6th July 1910, affirming that of the District Judge, Rawalpindi, dated the 29th January 1910, decreeing plaintiff's claim.

Mr. *Nanak Chand*, for the Appellants.

Lala *Durga Das*, for Rai Bahadur Lala *Sukh Dyal*, for the Respondents.

JUDGMENT.—The parties are *Kassars* of *tahsil* Chakwal in the Jhelum district, and the question before us is whether the Will whereby one Allah Dad, a childless proprietor, devised the whole of his ancestral property to his sister, *Musammat* Rahmtan, is valid in the presence of plaintiffs who are collaterals related to the testator in the 6th degree. The Will was executed on the 24th September 1908 and the testator died some five or six months thereafter. His mother, *Musammat* Gullan, is at present in possession for her life, and consequently plaintiffs seek merely a declaratory decree.

The lower Courts are agreed that the Will is invalid in the presence of plaintiffs and have, therefore, granted them the decree for which they prayed. *Musammat* Rahmtan has preferred a further appeal to this Court and we have heard Mr. Nanak Chand on her behalf and Mr. Durga Das on behalf of respondents. As a result, we are unable to agree with the finding of the Courts below. The burden of proof was, no doubt, at the outset upon the appellant, and it was for her to show that the custom of the parties recognised the validity of alienations such as that now under discussion. But she has, in our opinion, been able to adduce evidence which has shifted the *onus probandi* from her to respondents, and the latter have failed to meet the case put up by her. In the first place, appellant relies upon the entry in the *Riwaj-i-am* of this village prepared in 1880 which runs as follows:—

"If an owner in his life-time gift a portion or the whole of his property and give possession, he can do so; but certainly no one has hitherto made a gift to his

daughter or other person in the presence of sons.

As he can make a gift, so every one can make a Will, but he rarely does so."

The last answer is significant. In 1880 the idea of alienating property by Will was probably novel, but we find it distinctly recognised, and since 1880 the practice has undoubtedly grown in favour, and the majority of the Full Bench in *Musammat Bano* v. *Fateh Khan* (1) have laid it down as an undoubted proposition of Customary law in this Province that the recognition of a power of alienation *inter vivos* justifies the conclusion that a power of alienating by Will is equally recognised.

Next, we have the *Riwaj-i-am* of 1901 as embodied in Talbot's Tribal Custom in the Jhelum District.

Question 89 at page 59, runs as follows:—

"Can a father make a gift of the whole or any specific share of his property, moveable or immoveable, ancestral or acquired, to his daughter otherwise than as her dowry, to his daughter's son, to his sister or her sons or to his son-in-law? Is his power in this respect altered if he have (1) sons (2) near kindred and no sons? If the consent of the near kindred is essential to such gifts, state the degree of kindred towards him in which the persons must stand by whom such gift can be prohibited."

This is a very complicated and embarrassing question and it may be that the people, to whom it was put, did not fully understand it with all its various parentheses and sub-parentheses. But the reply of the *Mussalman* tribes of the Chakwal *tahsil*, the Talagang *Awans* and *Khatris*, is clear and definite: "Self-acquired and moveable property may be given; but not ancestral property without the consent of the reversioners to the fourth degree."

We see no reason to doubt that this answer was given with full understanding of the general question: "Can a proprietor make a gift of his ancestral estate?" The answer is:—"No, he cannot, if there are reversioners within the 4th degree, unless he first obtains their consent." The obvious inference from this is that the proprietor's rights can be controlled only by reversioners who stand within the degree specified and not by others more distantly related.

In the third place, we have a very early decision of this Court reported as *Khodadad* v. *Bukshun* (2). In the reported judgment no reference is made to the tribe of the parties but we find from Mr. Talbot's work (Appendix II, page xxi) that they were *Kassars* of *tahsil* Chakwal. In this case a gift to a sister's son was declared valid in the presence of collaterals. Again, in 1877, one Tora, a *Kassar* of this same *Tahsil*, made a gift of his land to his sister's son, Jahana, and no objection was taken by the collaterals. Mutation was accordingly effected in favour of the donee. Then, in the recent case of *Karm Bakhsh* v. *Musammat Gulab Khatun*, which was decided by the Munsif, 1st class, Rawalpindi, on the 1st June 1909, and on appeal by the Divisional Judge, on the 6th June 1910, we find reference made in the judgment of the Munsif to a case "No. 15 of *Mauza* Sang, Jhelum District," in which in 1865 a gift in favour of a sister's son was upheld as valid, the parties being *Kassars*. The Divisional Judge, in his judgment in *Karm Bakhsh's* case, states that "several instances" were given in the oral evidence produced by defendants to establish the power of a sonless *Kassar* to alienate by Will and he adds that those instances were not controverted. In that particular case itself, a sonless *Kassar* had made a gift of his ancestral property, by Will, in favour of his sisters and the gift was upheld upon the ground that the next reversioner had assented to it. The case is thus, of course, not directly in point, but it is relevant as showing the growing desire of persons of this tribe who have no children of their own, to give their property to their sisters. On the other hand, plaintiffs have not been able to point to a single instance in which a gift to a sister has been successfully challenged by collaterals related to the donor beyond the fourth degree. Nor have they been able to show that the consent of any such distant collateral has ever been obtained to a gift of that kind.

Mr. Durga Das has referred us to certain cases from the Jhelum District in which gifts

(1) 48 P. R. 1903; 111 P. L. R. 1903.

(2) 17 P. R. 1867.

to sisters or sister's sons have been declared invalid by the custom of Muhammadan *Mair Rajputs*; *Haidar Khan* v. *Jahan Khan* (3), *Kothi Jats*, *Hayat* v. *Hidayat* (4) and *Kanial Jats*, *Bakshi* v. *Rahim Dad* (5). But we are unable to see the relevancy of these decisions to the question now before us, and in any event the instances referred to in the judgment reported as *Lachhman* v. *Bhagwan Sahai* (6) (*Kahats* of *Tahsil* Chakwal) may be set off against them.

In our opinion, appellant has been able to adduce sufficient evidence in support of the Will to throw the *onus* upon the respondents of proving that a devise to her is invalid in the presence of collaterals related in the sixth degree, and they have failed to discharge this *onus*.

We, accordingly, accept the appeal and dismiss plaintiff's suit with costs throughout.

Appeal accepted.

(3) 50 P. R. 1902; 65 P. L. R. 1902.
(4) 34 P. R. 1905; 40 P. L. R. 1905.
(5) 107 P. R. 1893.
(6) 68 P. R. 1911; 160 P. L. R. 1911; 10 Ind. Cas. 277.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 346 OF 1912.

May 18, 1912.

Present:—Mr. Justice Kensington.

KANHIYA—DEFENDANT—PETITIONER

versus

SEWA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Chamars—*Right to skins of carcases in lieu of services—Services not performed—Appointment of another person for performance of services—Jurisdiction of Civil Court—Right to sue*—Wajib-ul-arz, *how far binding on non-proprietors.*

Plaintiffs, certain *Chamars* of a village, were by custom allowed the skins of animals dying in a privately managed institution known as a *Go-Shala*, in return for services rendered. The manager of the institution found that the plaintiffs were not performing those services satisfactorily; he, accordingly, appointed the defendant, a *Chamar* of a neighbouring village, in their place.

Plaintiffs, who admittedly had performed no services for over a year, sued defendant for the value of hides of carcases removed during the period:

Held, (1) that the Civil Courts had no jurisdiction to interfere in any way with the appointment of the defendant by the manager;

(2) that if the plaintiffs had been improperly ousted from the *Go-Shala*, their remedy was to get the proprietors of the institution to bring pressure on the manager to re-instate them or to appoint a fresh manager to carry out their instructions;

(3) that the non-proprietary residents of the village were not bound by the provisions of the *Wajib-ul-arz* in respect of an institution which they managed for themselves as regards their own cattle;

(4) that the suit ought to be dismissed.

Petition, under section 115 of Act V of 1908, for revision of the order of the District Judge, Delhi District, dated the 15th November 1911, reversing that of the Munsif 1st class, at Delhi, dated the 28th August 1911, dismissing plaintiff's claim.

Rai Bahadur *Lala Sukh Dyal*, for the Petitioner.

Mr. *Raushan Lal*, for the Respondents.

JUDGMENT.—The sum of money immediately involved in this case is comparatively trifling, but the lower Appellate Court's decree has an effect much beyond the amount actually decreed to the plaintiffs, and the decision is of so extraordinary a character that I feel bound to interfere in revision on the ground that a material irregularily has been committed in respect of the attitude which Civil Courts should take upon a claim of the kind.

The plaintiffs are certain *chamars* of a village who were by custom allowed the skins of animals dying in a privately managed institution known as a *Go-Shala*, in return for services rendered. The manager of the institution found that the plaintiffs were not performing these services satisfactorily and appointed the petitioner defendant, a *Chamar* of a neighbouring village, in their place. The plaintiffs, though admittedly performing no services for over a year, claimed Rs. 100 as the value of hides on carcases removed during the period and had been given a decree by the District Judge for Rs. 30.

This appears to me an unjustifiable invasion of the private rights of the manager of the institution, besides being unfair to the petitioner, who is thereby made to pay on a random calculation a sum of money which is considerable to him, though there is no pretence that he is in any way responsible for the arrangement made by the manager. The decision is all the more remarkable because the District Judge has himself found that the Settlement Officer

rightly refused to interfere on the application originally made to him by the plaintiffs.

If the plaintiffs have been improperly ousted from the *Go-Shala*, their remedy is to get the proprietors of the institution to bring pressure on the manager to re-instate them, or to appoint a fresh manager to carry out their intentions. In the meanwhile, the manager is at liberty to administer the institution in his own way without interference by the Civil Courts. In any case, plaintiffs have no such immemorial rights that they should be paid for services which they have not performed, at the expense of the man selected to do the work. The non-proprietary residents of the village are not bound by the provisions of the *Wajb-ul-arz* in respect of an institution which they manage for themselves as regards their own cattle, and no ruling can be traced directly bearing on a case of the kind.

Holding that Civil Courts have no jurisdiction to interfere in any way, I allow the revision, set aside the decree of the lower Appellate Court and restore that of the Munsif dismissing the suit with costs to the defendant throughout.

Revision allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 42 OF 1910.

April 18, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

KRISHNAMMA NAICKEN—APPELLANT

versus

KANDASAMI GOUNDEN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 313—Execution sale—Sale in one lot of separate parcels of land—Power of Court to sever sale—Absence of saleable interest of judgment-debtor in some of the plots—Onus of proof.

Where, in an execution sale, several parcels of land are sold in one lot and it is found that the judgment-debtor has a saleable interest in one survey number, the Court cannot, for the purposes of section 313 of the Code of Civil Procedure, sever the single sale.

Sonaram Dass v. *Mohiram Dass*, 28 C. 235 referred to.

When the saleable interest of a judgment-debtor in one of the numbers thus sold is admitted, it is for the decree-holder to prove that the judgment-debtor had no saleable interest in the property sold.

Appeal against the decree of the District Court of Coimbatore, in Appeal Suit No. 114 of 1908, presented against the order of the District Munsif of Coimbatore, dated 10th June 1908, in E. P. No. 10 of 1908 in O. S. No. 495 of 1903.

Mr. *T. Subrahmaniya Aiyar*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—The lower Appellate Court has not found the facts necessary to entitle the decree-holder to re-open the execution proceedings. Section 315 of the Code of Civil Procedure requires that it should be found that the judgment-debtor had no saleable interest in the property sold at the time of the sale. There is no such finding recorded by the lower Appellate Court. The judgment-debtor did not admit that he had no saleable interest in Survey Nos. 443 and 460. He asserted the contrary in his memorandum of appeal to the lower Appellate Court. We must, therefore, ask the lower Appellate Court to submit a finding on the question whether the judgment-debtor had a saleable interest in Survey Nos. 443 and 460 on the date of the auction-sale. Fresh evidence relating to this question may be admitted. The finding should be submitted within two months after the re-opening of the Court after the recess. Seven days will be allowed for filing objections.

In compliance with the above judgment, the District Judge of Coimbatore submitted the following

FINDING.—1. I am required to submit a finding on the issue "whether the judgment-debtor had a saleable interest in Survey Nos. 443 and 460 on the date of the auction-sale?"

2. The petitioners (plaintiffs) in the original execution petition, Execution Petition No. 104 of 1903 examined the *Kurnam* of the village who clearly proves that the judgment-debtors, (counter-petitioners) had no enjoyment or interest in Survey No. 443 as far as he knows and that his experience as *Kurnam* of the village extends over a period of 14 years past. The counter-petitioners have adduced no rebutting evidence.

3. As regards Survey No. 460, the *Kurnam* proves that the first counter-petitioner in Execution Petition No. 104 of 1908, Ran-

gasawmy Naicken, who is the father of the 2nd and 3rd counter-petitioners, has been in enjoyment of only one-fourth of this Survey Number since the date of the partition deed Exhibit A, dated 24th June 1889 and that his one-fourth share was situated in the north west corner of Survey No. 460. His evidence also shows that none of the counter-petitioners ever enjoyed any other portion of Survey No. 460 except the north west corner. It is contended by the petitioners' Vakil that the land mortgaged in Survey No. 460 is specifically described as 6·71 acres on the eastern side of Survey No. 460 that it was this land which he purchased in execution of his decree and that as it has been now proved by the *Kurnam's* evidence (which is not rebutted by any evidence adduced by the counter-petitioners, that none of the counter-petitioners ever had any interest in the eastern portion of Survey No. 460, he is entitled to a finding with regard to this field also on the issue now remanded.

4. Having regard to the wording of the issue, however, all that I am now required to find is whether the judgment-debtors had a saleable interest in Survey No. 460 and evidence adduced by the petitioners clearly shows that they had a saleable interest in the north west corner of the field consisting of a one-fourth share of the entire area. The evidence of petitioners' 2nd witness, a nephew of the 1st counter-petitioner, also shows that the one-fourth share of the 1st counter-petitioner was sold in execution of another decree subsequent to the sale in execution of the petitioners' decree. There can be no doubt, therefore, that the judgment-debtors did have a saleable interest in Survey No. 460 to the extent of a one-fourth share of the entire field on the date of the auction-sale now under consideration.

5. I would also remark that the description of the counter-petitioners' share in the mortgage-deed, Exhibit D, as consisting of 6·71 acres situated on the eastern side of Survey No. 460 appears to be only an inaccurate description and does not vitiate the mortgage as creating a lien on such property as counter-petitioners possessed in any portion of Survey No. 460. The decree, therefore, and the sale in execution of the decree must, in my opinion, be held to refer to any saleable interest which the counter-petitioners possessed in any part of Survey No. 460.

6. In the result, my finding on the issue remanded with regard to Survery No. 460 is in the affirmative and with regard to Survey No. 443 in the negative.

This Civil Miscellaneous Second Appeal coming on this day for final hearing after the receipt of the finding from the lower Appellate Court, the Court delivered the following

JUDGMENT.—It is unnecessary to consider whether, on the result of the present finding of the District Court, the judgment-debtor could be held to have had any interest in Survey No. 460 at the time of the sale. The defendants' right in three Survey Nos. 443, 476 and 460 was sold for a single price in one lot. It is admitted that he had a saleable interest in Survey No. 476. The decree-holder has not, therefore, proved that the judgment-debtor had no saleable interest in the property sold. See *Sonaram Dass* v. *Mohiram Dass* (1). The Court cannot, for the purposes of section 313 of the Code of Civil Procedure, sever a single sale. The orders of the lower Courts are reversed and Execution Petition No. 104 of 1903 on the file of the Munsif's Court dismissed but without costs throughout.

Appeal allowed.

(1) 28 C. 235.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 421 AND 461 OF 1909.

May 9, 1912.

Present:—Mr. Justice Brett and Mr. Justice Sharfuddin.

C. E. GREY, OFFICIAL TRUSTEE AND EXECUTOR TO THE ESTATE OF MANIK LAL SEAL, DECEASED—FIRST PARTY—APPELLANT IN R. A. NO. 421 AND RESPONDENT IN R. A. NO. 461

versus

RAM SHASHI ROY AND OTHERS—SECOND PARTY—AND GURUDAS KUNDU CHOWDHURY AND OTHERS—THIRD PARTY—RESPONDENTS IN R. A. NO. 421 AND APPELLANTS IN R. A. NO. 461.

Presumption—Permanent tenure, heritable and non-enhanceable—Tenancy created 50 years ago—Residential purposes—Improvements permanent—Rent unchanged—Transfers by sale—Inheritance—No attempt to eject—Recognition of transferees as tenants.

GREY v. RAM SHASHI ROY.

A tenancy was created some years before 1861. It was granted for residential purposes and since that time the land had been enclosed and improved by the tenant to form the grounds or compound of a residential building. Expenses had been incurred by the tenant on permanent improvements to the land so as to make it fit for residential purposes. The rent during all these years remained the same, though the land had of late years increased very considerably in value. The land was transferred by sale and passed by inheritance on several occasions without any objection raised by the landlords. On the contrary, they recognised the transferees as tenants receiving rents from them, and no attempt was made to eject the tenants:

Held, that all these facts justified the conclusion that the tenancy was a permanent, transferable and heritable tenancy at a fixed rental.

The mere retention of the name of the old tenant for the purpose of identifyiug the holding in the *Sherista* of the landlord is not in itself sufficient to indicate that there was no recognition by the landlord that the tenancy was heritable and transferable.

Upendra Krishna Mandal v. *Ismail Khan Mahomed*, 22 C. 41; 8 C. W. N. 889; 31 I. A. 144; *Nilratan Mandal* v. *Ismail Khan Mahomed*, 32 C. 51; 8 C. W. N. 895; 31 I. A. 149; and *Nabakumari Debi* v. *Behari Lal Sen*, 34 C. 902; 2 M. L. T. 433; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570, 9 Bom. L. R. 846; 17 M. L. J. 397; 34 I. A. 160, relied upon.

Appeals frcm the decree of the District Judge of Hooghly, dated August 4th, 1909.

Mr. *B. Chuckerbutty*, Counsel, and Babus *Shoroshi Charan Mitra* and *Hari Charan Ganguly*, for the Appellant in R. A. No. 421 and Respondent in R. A. No. 461.

Mr. *S. P. Sinha*, Counsel, and Babus *Baidyanath Dutt*, *Man Mohun Dutt* and *Romesh Chandra Sen*, for the Respondents in R. A. No. 421 and Appellants in R. A. No. 461.

JUDGMENT.—The two appeals, Nos. 421 and 461 of 1909, are directed against the judgment and decree of the District Judge of Hooghly in a reference made to him by the Land Acquisition Collector under section 30 of the Land Acquisition Act.

It appears that Government proposed to acquire three plots of land in Ram Kristapur, Pergunnah Boro, in Howrah for the purpose of building a District Jail, Police lines and official residence. The lands were in what was described as Seal's Bagan and consisted of (1) Premises No. 36, Seal's Garden, Ram Kristapur, Howrah, and included a residence and compound covering an area of 21 *bighas*;

(2) Premises No. 35 Seal's Garden Lane, Ram Kristapur, Howrah, being 7 *bighas* of land including a residence and compound, and (3) a parcel of Bastee land 15 *bighas* in area.

The total of the three plots covered 43 *bighas*. An agreement was entered into on the 2nd October 1905 between Manik Lal Seal and the Collector of Howrah as representing Government by which Manik Lal Seal agreed to accept Rs. 3,70,660 as the price of the land to be acquired half of which, Rs. 1,85,330, was to be paid at once and the rest on conclusion of the land acquisition proceedings. It was further agreed that any amount which the Land Acquisition Deputy Collector would eventually have to pay to persons other than Manik Lal Seal would be deducted from the second half.

For the purposes of acquisition, the three plots were afterwards divided up into smaller plots, and the 10th plot, which is the only one we have to deal with in this appeal, was divided into two parts, one of seven *bighas* including the residence and the other of 14 *bighas*, 11 *cottas*, 3 *chattaks* including the garden or compound. This second plot of 14 *bighas*, 11 *cottas*, 3 *chattaks* is the subject of the reference out of which the appeal before us arises.

The total amount of compensation awarded by the Collector for this area of land was Rs. 77,491-6-6 and the correctness of this award is not disputed.

There were three sets of claimants for apportionment of the compensation.

(1) Manik Lal Seal who claimed to be a permanent tenure-holder of the land.

(2) Ram Shoshi Roy and others, described as the Roys, who claimed to be 8-anna landlords, and (3) Gurudass Kundu Chowdhury and others, described as the Kundus, who claimed to be the landlords of the remaining 8-annas.

The Collector apportioned the compensation among the 3 sets of claimants by giving to each of the sets of landlords a half share of 20 years' purchase of the rental amounting to Rs. 255-5 each or both together to Rs. 510-10 and the balance of Rs. 76,980-12-6 to Manik Lal Seal as his share as being a permanent tenure-holder on the land.

The landlords put in a petition of objection in which they claimed to be entitled to the whole of the compensation and alleged that Manik Lal Seal, being a mere tenant at-will, was entitled to nothing. The reference was accordingly made to the Civil Court on the 16th August 1906, and on the 7th September 1906, after the reference had been received by the Civil Court, the claimant

Manik Lal Seal put in a petition alleging that the whole of the land acquired was his *lakheraj* land and that, therefore, he was entitled to the whole of the compensation.

The case was afterwards taken up by the District Judge. Evidence, oral and documentary, was adduced by both parties and judgment was delivered on the 4th August 1909. The claimant Manik Lal Seal died during the trial of the case before the Judge and was represented by the Official Assignee who had been appointed executor to his estate.

The Judge in disposing of the reference held that the Official Assignee on behalf of Manik Lal Seal was not entitled to raise the question that the land was *lakheraj* as the ground had not been taken before the Collector and no objection had been raised by Manik Lal Seal to the apportionment of the capitalised value of the rent to the two sets of proprietors. In support of that view, he relied on the case of *Abu Bakir* v. *Peary Mohan Mukerjee* (1) and the case of *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury* (2).

He then proceeded to deal with the main dispute between the claimants, that is to say, whether Manik Lal Seal and his heirs were tenants-at-will on the land as the landlords alleged or permanent tenure-holders as was alleged on behalf of Manik Lal Seal. He found that Manik Lal Seal had a permanent right as a tenant on the land, but that it was not proved that the rent of the land was fixed in perpetuity. Accordingly, he modified the award of the Collector by allowing to Manik Lal Seal's estate two-thirds of the balance of the compensation after deducting the shares awarded to the landlords which $\frac{2}{3}$rd share amounted to Rs. 51,660-15 and by allowing to each of the sets of landlords Rs. 12,915-3-9 or half of the $\frac{1}{3}$rd share, of the balance which amounted to Rs. 25,830-5-6.

Against the judgment and decree of the Judge, both parties have appealed: the Official Assignee on behalf of Manik Lal Seal's estate in Appeal No. 421 of 1909 and the landlords in Appeal No. 461 of 1909. The appeals have been heard together and will be governed by this judgment.

(1) 34 C. 451.
(2) 12 C. W. N. 98.

In support of Appeal No. 421, the learned Counsel frankly admitted that he was not prepared to question the correctness of the view taken by the lower Court that, after his client had consented to the payment of the capitalized value of the rent to the landlords out of the compensation money, it was not open to him to seek in the present case to press his claim to the compensation on the basis that the land acquired was included in the *lakheraj* land which he held in Ram Kristapur but he suggests that he might be allowed to rely on the contention that the land was a part of the *lakheraj* land in order to support the case which he set up in the lower Court that he held the position of a permanent tenant on the land. In support of the case that the land acquired was really a portion of his client's original *lakheraj* land, the learned Counsel wished to rely on the map prepared for the purposes of the suit (No. 16 of 1861), under Regulation II of 1819, which was finally disposed of on appeal by the High Court. In that map, the land was divided into three plots and the learned Counsel, relying on that map and the area of the land stated to be in dispute in that case and the map prepared for the purposes of his client in this case and the report of the Engineer who prepared the map, argued that as the area given of plot No. 3 in the map (*i.e.*, map No. 2) prepared in 1861 corresponded with the area found to have been included in plot C of the map (*i.e.*, map No. 1) prepared for the purposes of the present case and as the map prepared for the purpose of the present case covered the lands in suit, therefore, it must be concluded that the lands in the present suit which were acquired by the Collector were also included in Suit No. 16 of 1861. The map prepared in 1861 on which the learned Counsel relies was not prepared to scale and the note given in the map with regard to an elliptical portion of the land on the south and adjoining the Garden Road does not appear to support the contention that that portion of land was included in that case. The areas and the boundaries of the lands are also not sufficiently ascertained and determined so as to render it safe on a comparison between the two maps to arrive at a distinct conclusion that the lands in suit in the present case are really the lands covered by the case in 1861

Furthermore, we do not think that it is possible for us in the present case to support the claim set up by the Official Assignee on behalf of Manik Lal Seal's estate to the compensation awarded on the basis that Manik Lal Seal's estate had a permanent tenany in the lands acquired, or the basis of a finding that the lands were, in fact, held by the predecessors of Manik Lal Seal as *lakheraj* lands and not as included in a permanent tenancy. We think, therefore, that in the present case, the claims advanced on behalf of Manik Lal Seal's estate by the Official Assignee must succeed or fall on proof that Manik Lal Seal and his predecessors had a permanent tenancy in the lands acquired.

Proceeding then on the basis that the lands acquired formed a part of *Tawzi* No. 3994, that is to say, *chur* Ram Kristapur and not *mauza* Ramkrisnapur, the evidence adduced establishes that the lands were permanently settled by Government in the year 1846. The lands were then described as in the possession of Krisna Sundari Dasi as tenant who was the wife of Srinath Mullik. These lands in 1861 appear to have passed into the hands of Hara Chandra Lahiri from whom they eventually passed to the family of the Seals and to the predecessors-in-interests of Manik Lal seal. The case now put forward on behalf of Manik Lal Seal's estate is that, at the time when the tenancy was first created or before it passed into the hands of the Seals, it was a permanent tenancy at a rental of Rs. 125 for 25 *bighas* of land. It appears that in 1861, these lands had passed into the possession of Hira Lal Seal and others as purchasers of the tenant's right and that, at that time, these lands with others to the south of them had been included in what is described as the Seal's garden and had been encircled by a balustrade reaching up to the Government Road. At that time, there was a building which appears to be the same as the residential building which was included in plot No. 1 previously referred to, consisting of 21 *bighas* and described as 36 Seal's garden, and the 17 *bighas* which form the subject of the present reference appear to have formed the compound of that residence. The evidence adduced shows that that condition of affairs continued from 1861 down to the time of the present acquisition. Evidence was adduced on behalf of the landlords claimants to prove that this land was low-lying land, that it was subject to inundation from the river, and that it could not have been included in any permanent tenure. It seems, however, that the inundation was considerably exaggerated, that between the lands acquired and the river there has been for years one, if not two, Government Roads with native *bastis*, that is to say, lands covered with native huts on the land between and that the 17 *bighas* appear to have had the advantages and amenities of most of the lands in the compounds of houses in that locality. The rent receipts which have been filed and the evidence adduced also go to support the conclusion that from 1861 at least, if not from earlier times, the rent of the land has been practically unchanged. The only change which has been suggested by the learned Counsel as having taken place is that the odd rent which was fixed in Sicca rupees was afterwards reduced to Government rupees. We think that that change is not sufficient to indicate that there was any real variation in the rent from the time when the tenancy was created.

The learned Judge in arriving at the conclusion that the appellant had a permanent tenure in the lands acquired relied on the following facts:—

(1). Uninterrupted possession, probably exceeding 50 years.

(2). Substantial and costly improvements on the lands effected by the tenant.

(3). Recognition by the superior landlords of the tenancy as transferable and hereditary and

(4). The absence of any attempt on the part of the superior landlords to eject the tenant during this long period of years.

The learned Counsel who appears for the respondents in this appeal does not dispute that in this case there has been uninterrupted possession for 50 years but he argues that the appellant has failed to prove that he has effected any substantial or costly improvements on the land. He suggests that the only building which the Land Acquisition Deputy Collector found on the land was the balustrade enclosing the land and this cannot be regarded as a

substantial or costly improvement. He also argues that because in the receipts the tenure throughout is described as the tenancy in the name of Hara Chandra Lahiri and the Seals, the predecessors-in-interest of Manik Lal Seal, having been termed and described as *sarbarakars*, it shows that there was, in fact, no recognition by the superior landlords that the tenancy was hereditary or transferable: and, to oppose the argument that there has been no attempt on the part of the superior landlords to eject the tenant, the learned Counsel relies on the notice of ejectment dated 20th *Aswin* 1310 corresponding to October 1904 as indicating that landlords did not accept the position that the tenant could not be ejected. We have considered these arguments and we do not think that they sufficiently meet the case on which the learned Judge has based his conclusion. The land at the time when the tenancy was created appears to have been newly formed *chur* land and, in course of years, this has been converted into the compouud of a residential dwelling-house. This improvement could not have been effected without raising and levelling the soil of the land and there can be in this case no doubt that, whether or not costly buildings were constructed on the land itself, the land was taken for the purpose of forming a compound for such a building and for adding to the amenities of such a building and increasing its attractions and its value. The railing enclosing the land may not have been very costly but it clearly indicates that the person who had taken the tenancy was under the belief that this tenancy was something considerably higher than that of a mere tenant-at-will; and in fact, we think that the inclusion of the land within the walls for the purpose of forming a compound for the house goes a long way to indicate that the tenancy, as created at first, was intended to be permanent. The mere introduction of the words "*sarbarakar*" in the receipts is not, in our opinion, sufficient to indicate that there was no recognition by the superior landlords that the land was saleable and heritable. In fact, the land appears to have passed by the sale from the Mulliks to Hara Chandra Lahiri and from Hara Chandra Lahiri to the Seals and after coming into the possession of the Seals, it appears to have descended by inheritance to Manik Lal Seal. The landlords, for reasons best known to themselves, appear to have retained the name of Hara Chandra Lahiri as the tenant for a period long beyond the possible term of his natural life and, in the circumstances, we are unable to say that the landlords did not recognize the transfers of the land by sale and inheritance. The notice of ejectment appears to us to prove very little. It was served in 1904 when there can be no doubt that rumours of the acquisition were afloat and, for the reason that for the previous period of 60 years, there had been no attempt to eject the tenant, we are unable to regard it as of any value as indicating that, when the tenancy was created, it was intended to be a tenancy-at-will from which the tenant could be ejected at the wish of the landlords.

In support of Appeal No. 461 of 1909, which is preferred on behalf of the landlords, the same arguments have been used as those advanced to oppose Appeal No. 421. Further, in support of the contention that the interest which the estate of Manik Lal Seal had in the land acquired was merely that of a tenant-at-will, reliance is placed on receipts of rent Exhibit A, dated 30th *Chaitra* 1310 (April 1904) and Exhibit A1, dated 30th *Chaitra* 1312 (13th April 1906), both of which were signed by persons who on the dates mentioned were the cashiers of the Moti Lal Seal's estate. In the latter, the tenure is described as "*Bastu ticca*, and *Gar-mauroshi*", while in the former there is a note to the effect; "There is no mention of tenant's interest in the *dakhila*." Reliance is also placed on the plaint in a Rent Suit No. 224 of 1897, dated 10th April 1897 brought by Bishumbhar Dutt Roy against Gopal Lal Seal and others as '*sarbarakars*' in possession of the lands and tenures of the late Hara Chandra Lahiri, and in which the rent is described as "*Ticca* rent" which was decreed on the 22nd July 1897, also on a similar plaint in Rent Suit No. 244 of 1904, dated 13th April 1909, brought by Ram Sashi Roy and another, plaintiffs, in which the defendants are Manik Lal Seal and others and are described as *sarbarakars* and also as *ticca* tenants of *bastu* land which was decreed and on the extracts from

the general Registers of suit and of execution of decrees showing that these decrees were duly executed.

The entry "*Bastu ticca Gar-mauroshi*" in the receipts Exhibit A and the entry "*ticca*" in the copy of the plaint in Suit No. 244 of 1897, appear from the documents themselves, which have been laid before us by the Counsel for the respondent (the Manik Lal Seal's estate) not to be free from suspicion and certainly look like interpolations. The learned Counsel for the landlords appellants points, however, to a similar entry describing the rent as *ticca* rent in another plaint filed by the landlords in 1899.

We are not prepared to attach much importance to the entries in these documents, some of which are not free from suspicion. In themselves, they certainly fail to establish that the tenancy of Manik Lal Seal and his predecessors was only that of a tenant-at-will.

Reference on behalf of the appellants in this appeal is also made to the Settlement proceedings in 1846 Exhibit T (1), in which it is noted that nobody makes any claim of *Mauroshi* right, also to the deed of sale of the property executed by Bishambhar Datt Roy on the 18th August 1897 in favour of Ram Moy Roy, in which two encumbrances on the property in favour of persons other than the Seals were specifically mentioned and it was stated that no other permanent rights in any lands in the property had been given to any tenants.

These documents also do not appear to us to be entitled to much weight as proving that the rights of the Seals in the lands acquired were merely those of tenants-at-will. At the time of the Settlement in 1846, the land was all *chur* land and the tenure which finally passed by purchase to the Seals was evidently created later. The recital in the deed of sale of one of the predecessors-in-title of the landlord appellants is also not of much value as against the tenant respondent.

The evidence adduced on both sides, in our opinion, supports the conclusion that the tenancy or tenure was created some years before 1861, that at the time it was created it was granted for residential purposes and that since that time the land has been enclosed and improved to form the grounds or compound of a residential building, that expenses have been incurred on permanent improvements to the land so as to make it fit for the purpose for which it was purchased, and that it has from before 1861 been enclosed in a tract of land described as the Seal's garden. The rent during all these years has remained the same, though the land has of late years increased very considerably in value. The land has been transferred by sale and has passed by inheritance on several occasions without any objection raised by the landlords, and on the contrary, the landlords have recognized the transferees as tenants by receiving rents from them. The mere retention of the name of the old tenant for the purpose of identifying the holding in the *Sheristá* of the landlord is not in itself sufficient to indicate that there was no recognition by the landlords that the tenancy was heritable and transferable. And no attempt was made from 1861, and before that date to eject the tenants or to serve any notice of ejectment till 1904, when it must have been generally known that Government was about to acquire the land for public purposes.

All these facts are sufficient, in accordance with the principles laid down by their Lordships of the Privy Council in the cases of *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (3); *Nilratan Mandal* v. *Ismail Khan Mahomed* (4) and *Nabakumari Debi* v. *Behari Lal Sen* (5), to justify the conclusion that the tenancy set up by the Official Assignee on behalf of the estate of Manik Lal Seal was a *maurasi mokarrari* tenancy, that is to say, a permanent, transferable and heritable tenancy at a fixed rental.

That being so, we must follow the principle laid down by their Lordships of the Privy Council in the cases which we have mentioned and hold that the landlords are only entitled to the capitalised value of the rental out of the compensation and that the balance of the compensation must be awarded to the permanent tenant or tenure-holder.

The result is that we decree the Appeal No. 421 of 1909 with costs and dismiss Appeal No. 461 of 1909 with costs. The judgment and decree of the lower Court is modified and the award made by the Collector appropriating the compensation between the

(3) 32 C. 41; 8 C. W. N. 889; 31 I. A. 144.
(4) 32 C. 51; 8 C. W. N. 895; 31 I. A. 149.
(5) 34 C. 902; 2 M. L. T. 433; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 34 I. A. 160.

claimants is restored, that is to say:—Each set of 8-annas landlords, *viz.*, the Roys and the Kundus will receive out of the compensation the sum of Rs. 255-5 being a half of the capitalized value of the rental and the balance of the compensation will be paid over to the Official Assignee as Receiver of the estate of Manik Lal Seal.

The Official Assignee as Receiver for the estate of Manik Lal Seal will also recover the costs incurred by him in the lower Court from the landlords claimants, each set of landlords paying half of the costs.

Appeal No. 421 *of* 1909 *allowed.*
Appeal No. 461 *of* 1909 *dismissed.*

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL NO. 805 OF 1910.
May 21, 1912.
Present:—Mr. Justice Shah Din and
Mr. Justice Scott-Smith.
ABDUL SALAM—DEFENDANT—APPELLANT
versus
HAMID ULLAH—PLAINTIFF—
RESPONDENT.

Trade-mark — Infringement—Limitation (Act IX of 1908), s. 23—Continuing wrong—Registration of mark —Right to sue—Cause of action—Actual deception not necessary—Imitation of mark when an infringement of trade-mark—Third person allowed to use a similar mark—Damages—Actual damage not necessary to be proved.

The infringement of a trade-mark is a continuing wrong and so long as the infringement continues, a fresh cause of action arises *de die in diem.*

In India, a plaintiff can maintain a suit for infringement of trade-mark even if he has not proved registration of his trade-mark.

In a suit for infringement of trade-mark, it is not necessary to prove that any one has been actually deceived.

It is sufficient if it is proved that the defendant contemplates committing or has threatened to commit an infringement.

The question is not whether a purchaser has been deceived but whether he is *likely* to be deceived.

Nemi Chand v. *C. W. Wallace*, 34 C. 495 at p. 408; 11 C. W. N. 537; *T. Barlow* v. *Gobind Ram*, 24 C. 364; 1 C. W. N. 281, relied upon.

Muhammad Ishaq v. *Alif Khan*, 55 P. R. 1902; 98 P. L. R. 1902, distinguished.

In deciding whether there has been an infringement of plaintiff's trade-mark, the Court has to see whether the device used by the defendant is such a colourable imitation of the plaintiffs' mark as would be calculated to deceive the *ultimate* purchaser. The question is not what would be the effect on brokers or large dealers but whether the mark is calculated to deceive incautious, ignorant or unwary purchasers.

Nemi Chand v. *C. W. Wallace*, 34 C. 495 at p. 408; 11 C. W. N. 537; *Badische Aniline and Soda Fabrik* v. *Maneckji Shapurji Katrak*, 7 B. 584, followed.

If as the result of an arbitration, another trader has been allowed to use a trade-mark more closely resembling plaintiff's mark than that of defendant, that is no reason why the defendant should not be restrained from using other marks calculated to deceive the public.

For damages to be recovered for infringement of trade-mark, it is not necessary that special damage should be proved.

It is sufficient to show that plaintiff's right has been invaded, in which case, some damages, even if only nominal, will be given.

Second appeal from the order of the Divisional Judge, Delhi Division, dated 25th June 1910, reversing that of the District Judge, Delhi, dated 29th March 1910, dismissing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Mr. *Shah Nawaz* and Lala *Sarda Ram*, for the Respondent.

JUDGMENT.—This judgment disposes of Appeals Nos. 805 and 806, and the Cross-Appeals Nos. 1147 and 1146.

Hamidullah is the plaintiff in both the cases; Abdul Salam is the defendant in one case and Muhammad Ishaq and another are defendants in the other.

The cases relate to alleged infringement of plaintiff's trade-mark, namely, a pair of scissors, under which he sells balls of thread in the Delhi market. Defendants also sell thread in similar balls and packed in similarly got up paper bags to those of the plaintiff.

The description of the bags, etc., is given in the judgments of the first Court at page 3 of the paper-books in Appeals Nos. 805 and 806. The plaintiff's trade mark is, as already stated, a pair of scissors, the blades of which are partly open. Abdul Salam, appellant in Appeal No. 805, has two marks, first, two staples with rings at one end placed crosswise at about the same angle as that at the opening of the scissor blades; second, two crossed rods, also with rings at one end, one of the 2 rods having its other end threaded like a screw, that of the other being plain.

The mark of the appellants in Appeal No. 806 is 2 crossed spoons, the handles of the spoons being shaped like knife blades and the bowls being unshaded.

The first Court dismissed the suits holding that though the defendants' marks bore a

general resemblance to the scissors' mark of plaintiff, the resemblance was too slight to deceive any one and there had, therefore, been no infringement of plaintiff's trade-mark.

The lower Appellate Court, on the other hand, held that the marks of defendants were distinctly calculated to deceive the public and to induce ordinary customers to believe that they were purchasing a make which was sold under another and older mark.

It, therefore, gave plaintiff the injunctions prayed for and costs, but did not allow any damages, holding that actual damage was not proved. From these decrees the defendants have appealed, and there are cross-appeals by the plaintiff praying for Rs. 900 on account of damages in each case. Appeals Nos. 807 and 1149 which were heard along with these ones are cross-appeals in another trade-mark case in which the parties are different, though many of the facts are the same. They are disposed of by a separate judgment of to-day's date.

Mr. Shadi Lal began his argument for appellants in Appeal No. 806 by urging the two points disposed of by the Divisional Judge in the 2nd para. of his judgment (page 7 of the paper-book in Appeal No. 805). The plea of limitation was not seriously urged after we had called Counsel's attention to section 23 of the Limitation Act which deals with the case of *a continuing wrong independent of contract.*

We have no doubt that the infringement of a trade-mark is such a case, and that a fresh cause of action arises *de die in diem* so long as the infringement continues; see Sanjiva Row's Limitation Act, cases cited under section 23, pages 218 to 220. As regards the other plea that Karm Ilahi the original owner of the scissors' mark signed as an attesting witness the sale-deed whereby the original owner of the "crossed spoons" mark transferred it to others, we are in agreement with the Divisional Judge. *Prima facie*, the deed shows that a *single spoon* mark was sold, and not a *crossed spoons* mark.

Mr. Shadi Lal also argued that plaintiff could not maintain the suit as he had not proved registration of his trade-mark. This is the law in England since July 1st, 1876, see Kerly on Trade-marks, page 7, 3rd Edition, but it is not the law in this country.

The next point urged by Mr. Shadi Lal was that there was no proof that any one had been deceived. It is, however, not necessary that such proof should be forthcoming. Kerly at page 442 of his work says:—"The grant of an injunction in Trade-mark cases is governed by the general rules governing it where other rights are concerned. There must be some threat or probability that the infringement will be commenced, continued or repeated, or the Court will not interfere; but if an actual infringement is shown to have occurred. that is usually sufficient". Further on he says: "It is not even necessary that any actual infringement should have taken place if it is proved that the defendant contemplates committing or has threatened to commit one". This principle was followed in *Nemi Chand* v. *C. W. Wallace* (1); at page 508 the following passage occurs: "There is no evidence in this case that any body has been deceived, but the question is not whether a purchaser has been deceived, but whether he is likely to be deceived."

Mr. Shadi Lal referred us to *T. Barlow* v. *Gobindram* (2) and *Muhammad Ishaq* v. *Alaf Khan* (3). In the former, it was laid down that "it is only when the use of the name or number (in dispute) deceives, or is reasonably likely to deceive the public that it can be interfered with or prevented. There must be a reasonable probability of purchasers being deceived." There is nothing in this opposed to the passages quoted by us from *Nemi Chand* v. *C. W. Wallace* (1).

In *Muhammad Ishaq* v. *Alaf Khan* (3), it was held that the colour and size of a label could not be regarded as a constituent part of a Trade-mark. This is not in point here for though the colour and size of defendants' labels are practically identical with those of the plaintiff, that is not what he objects to; he objects to the similarity of the device.

This brings us to the real point at issue, namely, whether the marks used by the defendants so resemble plaintiff's scissors' mark that there is a reasonable probability of the ordinary purchaser being deceived.

In this connection the remarks in Sebastian on Trade-marks at pages 144 and 145 of the 3rd Edition should be borne in mind.

(1) 34 C. 495; 11 C. W. N. 537.
(2) 24 C. 364; 1 C. W. N. 281.
(3) 55 P. R. 1902; 98 P. L. R. 1902.

He says: "it would be a mistake to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblances of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of *any mark which will cause his goods to bear the same name in the market*, may be as much a violation of the right of that rival as the actual copy of his device.

The natural consequence of marking goods so as to cause them to bear the same name in the market as those of a well known firm is to deceive the ultimate purchaser, and such deception will be restrained, even though the original purchaser is not deceived".

Adopting these principles, we have to see not whether the retail dealer who purchases from defendants will be deceived, but whether the ultimate purchaser will be.

In *Badische Aniline and Soda Fabrik* v. *Moneckji Shapurji* (4), this principle was followed. Sargent, C. J. said:—"The question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the *Mofussal*".

In *Nemi Chand* v. *C. W. Wallace* (1), it was held that the Court had to consider whether the mark was calculated to deceive incautious, ignorant or unwary up-country purchasers. See also in this connection the *dictum* of James, L. J. in *Singer Manufacturing Company* v. *Loog* (5), quoted on page 1, Kerly on Trade-marks, 3rd Edition. We have now to decide the main question in these two cases which is as already stated whether the devices used by the defendants are such colourable imitations of the plaintiff's mark that they must be held calculated to deceive the ultimate purchaser. Upon this question, after a careful comparison of the devices in question with that of the plaintiff, we have no hesitation in agreeing with the decision of the Divisional Judge, which is set out in the 2nd paragraph at page 8 of the paper-book in Appeal No. 805.

The crossed-spoons device, even on the green labels affixed to the larger packages, is to a casual observer like a pair of scissors. The spoons are not like any spoons which we have ever seen; the bowls are left unshaded so as to look like the handles of a pair of scissors, and the handles are like the blades of a pair of scissors or like knives. There can be no reasonable doubt that the intention of the defendants-appellants in Appeal No. 806 was to have the mark resembling plaintiff's scissors' mark and so to deceive intending purchasers. The crossed staples and rods used by Abdul Salam do not on the large scale bear so much resemblance to plaintiff's Trade-mark but as pointed out by the learned Divisional Judge when the scale is reduced, as in the case of the small circular red tickets placed on each ball of thread—and it must be remembered that these are what are sold to the ultimate purchaser—, the resemblance is very striking, and there is a strong probability that the ignorant or unwary customer would be deceived; wanting to buy scissors or "*khainchee*" mark thread, he would generally be quite satisfied when shown the defendant's devices on the small balls and would think he was getting the well-known make of the plaintiff. The argument put forward by the first Court in its judgment (page 5 last para. of paper-book in Appeal No. 805) has not been urged before us and we do not consider it to have any force. Even if as the result of arbitration, another trader has been allowed to use a Trade-mark more closely resembling the "scissors" mark than those of the defendants, that is no reason why the latter should not be restrained from using other marks calculated to deceive the public.

We, therefore, after considering all the facts of these cases and consulting the authorities, agree with the lower Appellate Court that defendant's marks are infringements of plaintiff's Trade-mark, and that plaintiff is entitled to injunctions.

(4) 17 B. 584.

(5) (1882) 8 A. C. 15; 52 L. J. Ch. 481; 48 L. T. 3; 31 W. R. 325.

VELUSAMI TEVAR *v.* AROKYA UDAYAN.

With regard to plaintiff's appeals, we find there is no sufficient proof of special damage, but for damages to be recovered it is not necessary that special damage should be proved; it is sufficient to show that plaintiff's right has been invaded, in which case some damages, even if only nominal, will be given. See the Law of Trade Marks by Sebastian, page 256, 3rd Edition and Kerly on Trade Marks, page 452.

Karam Elahi v. *Abdul Aziz* (6) was also one of infringement of this "Scissors" mark and was brought by plaintiff's predecessor. In that this Court did not award any damages, but the case was rather different.

In the present cases, having regard to all the circumstances, we think plaintiff is entitled to some damages and have decided to allow him Rs. 100 in each.

The defendant's appeals are dismissed with costs.

The appeals of the plaintiff are accepted so far that he will be given a decree for Rs. 100 in each case in addition to the injunction; he will also get Court-fees and Pleader's fees in all Courts in proportion to the decrees and all his other costs.

(6) 116 P.W.R. 1909; 127 P. L. R. 1909; 4 Ind. Cas. 963.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 675 AND 676 TO 700 OF 1908.

April 1, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

VELUSAMI TEVAR AND OTHERS—APPELLANTS

versus

AROKYA UDAYAN AND OTHERS—RESPONDENTS.

Landlord and Tenant—Grant of permanent occupancy-rights to community - Express or implied surrender of the right—Burden of proof—Sub-division of lands by grantees—Variation in extent—Presumption.

Where permanent occupancy-rights have been granted to certain individuals for the benefit of a community to which they belong, the *onus* of proving an express or implied surrender of such rights lies on the party affirming it.

The sub-division of the lands and even the surrender of a portion thereof by the grantees will not be inconsistent with the latter continuing to hold the lands in their occupation on the terms of the original grant, *i.e.*, by right of permanent occupancy, although community of interest may have ceased as between themselves.

If the same lands had been held by different persons in different years, this would be *prima facie* evidence of the tenure being inconsistent with the continuance of the rights under the original grant.

Material variation in the extent of the lands held in each year might lead to the same inference, though it might also be explicable on the ground that the *pattas* for each year were only for the extent cultivated during the year.

Second appeals against the decrees of the District Court of Madura, in A. S. Nos. 248 and 250 to 273 of 1907, presented against the decrees of the District Munsif of Paramakudy, in Original Suits Nos. 25 and 27 to 50 of 1905.

Mr. *K. Srinivasa Aiyangar*, for the Appellants

Mr. S. Sreenivasa Iyengar, for the Respondents.

JUDGMENT.—These are suits to eject defendant in each case from the land held by him in the *Inam* village of Pathur which is held by plaintiffs Nos. 1 and 2 as *Sarva Maniyam Inam*. Plaintiffs Nos. 3 and 4 are mortgagees under the 1st and 2nd plaintiffs.

According to the plaintiffs, the defendants hold their land on leases granted by the 3rd and 4th plaintiffs for the *Fasli* years 1311 to 1313. The defendant's case is that 500 *kurukamas* of land were leased to their ancestors the Nathambadi Christains by the *inamdars* in 1861 in the names of two persons, Sourimathu and French, on a permanent occupancy-right and that they are not liable to be ejected. The plaintiffs admitted the lease of 1861 but contended that it was made by the above-named two individuals for their own benefit only, that the lease was abandoned by those two individuals and that subsequently different portions of land were leased from time to time to the defendant's ancestors and to the defendants. The plaintiffs say that the defendants have been evicted and were out of possession during *Faslis* 1307 to 1310 and were let into occupation again in *Fasli* 1311. The lower Appellate Court has found that the letting of 1861 was really made for the benefit of the families of all the Nathambadi Christians and not for the benefit of the Sourimuthu and French alone, and we accept this finding.

We also concur with the District Judge in holding that the lease of 1861, of which Exhibit DD is a copy, conferred a permanent right of occupancy on the lessees. There is no evidence of any express surrender of their rights under Exhibit DD. On the other hand, it

is admitted that the defendants were accepting separate *pattas* from the plaintiffs for different portions of the 500 *kurukkams*, that the *inamdar* instituted separate suits against them for rent and that some of them sued the *inamdar* separately in 1895 to compel him to give them separate *pattas*. The District Munsif, who passed a decree in favour of the plaintiffs, observes, in paragraph 12 of his judgment, with reference to the *pattas* issued to and accepted by the defendants: "I find that the same land is not cultivated by the same tenant in all *Faslis* or for any series of *Faslis* continuously." He then points out that the extent of the land included in the *patta* of each *ryot* varies in different years. In paragraph 16, he says: "From the above it is seen that the lands included in the *pattas* form only a portion of the 500 *Kurukkams* referred to in Exhibit DD., that the defendants have not been in possession of the lands claimed by them uniformly or for any consecutive years." He further observes that the public accounts, Exhibits D series to H series, along with the *pattas* show that the defendant's possession and enjoyment have not been such as to justify the finding "that the plaintiffs are not owners of the soil entitled to eject the defendants." He held that the defendants have for a long time held their lands not under Exhibit DD but under separate leases.

It is admitted by the respondent's Vakil that the lands included in Exhibit DD were sub-divided among themselves by the Nathambadi Christians. The District Judge does not say whether, as apparently found by the Munsif, the Nathambadi Christians are only in possession of a portion of the 500 *kurukkams*. The sub-division of the lands and even the surrender of a portion thereof would not be inconsistent with the defendants' continuing to hold the lands in their occupation on the terms contained in Exhibit DD, although community of interest may have ceased as between themselves. As no express surrender of the rights under Exhibit DD has been proved, it lies on the plaintiffs to prove that there has been an implied surrender of such rights, by showing that the lands have been held on terms inconsistent with the provisions of Exhibit DD. If the same lands have been held by different defendants in different years, this fact would be *prima facie* evidence of the tenure being inconsistent with the continuance of the rights under Exhibit DD. Material variations in the extent of the lands held in each year might also lead to the same inference, though such a state of things might also be explicable on the ground suggested by the learned Vakil for the respondents that the *pattas* for each year were only for the extents cultivated during the year, and it is stated that such is the custom in the *zemindary* of Ramnad. But these circumstances, which require explanation and are the most important facts relied on in favour of the plaintiffs' case by the Munsif, are not referred to in the judgment of the learned District Judge. He observes that "in the face of the *cowle* deed, Exhibit DD, no *pattas* were necessary" and that "*pattas* must have been tendered merely for the convenience of collecting the rent due from the individual cultivators instead of through the headman mentioned in the lease." This might be so if the circumstances relied on by the Munsif and already referred to above are properly explained. But no explanation is referred to in the judgment of the lower Appellate Court. The District Judge observes that the suits by parties for separate *pattas* were dismissed, because "no *patta* could be demanded in face of Exhibit DD, the *cowle*." It nowhere appears in evidence that this was the ground on which the suits were dismissed. The respondent's Vakil strongly relies on Exhibit IV series as showing that the lands are still held on the terms contained in Exhibit DD. These documents were admitted in evidence by the District Judge, the Munsif having rejected them on the ground that they were unstamped. Our attention is not drawn to any evidence regarding the circumstances under which Exhibit IV series came into existence and we are, therefore, unable to come to any definite conclusion regarding the proper inference to be drawn from them.

We think, therefore, that it is desirable to have a revised finding on issues Nos. 1 and 2 in the light of the above observations. As Exhibits IV series were not in evidence in the Court of first instance, both parties may be permitted to adduce fresh evidence relating to the circumstances in which they were executed. Mr. S. Srinivasa Aiyangar has raised a new point before us in second

appeal, *viz.*, that under section 6 of the Estates Land Act, his clients have acquired a permanent right of occupancy even if they had none before and he relies on clause 4 of the section. We cannot dispose of this contention without findings on the following questions:—

(1) Whether the Puthur village is "an estate" within the meaning of the Act?

(2) If it be an estate whether any and what portions of the lands in suit are *ryoti* lands?

(3) Whether any and what portions of them are tank-bed lands?

Parties may adduce fresh evidence on these issues also.

We do not deal with the question of the *onus* of proof which has been argued before us as it should properly be dealt with by the lower Appellate Court in dealing with these issues.

This observation is also applicable to the question what presumptions there may be in favour of either party in the decision of the 1st and 2nd issues raised in the District Munsif's Court.

The findings should be submitted within two months after the re-opening of the District Court after the recess. Seven days for objections. As the jurisdiction over the lands to which the suits relate is now vested in the District Court of Ramnad, we direct that the findings called for be submitted by that Court.

In compliance with the order, the District Judge of Ramnad submitted the following

FINDINGS.—On issues Nos. 1 and 2, that the suit lands were not the absolute property of plaintiffs and that defendants held them on a permanent tenancy.

On the newly-framed issues, his findings were (1) that Puthur village was an estate within the meaning of Madras Act I of 1908; (2) that suit lands were *ryoti* lands except such as were tank-bed lands and (3) that 150 *Krukams* described in Exhibit DD were tank-bed lands.

These second appeals coming on for final hearing after return of the said findings, the High Court delivered the following

JUDGMENT.—There is no legal objection to the finding of the lower Appellate Court. We accept it and dismiss the second appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 7 OF 1912.

May 28, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

SALUK SINGH—DEFENDANT—APPELLANT

versus

AJUDHYA PERSHAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Mortgage—Execution of mortgage admitted by mortgagor but denied by his transferee—Consideration—*Onus *of proof.*

A., a mortgagee, brought a suit on the basis of the mortgage against the mortgagor and his transferee. The mortgagor admitted execution of the bond but denied receipt of consideration, while the transferee denied both execution and consideration:

Held, that the burden of proving the payment of consideration lay upon the plaintiff.

First appeal from an order of the District Judge of Banda, dated the 28th of November 1911.

Mr. *Bajpai*, for the Appellant.

Mr. *Purushottam Das Tandon*, for Mr. *Damodar Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale upon a mortgage, dated the 30th of September 1896, executed by Ganraj Gir in favour of Ram Sahai, the predecessor-in-title of the plaintiffs, for Rs. 133 with interest. Subsequent to the mortgage, the mortgagor sold the property to one Lulak Singh. The plaintiffs have made both the mortgagor and the transferee parties to the suit. The Court of first instance dismissed the suit holding that the plaintiffs had failed to prove consideration. It placed the burden of proof on the plaintiffs to establish consideration for the bond. The mortgagor admitted execution of the deed but denied receipt of consideration. The transferee put the plaintiffs to the proof of both execution and consideration. The plaintiffs produced witnesses who testified simply to the execution of the deed but knew nothing as to consideration for the bond. On appeal, the lower Appellate Court held that the burden of proof was not on the plaintiffs to establish consideration for the deed, but that the burden of proving non-payment of consideration was on the defendant-transferee. In this view, it set aside the decree of the Court of first insantce and remanded the case for trial under Order XLI, rule 23. On appeal by the transferee, it is pleaded that the burden of proof is really on the plaintiffs, and that the evidence which they have produced has

not shifted the onus on to the defendant-transferee of proving non-payment of consideration. It is contended that the admission contained in the bond by the mortgagor is no evidence as against the appellant who is a transferee from the latter. There has been considerable discussion on the question whether the admission in the bond is admissible in evidence as against the transferee, the present appellant. In our opinion, for the purposes of this case, it is unnecessary to actually decide the point. In the present case, the transferee is a person who has taken property by private sale from the mortgagor, and it may well be contended that he is a representative-in-interst of the mortgagor within the meaning of section 21 of the Indian Evidence Act. Assuming, however, without deciding the point that this admission is evidence as against the present appellant, nevertheless the burden of proof in such a case is primarily on the plaintiffs to establish payment of consideration, and as against the transferee who is no party to the bond and has no sufficient knowledge of the circumstances under which it was executed, that admission is of very little value and, in our opinion, is insufficient to shift the burden of proof on the defendant transferee. In the case now before us, the major part of the consideration consisted of old debts due on former bonds. The plaintiffs had ample means, if the bond were a true one, of clearly proving the old debts and of establishing payment of consideration. In our opinion, the evidence which they produced was totally insufficient to establish such payment, and the Court of first instance was quite right in primarily placing the onus of proof upon them and in holding that the burden of proof had not been shifted. We, therefore, admit the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have his costs in all Courts including fees in this Court on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

FULL BENCH.

CIVIL REFERENCE No. 20 OF 1912.

May 18, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge,
Mr. Justice Kensington and
Mr. Justice Chevis.

GANPAT—APPELLANT

versus

PREM SINGH—RESPONDENT.

In the matter of THE STAMP ACT.

Power-of-attorney—Attorney not a Legal Practitioner—Duty leviable—Court Fees Act (VII of 1870), Sch. II, Art. 10—Stamp Act (II of 1899), s. 2 (21), Sch. I, Art. 48—"Case" -- Mukhtar—Mukhtarnama—Interpretation of statutes—Technical and popular meaning of words.

A power-of-attorney empowering a person, who is neither a *Vakil* of a Court nor a certificated *Mukhtar* of a Court, to represent another in a Civil Court is governed not by Article 48 of 1st Schedule of the Stamp Act but by Article 10 of Schedule II of the Court Fees Act.

Permanand v. *Sat Prasad*, 33 A. 487; 9 Ind. Cas. 617; 8 A. L. J. 378, dissented from.

The first and most elementary rule of construction is that words or phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not.

The documents specified in Article 10, Schedule II of the Court Fees Act, are the documents which it was intended to exclude from the definition of a power-of-attorney in section 2 (21) of the Stamp Act.

The word "case" in the Court Fees Act must be confined to judicial cases or *quasi*-judicial cases as opposed to transactions.

Article 10, Schedule II, of the Court Fees Act is not restricted to documents given to and presented by duly certificated *Mukhtars* and Pleaders under the Legal Practitioners Act.

A *Mukhtar* is an attorney, whether appointed specially or generally or certificated as a legal practitioner and *Mukhtarnama* is a document which empowers him to act for the person by or on whose behalf the document is executed and includes a power-of-attorney in favour of a person other than a certificated *Mukhtar*.

Case referred by the District Judge of Sialkote, with his letter No. 901, dated the 23rd November 1911, for orders of the Chief Court.

Mr. *Bevan Petman*, Government Advocate, for the Appellant.

JUDGMENT.—This is a Reference under section 60, Indian Stamp Act, II of 1899. The question referred is whether a power-of-attorney empowering a person, who is neither a Vakil of a Court nor a certificated *Mukhtar* of a Court, to represent another in a Civil Court is governed by article 48 of the 1st Schedule of the Stamp Act II of 1899 or by Article 10 of Schedule II of the Court Fees Act, VII of 1870. The re-

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

ferring Court cited *Parmanand* v. *Sat Parsad* (1). We regret that we are unable to concur with the learned Judges who decided that case, and the learned Government Advocate has argued that the conclusion arrived at by them is erroneous.

Article 10 above referred to prescribes Court-fees of annas 8, Re. 1, Rs. 2, for *mukhtar-namas* or *vaklatnamas* when presented for the conduct of any one case, the fee varying in proportion to the status of the Court or official to which or to whom it is presented. Section 2 (21) of the Stamp Act defines power-of attorney as including "any instrument (not chargeable with a fee under the law relating to Court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it."

A *Mukhtar* is an attorney, whether appointed, specially or generally or certificated as a legal practitioner, and a *mukhtar-nama* is a document which empowers him to act for the person by or on whose behalf the document is executed.

It is significant that Article 48, Schedule I of the Stamp Act, does not mention suits or proceedings other than those under the Presidency Small Cause Courts Act. Clause (*a*) refers to registration of documents; clause (*b*) refers to suits or proceedings under the Presidency Small Cause Courts Act; clause (*c*) refers to a single transaction; clauses (*d*) and (*e*) refer to several transactions; clause (*f*) refers to sale of immoveable property; and clause (*g*) prescribes the stamp payable on a power-of-attorney "in any other case" not "in connection with any other cases." The Article of the Court Fees Act referred to deals, on the other hand, exclusively with "the conduct of" cases.

The word "case" is not defined and the use of the word in the Court Fees Act must, in our opinion, be confined to judicial cases or *quasi*-judicial cases as opposed to transactions.

In the 2nd section of Chapter I of Maxwell on the Interpretation of Statutes, Edition IV, page 2, it is said: "The first and most elementary rule of construction is that it is to be assumed that the words or phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not."

In the Full Bench ruling of the Allahabad Court just cited, their Lordships said, after reciting the Article of the Court Fees Act: "It appears to us that all these documents are documents which it was intended to exclude from the definition of the expression power-of-attorney in section 2 clause 21 of the Stamp Act. It, therefore, seems to us that it is clear that the documents referred to in Article 10, Schedule II, of the Court Fees Act are restricted to documents given to and presented by duly certificated *Mukhtars* and Pleaders under the Legal Practitioners Act."

We regret that we are unable to follow this line of argument. It does not dispose of the question whether a *Mukhtar-nama* includes a power-of-attorney in favour of a person other than a certificated *Mukhtar*. The mere juxtaposition of *Vakalatnama* and *Mukhtarnama* in the Article of the Court Fees Act does not, in our opinion, indicate that a *Mukhtar* or attorney must be a legal practitioner because a Vakil usually is a legal practitioner. Moreover, many persons described as Vakils who are agents of Native States are not legal practitioners.

We concur in the opinion of the Full Bench of the Allahabad Court that the documents specified in Article 10 of the 2nd Schedule of the Court Fees Act are the documents which it was intended to exclude from the definition of a power-of-attorney in section 2 (21) of the Stamp Act, but, for the decision of the interpretation to be placed on the word *Mukhtarnama* in the Court Fees Act, the nature of that Act and of the Stamp Act must, in our opinion, be considered.

We understand that all sums realized from Court-fees are devoted in the first instance to the maintenance of the Civil, Criminal and Revenue Courts, while sums realized from stamps are devoted to other purposes. The presumption, therefore, is that any sum payable as a condition precedent to going into Court would be levied under the Court Fees Act, and the words "not chargeable" etc., in section 2 (21) of the Stamp Act indicate that the first point for consideration is whether fees are chargeable under the Court Fees

(1) 33 A. 487; 9 Ind. Cas. 617; 8 A. L. J. 378.

Act. That Act, therefore, is the excluding Act while the Stamp Act applies to any document not excluded from its provisions by the Court Fees Act. Chapter X of the Presidency Small Cause Courts Act, XV of 1882 deals with fees and costs and section 77, the last of the Chapter, saves the application of sections 3, 5 and 25 of the Court Fees Act.

Section 3 of the Court Fees Act provides for the levy of fees in Presidency Small Cause Courts, section 5 provides for the procedure in case of difference as to necessity or the amount of fees in such Court and section 25 provides that all fees referred to in section 3 or chargeable under he Act shall be collected by stamps.

The rules relating to fees payable in Presidency Small Cause Courts are, therefore, not exclusively those embodied in the Court Fees Act, and the inclusion, in Article 48 of Schedule I of the Stamp Act, of powers-of-attorney required in suits or proceedings under the Presidency Small Cause Courts Act does not, in our opinion, indicate that a power-of-attorney in favour of a person who is not a legal practitioner for the conduct of a case in an ordinary Civil Court comes within the definition of section 2 (21) of the Stamp Act. The indication is in the opposite direction.

For these reasons, our answer to the reference is that the power-of-attorney in question is governed by Article 10 of Schedule II of the Court Fees Act.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 78 OF 1911.

April 24, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

PALLAGANI SREERAMULA—APPELLANT

versus

RAJAH VENKATA RANGAYYA APPA ROW BAHADUR GARU—RESPONDENT.

Madras Estates Land Act (I of 1908), *ss.* 3 (11), 19, 77, 189—*Rent, suit for—Landowner's private land—Jurisdiction of Civil Courts.*

A suit by a landowner against his tenant for rent in respect of his *kamatam* or private lands (*i.e.*, lands not coming under the head of '*ryoti*' lands, as defined in section 3, clause 16 of the Madras Estates Land Act), must be instituted in the Civil Court and not in the Revenue Court.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling, dated 3rd May 1911, in C. R. P. No. 432 of 1910, (S. C. C. No. 1770 of 1909, on the file of the Principal District Munsif of Bezwada).

Mr. *P. Nagabushanam*, for the Appellant.

Mr. *V. Ramesam*, for the Respondent.

JUDGMENT.

MILLER, J.—I do not think we can differ from the finding that the land is *kamatam* land. In that view, the question whether the District Munsif has jurisdiction, depends ultimately on the proper construction of section 19 of the Estates Land Act. It is contended before us that the phrase "the relations between a land-holder and a tenant of his private land" cannot properly be held to include the right to sue for rent and the liability to be sued for it, and it was urged that these 'relations' are the conditions of the tenant's tenures as set out in Chapter III of the Act. I do not find that this narrow construction is necessary; the phrase can, without impropriety, be construed to include all the mutual rights and obligations of the landlord as such and his tenant as such, and, in the absence of anything to indicate a contrary intention, I should be disposed so to construe it. I find nothing to indicate a contrary intention and on the other hand, as my learned brother has shown in the judgment which he has prepared and which I have had an opportunity of reading, the intention of the framers of the Act appears to have been by section 19 to exclude the Collector's Court as the forum in which were to be instituted suits for rent by a land-holder against a tenant of his private land.

Finding then no reason to exclude the provision of section 19, I agree with my learned brother that there is no provision of the Act which 'specially provides' for the institution of suits for rent by a land-holder against a tenant of his private land; and it follows that the forum in which such suits are to be instituted is not regulated by the Act and a suit in a Civil Court is not prohibited.

The appeal, therefore, fails and we dismiss it with costs.

SADASIVA AIYER, J.—This is a Letters Patent Appeal and the only question seriously argued on the appellant's behalf was, whether in respect of *kamatan* or private lands (*i.e.*, lands not coming under the head of "*ryoti*" lands as defined in section 3, clause 16 of the Madras Estates Land Act), a suit for rent by the andlord against the tenant of such lands is excluded from the jurisdiction of the Civil Courts, when section 3, clause (11) sections 77 and 189 and the Schedule part (A) No. 8 of the Estates Land Act are read, together. Section 3, clause (11), defines 'rent' as whatever is lawfully payable to a land-holder for the use of land in his estate for the purpose of agriculture. Section 77, clause (1), empowers the land-holder to "institute a suit before the Collector for the recovery of arrears of rent." Section 189 says: "A Collector or other Revenue Officer etc. shall hear and determine all suits . . . of the nature specified in parts A and B of the Schedule and no Civil Court, in its original jurisdiction, shall take cognizance of . . . such suit." The Schedule Part (A) No. 8 refers to suits by landlords to recover arrears of rent. It seems to me clear that if these provisions alone are considered, the present suit is excluded from the jurisdiction of the District Munsif who has tried it on the Small Cause side.

But the respondent relies on section 19 of the Act which is as follows:—"Except as otherwise specially provided in this Act, the relations between a *ryot* and his tenants or between a land-holder and a tenant of his private land and the rights of any other owners of land, are not regulated by the provisions of this Act." Such special provisions expressly applying the provisions of the Act to the relations between a land-holder and the tenant of his private land appear in sections 134 and 158 of the Act. Can we say that it is "specially provided" by section 189 (read with sections 3 (11), 77 and Part A No. 8) that the relations between the land-holder and the tenants of his private lands in the matter of the forum, in which a suit for rent by the land-holder against such a tenant should be brought, are regulated by the provisions of that section, 189? I feel grave doubts on that point. Having regard to the express reference in sections 134 and 158 to "a tenant of private land" and to the positive provisions in those sections regulating some of the relations between such a tenant and the land-holder, I do not think that the mere omission to mention in section 189 and to exclude expressly a suit for rent against such a tenant of private land from the operation of section 189 could be treated as a special positive provision making that section regulate the relations between the land-holder and a tenant of "private" land in the matter of the forum in which the land-holder should bring his suit for rent against such a tenant.

I am glad to find myself supported in this view by the proceedings before the Legislative Council when the Act was being fashioned in the Legislative anvil. Sections 77 and 134 of the Act occur in the same Chapter VI of the Act and correspond to clauses 67 and 124 A of the Bill. Sub-clauses 1 and 2 of clause 124A of the Bill [corresponding to sub-clause (1) of section 134 of the Act] refer to one of the relations between a land-holder and the tenant of his private land and to the similar relation between land-owners under the *ryotwari* tenure and their tenants. The Advocate-General in moving an amendment to clause 124A said: "It was not intended that these other land-owners specified in clauses 1 and 2 should be debarred from instituting suits in the Civil Courts. The provisions of this Chapter are a little too wide and clause 67 is one of the provisions of this chapter. Under that clause, sub-clause (1), the provision is 'the land-holder may institute a suit before the Collector for the recovery of the arrears,' so that the result of the enactment under clause 124 (A) as it stands will be to require land-holders mentioned in sub-clauses (1) and (2) also *to institute suits for arrears of rent before the Collector. That was not intended.*" The Advocate-General then by his amendment introduced words which (he thought) made a contrary intention clear, evidently holding that the clause in the Bill corresponding to section 19 of the Act will prevent recourse by the land-holder to the Revenue Courts for recovery of rent against the tenants of his private lands after clause 124A is amended as proposed by him (the Advocate-General) by the addition of some words. The Hon'ble Mr. G. S. Forbes, in seconding the amendment of the Advocate-

General, said:—"It was clearly the intention of the original Bill and the Council, that these other land-holders should have a right for the recovery of rent by these *processes. It was never intended to give them a right to sue before the Collector.*" The remedies of a land-holder against the tenant of his private land and of a *ryotwari* landlord against his tenant for the recovery of rent were intended to be placed on the same footing and the latter can, of course, sue only in the ordinary Civil Court for rent, though he can, in certain cases, use the processes mentioned in section 134 for recovery of arrears of rent.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 361 OF 1911.
May 27, 1912.
Present:—Sir Henry Richards, KT., K. C., Chief Justice, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.
HORI LAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
NIMMAN KUNWAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage-suit against the manager of a Hindu joint family—Other members not impleaded as parties—Suit whether maintainable—Parties.

A suit can be maintained against the manager of a joint Hindu family alone to enforce a mortgage against property belonging to the family. The manager of such family sufficiently represents other members in the suit.

Banerji, J.—It is not essential that the manager when he brings his suit should state in distinct terms that he is suing as manager or that the plaintiff in a suit against the family should describe the defendant as the manager of the family. All that is essential is that the manager is in fact suing or is being sued as such in respect of a family debt.

Bhawani Prasad v. *Kallu*, 17 A. 537; *Debi Singh* v. *Jia Ram*, 25 A. 214; *Kishun Pershad* v. *Har Narain Singh*, 33 A. 272; 9 Ind. Cas. 739; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 38 I. A. 45; (1911) 2 M. W. N. 395; *Ram Narain Lal* v. *Bhawani Prasad*, 3 A. 443; *Kendall* v. *Hamilton*, 4 A. C. 504; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97; *Daulat Ram* v. *Mehr Chand*, 15 C. 70; 14 I. A. 187; *Lala Surja Pershad* v. *Gulab Chand*, 27 C. 724; 4 C. W. N. 701; *Ramasamayyan* v. *Virasami Ayyar*, 21 M. 222; *Kunj Behari Lal* v. *Kandh Prashad Narain Singh*, 6 C. L. J. 362; *Lutchmanan Chetti* v. *Siva Prokasa Modeliar*, 26 C. 349; 3 C. W. N. 190; *Gan Savant Bal Savant* v. *Narain Dhond Savant*, 7 B. 467; *Vishnu Dhondi* v. *Babaji*, 32 B. 375; 10 Bom. L. R. 505; *Ramakrishna Narain Sindhe* v. *Vinayak Narain Saswadkar*, 12 Bom. L. R. 219; 34 B. 354; 5 Ind. Cas. 967; *Chimna Sadashiv* v. *Sada Barka*, 12 Bom. L. R. 811; 7 Ind. Cas. 990; *Arunachala Pillai* v. *Vithialinga Mudaliar*, 6 M. 27; *Angamuthu Pillai* v. *Kolandavelu Pillai*, 23 M. 190; *Sheikh Ibrahim* v. *Rama Iyer*, 21 M. L. J. 508; (1911) 2 M. W. N. 442; 10 Ind. Cas. 874; *Shamrathi Singh* v. *Kishan Pershad*, 29 A. 311; 4 A. L. J. 194; A. W. N. (1907) 58; *Patesheri Partab Narain Singh* v. *Rudra Narain Singh*, 26 A. 528; *Gendan Lal* v. *Babu Ram*, 9 A.L.J. 86; 13 Ind. Cas. 197; *Nathi Lal* v. *Lala*, 9 A. L. J. 410; 14 Ind. Cas. 35, referred to.

Second appeal from the decision of the District Judge of Shabjahanpur, dated 31st of March 1911.

Mr. *Govind Pershad*, for the Appellants.

Mr. *Benode Behari*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit for sale on foot of a mortgage. The mortgage was dated the 14th of November 1870. The mortgagee was one Dharam Singh, husband of the plaintiff, and the mortgagor was one Naiti Singh. Tilok Ram purchased the mortgaged property on the 7th of January 1889 and the defendants Hori Lal and Jagan Nath are the sons of Tilok Ram who is now dead. They pleaded amongst other things that their four sons constituting with themselves a joint Hindu family were not made parties to the suit. This is the plea with which we are concerned in the present appeal. Having regard to the respective dates of the mortgage and of the institution of the suit, the non-joinder of parties, if such there was, could not be cured by making the sons of Hori Lal and Jagan Nath parties, because the suit at the time their absence was pleaded was barred by limitation. Order XXXIV, rule 1, of the Code of Civil Procedure, provides as follows:—

"Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage".

It is contended that all the members of the joint family have an interest in the

right of redemption and that as they were not made parties originally and cannot now be added as parties, the suit should be dismissed.

I do not think that the words in the rule "subject to the provisions of this Code" can help the plaintiff. It is true that the Code provides that no suit shall fail for want of parties, but this does not mean that the defendants cannot insist on having all the necessary parties before the Court, either by their being made parties when the suit was instituted or being afterwards added as parties. I, therefore, think that, unless in the circumstances of the present case, Hori Lal and Jagan Nath can be said to represent their sons, or in other words that the sons are really parties to the suit through Jagan Nath and Hori Lal, the suit should be dismissed. All the members of the joint Hindu family have beyond doubt an "interest" in this mortgaged property.

It has been found by the Court below that Hori Lal and Jagan Nath are the managers of the family and that their names alone appear in the village record. I think that we should accept this finding, and my judgment presumes that Jagan Nath and Hori Lal are the managers of the joint Hindu family made up of themselves and their four sons. I propose in the first instance to deal with the question apart from decided cases.

Prior to the passing of Act V of 1908 (the present Code of Civil Procedure), the enactment dealing with parties to a suit relating to a mortgage was section 85 of the Transfer of Property Act. That section is as follows :—

"Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter relating to such mortgage provided that the plaintiff has notice of such interest."

The only change material in any way to the present question is the dropping out of the words "provided that the plaintiff has notice of such interest" in Order XXXIV rule 1. It must be remembered that neither section 85 of the Transfer of Property Act nor Order XXXIV rule 1 was any departure from the well established practice of the Courts. It was always necessary that persons interested in the mortgaged property should be made parties to a suit relating to the mortgage. If the mortgage-debt belonged to a number of persons, they should all be parties so that the person paying off the mortgage might get a good discharge.

The persons to whom the property mortgaged belonged were entitled to be parties to enable them to defend the suit and have the amount due (if any) properly ascertained. I do not think, therefore, that any greater importance should be attached to the absence of some of the members of the joint family because their presence is now required by a rule of the Code of Civil Procedure instead of a well established rule of practice.

It seems to me that if it is intended by Order XXXIV, rule 1, to provide that in a case like the present all the members of a joint Hindu family must be defendants by name and could not be represented by the manager, the law requires the plaintiff to do what in many cases must be a practical impossibility. The members of a joint Hindu family are frequently very numerous, comprising of the absent members and infants of tender years. Furthermore, during the course of the litigation there would be in all probability frequent births of sons, and the array of defendants would never be strictly complete unless during the entire time the suit was running its course, every newly born son was added as a defendant. The plaintiff in many cases would have no possible means of ascertaining the existence of the infant members of the family.

It seems to me to be impossible to dispute the proposition that it is a general rule of Hindu law that the manager represents the family in all transactions with the outer world, provided these transactions are family matters. Indeed if it were not so, it is difficult to understand how the affairs of the family could be carried on. If the proposition is correct I can see no good reason why in a case, like the present, the manager should cease to represent the family when the family has to institute or defend a suit in a Court of justice. Before suit the manager can pay and be paid the family debts and take and give a valid discharge for the same. In the present case, the property was purchased by Tilok Ram presumably with family funds. On his

death, the names of his sons, Hori Lal and Jagan Nath, alone were recorded. Every defence which can be put forward in the present suit can properly and fairly be put forward by the managers. I am very far from saying that a plaintiff in a mortgage suit would be prudent in refraining from making as many members of the family as possible parties to the suit. On the contrary, in all suits and particularly in suits in which the mortgage was made by a manager, and there is any possible question of the mortgage not having been made for legal necessity or a family purpose, the plaintiff would be wise to make all or as many members of the family as possible parties so that they may be bound by the result of the suit. Furthermore, I am of opinion that in all such suits notwithstanding that the manager is a party, the Court should not hesitate to add as a party any member of the family who applies to be made a party, so as to enable him to put forward any defence which he desires to make includiug, of course, a defence challenging the mortgage as not having been made for family necessity and family purposes.

In the course of the argument, a great mass of authority has been cited, and it seems to me that the great weight of authority of the Courts in India has been in favour of holding that a decree against a manager in a suit like the present is not void, but that on the contrary the members of the family who were not parites to the suit, are bound by the decree on the ground that they were sufficiently represented by the manager, and that they can cnly re-open the litigation by showing that the mortgage was not for family purposes. It seems to me inconsistent to hold that the family is represented by the manager when the question is raised after decree and that they are not so represented if the question is raised before decree. In *Bhawani Prasad* v. *Kallu* (1), it was, however, held that the sons, who had not been made parties to a suit for sale on a mortgage brought against their father alone, could sue for and obtain a declaration that the property being family property could not be sold in execution of the decree against the father, and that they could obtain this declaration upon the sole ground that they had not been made parties to the mortgage suit. This was a Full Bench case and was the decision of four out of the five Judges who constituted the Bench. Banerji J., dissented from the view taken by the rest of the Court. The case was not unlike the present, the difference being that the question did not arise until after a decree had actually been obtained against the father, while in the present case the plea has been taken in the suit by the defendants who were parties. There was this further difference that there was no finding that the father was the manager of the family though in all probability he was. The case seems to me to have been decided by the majority of the Court upon the express words of section 85 of the Transfer of Property Act which was the provision of law then in force, providing for the parties to a suit relating to a mortgage. It does not seem to have been argued that the absent members of the family were or could be represented by their father as the manager. The effect of the decision has to some extent been modified by the case of *Debi Singh* v. *Jia Ram* (2).

But it is, nevertheless, the decision of a Full Bench and I think it ought to be followed and treated as binding upon this Court unless we see cogent reasons for not doing so. Do such cogent reasons exist? I have already pointed out that section 85 of the Transfer of Property Act has been repealed and re-placed by a rule of the Code of Civil Procedure. It was evidently thought that a rule under the Code of Civil Procedure was a more fitting place for a provision relating entirely to a matter of procedure. It may well be that the Court might consider itself more strictly bound by the express words in a section in the Transfer of Property Act then by a rule of procedure. I think the repeal of section 85 is some reason for holding that the ruling in *Bhawani Prasad* v. *Kallu* (1) should not be followed in this case. I have also pointed out that no argument based on the manager being a party to the suit was put forward in the case. It is very probable that the father against whom the decree for sale was made was the managing member of the family but there was no finding to that effect, and it is, of course, possible that he was not. I have also pointed out that the weight

(1) 17 A. 537.

(2) 25 A. 214.

of authority in India has been to hold that after decree, at any rate, the absent members of a family are bound by the decree against the manager and the ruling in *Bhawani Pershad* v. *Kallu* (1) has certainly not met with universal approval in the rest of the Courts in India. Edge, C. J., pointed out the importance of having all the parties interested in the property before the Court so as to prevent further litigation. I agree that this is desirable but, as already mentioned, this in many cases is impossible. If *Bhawani Prasad* v. *Kallu* (1) is applied to cases where the manager is a party, each member of the family who was not made a party can re-open the whole litigation on the sole ground even though it my turn out in the end that the mortgage was binding on the whole family. This it seems was the very thing the learned Chief Justice wished to avoid. As a matter of fact, there have been many such cases. In *Kishun Pershad* v. *Har Narain Singh* (3), certain persons brought a suit to recovor money. The defendants pleaded that the plaintiffs and certain other persons constituted a joint Hindu family and that the plaintiffs were not entitled to sue without joining as parties the other members of the family. The plaintiffs answered this plea by contending that they were managers and carried on the business, and, therefore, the other members of the family were not necessary parties but that if the defendant wanted to have them made parties they were willing that they should be added. The Court of first instance made the other members parties but the time it did so the suit was barred so far as the added parties were concerned. The question arose whether or not the suit was barred by limitation. It had to be admitted that if the added parties were necessary parties originally, the making of them parties later on could not cure the defect by reason of limitation. The Subordinate Judge held that the absent members were not necessary parties and gave a decree. This Court reversed the decree of the Court of first instance holding that it was necessary that all the members of the family should join in the suit. Their Lordships of the Privy Council reversed the decision of this Court and restored the decision of the Court of first instance. It is true that in that case the suit was a suit on a contract and the persons who were originally plaintiffs were the parties to the contract; while the present case is a suit for sale on a mortgage executed by the vendor of the predecessor-in-title of the defendants It seems to me, however, that there is no difference in principle in the two cases. I feel certain that their Lordships of the Privy Council intended to hold not merely that the actual parties to the contract could enforce it but also that the other members of the family would be bound by the decree and that such a decree could be enforced against the family property. I think this decision of their Lordships is a strong ground for not applying the ruling in *Bhawani Prasad* v *Kullu* (1) to the circumstances an dfindings in the present case. What seems to me to be in principle the same question as the question involved in this appeal has recently arisen in a different way. The case was argued before this Bench. It was the case of *Madan Lal* v. *Kishen Singh* (4). A father who was found to be the manager of the family brought a suit to realize a mortgage which admittedly belonged to the family. He did not make his son a party. The defendants pleaded the non-joinder of the son. The question was whether the son was a necessary party. The very same arguments were put forward as are put forward in this case. The son was interested in the mortgage security and should, therefore, it was urged, under Order XXXIV, rule 1, be made a party. In such a case, it seems to me impossible almost to argue that the father could not represent the son. If no suit had been brought, the father could have received the mortgage-money and have given a good discharge to the persons paying the money.

In my opinion, the manager of a joint Hindu family can represent the family in a case like the present and the other members need not be made parties and I would dismiss the appeal.

BANERJI, J.—The question to be determined in this appeal is whether the suit of the plaintiff, which is one for sale on a mortgage, is liable to dismissal on the sole ground that the sons of the defendants, Hori Lal and Jagan Nath, were not joined as defendants. The mort-

(3) 33 A. 272; 9 Ind. Cas. 739; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 38 I. A. 45; (1911) 2 M. W. N. 395.

(4) 15 Ind Cas. 138, *infra*.

gage was made by Nait Singh who subsequently to the mortgage sold the mortgaged property to Tilok Ram, the deceased father of the aforesaid defendants. The Court of first instance found on the merits against the defendants but dismissed the suit on the ground that the sons of Hori Lal and Jagan Nath, who have an interest in the mortgaged property by reason of their being, with their fathers, members of a joint family, were omitted from the suit. The lower Appellate Court has found that Hori Lal and Jagannath are managers of the joint family properties belonging to them and their sons and that they fully represent the interest of their sons. It has accordingly decreed the claim. The finding that Hori Lal and Jagan Nath are managers of the joint family of which they and their sons are members is a finding of fact and must be accepted by us in second appeal. We have, therefore, to consider 'whether in a mortgage suit all, the persons having an interest in the mortgage security or in the right of redemption are, in the case of a joint Hindu family, represented by the manager of the family."

Order XXXIV, rule 1 of the Code of Civil Procedure, on which reliance is placed on behalf of the appellants, provides that "all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties." The requirements of this section are, in my opinion, fulfilled if all such persons are represented in the case of a joint Hindu family by the managers of the family. The powers of the manager in a joint Hindu family are well known. He represents the family in all business transactions, he can enter into contracts in regard to matters relating to the family, give discharges for debts due to the family and pay debts due by the family. When, therefore, in respect of a mortgage due to or by the joint family, he sues or is sued in his own name in his capacity as manager, all the other members of the family being represented by him must be deemed sued through him. If this view is correct, the omission to join in the array of parties members of the family other than the manager is not a defect in the frame of the suit and it cannot be said that there has been a non-joinder of parties. All the persons interested are substantially parties to the suit through the manager. This was ruled by their Lordships of the Privy Council in the recent case of *Kishun Perhsad* v. *Har Narain* (3). Their Lordships held that the managing members of a joint family business of money lending are entitled to maintain suits brought to enforce contracts made in the course of that business, without joining in the suit with them, either as plaintiffs or as defendants, the other members of the family. This decision of their Lordships seems to me to settle the point. The case was, no doubt, that of a business contract but the principle laid down applies equally to a mortgage and is applicable as well in the case of the defendant as in the case of the plaintiff. It has been held by all the High Courts that a decree obtained against the manager of a joint Hindu family binds the other members though they were not impleaded in the suit in which the decree was passed. The cases on the point have been referred to at length in the judgments of some of my learned colleagues and I do not think any useful purpose will be served by repeating them. In *Ram Narain Lal* v. *Bhawani Prasad* (5), a Full Bench of this Court held that "when a member of a joint Hindu family is sued for a family debt, it may be assumed that he is sued for the same as the representative of the family; and when the decree in such a suit is substantially one in respect of the family debt and against the representative of the family such decree may properly be executed against the family property." This case accepts the rule that the members of a joint family, are represented by the manager in a suit brought against the latter alone in respect of a debt due by the joint family. This case was, it is true, decided before the passing of the Transfer of Property Act, but it has been repeatedly held that section 85 of that Act, which with some modifications has been re-enacted in Order XXXIV, rule 1 of the present Code of Civil Procedure, only gave legislative effect to what had always been the law. It was, no doubt, held, by the majority of the Court, in *Bhawani Prasad* v. *Kallu* (1), that the omission of the son in a mortgage suit brought against the father entitled the son to bring a suit to repudiate the decree, simply on the ground that he was not joined as a party to the mortgagee's suit. This view has not found favour with the other High Courts and seems to me to be opposed to the principle laid down by their Lordships of

(5) 3 A. 443.

the Privy Council in *Kishun Prasad* v. *Har Narain Singh* (3). The latest case on the point decided by the Madras High Court is that of *Sheikh Ibrahim Tharagon* v. *Rama Ayar* (6).

The ordinary rule undoubtedly is that all persons interested in a suit should be made parties to it, but in the case of a joint Hindu family, this rule is complied with if the manager of the family is sued or sues and thus represents the other members of the family. What is required is that all persons whose interests are to be affected by the suit are sufficiently and substantially represented. In the case of a joint Hindu family, all persons interested are represented in the suit by the manager and are substantially parties to it through the manager. I do not think that it is essential that the manager, when he brings his suit, should state in distinct terms that he is suing as manager, or that the plaintiffs in a suit against the family, should describe the defendant as the manager of the family. All that is essential is that the manager is in fact suing or is being sued as such in respect of a family debt. If it is denied that the person suing or sued is the manager that fact must be proved. The question is merely one of procedure and I do not think it affects the substantive law as to the representation of members of a joint Hindu family by the manager of the family. "Procedure" said Lord Penzance in the well-known case of *Kendall* v. *Hamilton* (7) "is but the machinery of the law, after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights and is thus made to govern where it ought to subserve." In the present case, the appellants have no defence to the suit on the merits but they are seeking to defeat it on the ground of a defect in procedure. In my judgment there is no such defect, as the sons of the appellants are substantially parties through the appellants who have been found to be the managers of the joint family of which all of them are members. I would, therefore, dismiss the appeal.

(6) 21 M. L. J. 508; (1911) 2 M. W. N. 442; 10 Ind. Cas. 874.

(7) 4 App. Cas. 504; 48 L. J. C. P. 705; 41 L. T. 418; 18 W. R. 97.

TUDBALL, J.—The facts of this case are simple. One Nait Singh mortgaged the property in suit on 14th November 1870 to one Dharam Singh.

On 7th January 1889, Nait Singh sold the property to Tilak Ram, the father of defendants Nos. 4 and 5, Hori Lal and Jagan Nath The appeal has been argued on the assumption that Tilak Ram and his sons constituted a joint Hindu family and that the purchase was made out of joint family funds. The property thus purchased became the property of the joint family. It stood recorded in the name of Tilak Ram alone who, one may presume, was the manager. Tilak Ram died and the names of Hori Lal and Jagan Nath were recorded in Government records. Dharam Singh has died and the present plaintiff, his widow and successor, has brought this suit for sale on the basis of the mortgage.

To this suit she has made parties

1. The heirs and representatives of Naiti Singh.

2. Hori Lal and Jagan Nath.

The suit was brought at the extreme limit of time allowed by law.

Among other defences, Hori Lal and Jagan Nath pleaded that they had sons who were joint with them and, therefore, interested in the mortgaged property and that these sons were necessary parties under Order XXXIV rule 1. This objection was taken at the earliest possible date.

On the merits, the Court of first instance found for the plaintiff but it dismissed the suit on the ground that the sons of Hori Lal and Jagan Nath were necessary parties to suit and not having been impleaded, the suit must fail. I presume that if there had been time to do so, the Court would, under Order I, rule 10, have made the sons parties and proceeded to decide the suit. If they had been thus made parties, however, at that stage, the suit as against them would have been barred by time.

The plaintiff appealed and urged that Hori Lal and Jagan Nath were the managers of the family and fully represented the interests of their sons and that it was not necessary to implead the latter as the joint family was fully represented through its managing members,

The lower Appellate Court held that these two defendants Nos. 4 and 5 were the managers of the joint family and that, therefore,

it was unnecessary to implead their sons, and decreed the suit. Hori Lal and Jagan Nath appeal.

Two points were taken:—

(1) That the plaintiff has not proved that the appellants are the managing members.

(2) That the sons of the appellants are necessary parties and the suit must fail unless they are impleaded.

As regards the first point, there is a clear finding by the lower Appellate Court and there is no certificate that there is no evidence on record to support it. The plea, therefore, fails.

In regard to the second point, it is clear that all persons having an interest in the mortgage security or the right of redemption must be joined as parties, *vide* Order XXXIV, rule 1, Civil Procedure Code. The proper procedure, I take it, where such a person has not been made a party, is for the Court to make him a party and then the question of limitation, if it arises, may be decided.

But the question to be decided in the present appeal is whether or not, as a matter of fact, the sons of the appellants are virtually parties to the suit through their representatives, the managing members of the family; in other words, "Can the managing member of a joint Hindu family be sued as representing the whole family without making the other co-parceners parties in a suit for sale on a mortgage. ?"

The question is one of some difficulty by reason of the conflict of opinion disclosed in the various decisions of the High Courts in India. Order XXXIV, rule 1, Civil Procedure Code, is a rule of procedure which was formerly embodied in the Transfer of Property Act, section 85. The only differences are that the proviso of section 85 as to notice has been omitted and the words "in the property comprised in the mortgage" have also been altered.

Unless there be some other law which operates in the case of a joint Hindu family, it is clear that the members thereof other than the manager would be necessary parties to a suit for sale on a mortgage. In the case of *Bhawani Prasad* v. *Kallu* (1), it was held by a majority of a Full Bench of this Court that where a mortgagee had obtained a decree on his mortgage against a father in a joint Hindu family without impleading the sons, the latter were entitled to a declaration that the decree-holder was not entitled to sell, in execution of his decree, the interests of the sons, on the sole ground that they were not parties to the suit on the mortgage.

In the course of his judgment in that case, the learned Chief Justice remarked:—"I have not yet heard any one suggest that the father in a joint Hindu family, is, as such, a trustee, executor or administrator, within the meaning of section 437 of the Civil Procedure Code, of his son, particularly if that son is alive and *sui juris*.

"Consequently, we may dismiss from the consideration of this case that Pemi in Bhowani Prasad's suit for sale of the interests of the sons in the family property represented his sons or could have been treated by Bhowani Prasad or by the Court in that suit as representing them for the purpose of section 85, Act IV of 1882."

It will be noticed that there was no consideration in the above case of the position of the manager of a joint Hindu family and his power to represent the family in the course of any litigation in which it might be involved. In so far as the above ruling may have held that the sons were absolutely necessary parties to the suit against the father, the binding force of it has been considerably decreased by the Full Bench ruling in *Debi Singh* v. *Jia Ram* (2). In the latter suit, the decision in which has since, with perhaps one exception, been regularly followed in this High Court and in other High Courts as well, it was held that where the property had been actually sold, the sons could not succeed in a suit to recover it, on the sole ground that they were not parties to the suit but must base their suit on some ground which, under Hindu Law, would free them from their liability for the debt incurred by their father. The principle which is the basis of this ruling, it seems to me, must apply whether the property has been sold or not, but be that so or not, it is a clear instance of a case in which a person interested in the mortgage property was held bound by the decree and sale thereon even though he was not a party personlly to the suit.

In other words, it is a clear decision to the effect that the substantive law to which he was subject was not overridden by the

rule of procedure which makes it necessary to bring on to the record all persons interested in the right of redemption on the mortgage security.

Now the general rule of Hindu Law is that a joint family is represented by its manager in all its transactions or concerns with the outer world provided they are for family necessity [vide *Vishnu Dhondi* v. *Babaji Bairu* (8)]. In certain circumstances, the manager has power to mortgage or sell the family property.

"The manager is neither a partner nor a principal nor an agent of the family but a sort of representative owner, his independent rights being limited on all sides by the correlative rights of others, etc." (*vide* Cowell's Tagore Law Lectures, 1870, page 105). Where the manager borrows money on promissory-notes for the purpose of a joint family business or to meet a joint family necessity, the creditor can recover the money from all the members of the family although they have not been parties to the notes [vide *Baisnab Chandra De* v. *Ramdhon Dhar* (9); *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (10) and *Raghunathji Tarachand* v. *The Bank of Bombay* (11)]. One of the duties of a manager is to get in the income and pay the debts of the family (see Bhatacharya's Law of the the Joint Family, page 295).

He can give a valid discharge without the concurrence of the minor members of the family [*Ahinsa Bibi* v. *Abdul Kader Sahib* (12)].

It is difficult to see, therefore, why a manager, if he can repesent the family in its transactions and concerns with the outer world, should not be also able to represent the family in its litigations in the Courts.

In *Daulat Ram* v. *Mehr Chand* (13), the contention of the co-parceners other than the manager was that as they had not been made parties to the suit against the manager, they were not affected by the decree and their shares had not passed by the sale in execution thereof. In the original suit, the decree had been obtained against the managing members who had mortgaged the whole estate to pay off the family debt. Their Lordships of the Privy Council held that the other co-parceners were bound by the decree and that the whole estate had passed. The managers had clearly represented the family in the litigation.

In *Lala Surja Pershad* v. *Gulab Chand* (14), the two learned Judges differed on this point. Ghose, J., ruled that the share of the son in the ancestral estate was liable for the satisfaction of the decree notwithstanding the provisions of section 85, Transfer of Property Act, the father having incurred the debt in his representative capacity and as managing member of the family and the son having been substantially a party to the suit in which the said decree was passed through the representation of his father, that section 85 of the Transfer of Property Act laid down only a rule of procedure and the words "*all persons*" in the section could hardly have been intended to include a *Mitakshara* son in a suit where the father is sued in his representative capacity. He dissented from the ruling in *Bhawani Prasad* v. *Kallu* (1). Since the above decision, section 85 of the Act has been repealed and the rule laid down therein is now a rule of procedure in the Civil Procedure Code.

Harrington, J., differed and quoted the case of *Bhawani Prasad* v. *Kallu* (1) in support of his decision though pointing out that Sheppard, J., had dissented from it in *Ramasamayyan* v. *Virasami Ayyar* (15), which was followed in *Palani Goundan* v. *Ringayya Goundan* (16).

It is unnecessary to set forth at length the arguments on which the learned Judges based their opinions. In *Kunj Behari Lal* v. *Kanth Prashad Narain Singh* (17), it was held that if a decree is passed against the manager of a joint Hindu family in respect of a liability properly incurred for the necessities of the family, the binding character of the decree upon the interests of the other members depends not upon their having or not having been parties to the suit, but on the authority of the manager to incur the liability. See also the decision in

(8) 32 B. 375; 10 Bom. L. R. 505.
(9) 11 C. W. N. 139.
(10) 7 C. W. N. 725.
(11) 34 B. 72; 11 Bom. L. R. 255; 2 Ind. Cas. 173.
(12) 25 M. 26.
(13) 15 C. 70; 14 I. A. 187.
(14) 27 C. 724; 4 C. W. N. 701.
(15) 21 M. 222.
(16) 22 M. 207.
(17) 6 C. L. J. 362.

Lutchmanan Chetti v. *Siva Prokasa Modeliar* (18), where the rule of representation was upheld.

In *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (19), it was pointed out that "a Hindu family is regarded as a corporation whose interests are naturally centred in the manager, the presumption being that the latter is acting for the family unless the contary is shown and that before the introduction of the Civil Procedure Code, this was equally so with regard to litigation as to other transactions."

I have already noted the rule of Hindu Law as pointed out in *Vishnu Dhondi* v. *Babaji* (8). In *Ramakrishna Narayan Sindhe* v. *Vinayak Narain Saswadkar* (20), it was held that the rule of procedure laid down in section 85, Transfer of Property Act, does not interfere with the rule of Hindu Law, that it is open to the manager in a Hindu family to represent the other members (subject to certain conditions) in a suit brought upon a mortgage against him. In *Chimna Sadashiv* v. *Sada Barka* (21), the same rule was approved, dissent was expressed from the decision in *Bhawani Prasad* v. *Kallu* (1). Sheppard, J.'s decision in *Ramasamayyan* v. *Virasamy Ayyar* (15) and the decision in *Debi Singh* v. *Jia Ram* (2) were quoted with approval.

In *Arunachala Pillai* v. *Vithialinga Mudaliar* (22), it was held that no member of an undivided Hindu family (*except the manager as such*) is entitled to bring a suit to establish a right belonging to the family without making the other members of the family parties to the suit.

But in the case of *Angamuthu Pillai* v. *Kolandavelu Pillai* (23) it was held that the plaintiff could not sue without making his brother the other member of the undivided family a party to the suit, though he was suing as the manager to recover certain property for the family. The latest decision of the Madras High Court is to be found in *Sheikh Ibrahim Tharagon* v. *R. K. Rama Iyer* (6), in which, after an exhaustive consideration of all rulings on the point, the rule of Hindu Law, (*i. e.*, of representation of the family by the manager), was enforced and the manager's right to sue as such was maintained. In this Court in the case of *Shamrathi Singh* v. *Kishan Prasad* (24), it was ruled that the managing members of a joint Hindu family carrying on a joint family business are not entitled to maintain a suit in their own names against debtors of the family without joining with themselves either as plaintiffs or defendants all the other members of the family. The decision in *Pateshri Partab Narain Singh* v. *Rudra Narain Singh* (25) was distinguished.

Their Lordships of the Privy Council have reversed this decision, *Kishun Pershad* v. *Har Narain Singh* (3), holding that there was no principle of law or custom applicable to such a case under which the managing members of a Hindu joint family entrusted with the management of the business could be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names.

The decision in *Arunachala Pillai* v. *Vithialinga Mudaliar* (22) was quoted with apparent approval and the decision in *Ramsebak* v. *Ram Lal Koondoo* (26) explained, as also was that in *Alagappa Chetti* v. *Vellian Chetti* (27). In respect to the latter, their Lordships expressed the opinion that the proposition there laid down to the effect that the manager cannot sue without joining all those interested with him, if literally construed, goes too far.

In *Jaddo Kuar* v. *Sheo Shankar Ram* (28), this Court also applied the rule of representation and held that the other members of the joint Hindu family were bound by the action of their managing members. It is unnecessary to discuss any further rulings on the subject. While there, no doubt, is a conflict of opinion as to whether the rule of procedure does or does not override the rule of Hindu Law, which allows the manager to represent the family under certain conditions in the case of litigation as well as in the other concerns of ordinary life, the weight of opinion seems to me to be in favour of the rule of substantive law.

(18) 26 C. 349; 3 C. W. N. 190.
(19) 7 B. 467.
(20) 12 Bom. L. R. 219; 34 B. 354; 5 Ind. Cas. 967.
(21) 12 Bom. L. R. 811; 7 Ind. Cas. 990.
(22) 6 M. 27.
(23) 23 M. 190.
(24) 29 A. 311; 4 A. L. J. 194; A. W. N. (1907) 58.
(25) 26 A. 528.
(26) 6 C. 815; 8 C. L. R. 457.
(27) 18 M. 33.
(28) 33 A. 71; 7 A. L. J. 945; 7 Ind. Cas. 902.

HORI LAL *v.* NIMMAN KUNWAR.

[Prior to the introduction of the Civil Procedure Code and the Transfer of Property Act, this latter rule had full sway. Afterwards, the pendulum has swayed both ways. Of late the rule of Hindu Law has been given precedence over the rule of procedure and the latest decision of the Privy Council in *Kishan Pershad's* case (3) can leave no doubt upon the point. I, therefore, am of opinion that the rule of Hindu Law must be given its full force, and that where the necessary conditions prevail, the manager of the family when acting as such can both sue and be sued in his representative capacity and suits in such circumstances cannot be dismissed simply because the other members of the family are not before the Court.

It will always be open to the opposite party to plead that the person alleged to be the manager is, as a matter of fact, not the manager and the issue as to this fact can be decided. It may also be similarly pleaded that he is not acting within the scope of his authority. The result of this no doubt will be to leave it open to the other members of the family to attack the decree on the ground of fraud etc., in a subsequent suit. This is even so now and suits by sons against their fathers and persons holding decrees against him are fairly frequent as it is.

It would, therefore, be still advisable for the Courts, where the objection of non-joinder is taken, to make the absent members parties to the suit, if possible, so as to prevent the necessity of further litigation and to decide finally whether or not the action of the manager is within his authority and binding on his co-parceners.

In the present case, Hori Lal and Jagan Nath are the managing members. The property was purchased by the joint family with the burden of the plaintiffs' mortgage already upon it. There is no defence open to their sons which is not open to them. The sons cannot plead a debt contracted by their fathers for immoral or non-family purposes. The question is as to the validity or otherwise of the mortgage as created by the original mortgagors. There is, therefore, no valid reason in this case for not applying to the parties the rule of substantive law which is binding upon them and I would, therefore, hold that the decision of the Court below is correct and would dismiss the appeal.

CHAMIER, J.— I agree that the appellants cannot be allowed to challenge the finding of the lower Appellate Court that they are the managers of the joint family to which they belong. The only question which we have to decide in this appeal is whether a suit can be maintained against the manager of a joint Hindu family alone to enforce a mortgage against property belonging to the family.

A somewhat analogous question has arisen in *Lala Madan Lal* v. *Kishan Singh* (4), which has been heard by this Bench of four Judges, namely, whether the manager of a joint Hindu family *suing as such* can maintain a suit for the recovery of a mortgage-debt due to the family. I have stated the question in this way because I agree with my learned colleagues that the Court below ought to have allowed the plaint to be amended and that the case should be treated now as if the Appellant had from the first sued as the manager of a joint family.

The records of cases decided in these Provinces forty or fifty years ago show that in those days a joint Hindu family ordinarily sued and was sued through the manager of the family or through the more prominent members of the family and the practice was recognized by their Lordships of the Privy Council as long ago as 1871 [see the remarks made in the case of *Jogindro Deb Roy* v. *Funindro Deb Roy* (29). But the reports show many instances of cases in which, after a decree had been obtained by or against one or more members of a joint family, attempts were made by members who had not been impleaded to show that they were not bound by the decree which had been passed. Whether on account of the difficulties which resulted from that practice or for any other reason, there is no doubt that in many parts of India a practice has been growing up of impleading as many members of a joint family as possible [see the remarks made in the cases of *Kashi* v. *Chimnaji* (30); *Naranji* v. *Mohi Govanji* (31) and *Harihar Prasad* v. *Mathura Lal* (32)]. In these Provinces, it has been for many years the practice to join all the members of a joint

(29) 14 M. I. A. 367; 11 B. L. R. 244; 17 W. R. 104.
(30) 30 B. 477; 8 Bom. L. R. 268.
(31) 9 Bom. L. R. 1126.
(32) 12 C. W. N. 598; 35 C. 561; 8 C. L. J. 256.

family in a suit relating to the property of a joint family and there are instances in this Court of suits having been dismissed on account of the non-joinder of subordinate members of a family. But objections on the score of non-joinder of members of a family have generally been met by those members being added as parties or have been overruled as having been taken too late, and I know of no case in this Court in which it has been definitely held that a manager of a joint family cannot sue or be sued on behalf of the family.

An exhaustive review of the case law in the other High Courts will be found in the recent case of *Sheikh Ibrahim* v. *Rama Iyer* (6). It shows, I think, that there has not been any uniform course of decisions in those Courts.

The case of *Kishun Prasad* v. *Har Narain* (3) has been regarded by some Courts as deciding that a manager of a joint family can sue and be sued on behalf of the family. It seems to me that all that their Lordships of the Privy Council decided in that case was that managing members of a joint family entrusted with the management of a business are competent to enforce at law the ordinary business contracts which they are entitled to make or discharge in their names; but the language used by their Lordships in more than one place in their judgment suggests that they were of opinion that, apart from the case of a family business, the managing member of a joint family *suing as such* is entitled to maintain a suit to establish a right belonging to the family without making other members of the family parties. Indeed, this seems to be a necessary conclusion from their decisions in such cases as that of *Daulat Ram* v. *Mehr Chand* (13). On principle, it would seem that the decision should be the same whether the question of the right of the manager to represent the family is raised in the suit brought by or against the manager or in a subsequent suit brought by or against a member of the family not impleaded in the former suit to try the effect of the decision in the former suit as against him. The manager of a joint family represents the family in its dealings with outsiders in all the ordinary affairs of life, at all events where he is acting within the scope of his authority or for the benefit of the family, and there seems to be no reason why he should not represent the family in a suit whether as plaintiff or defendant unless there is some legislative enactment to the contrary. It has been held more than once that the rule of procedure which is now Order VII, rule 4, applies to the case of a manager of joint family suing on behalf of the family. If those decisions are correct, the rule referred to shows that a manager can sue on behalf of a joint family.

Except possibly in a few cases there appears to be no presumption that a joint family has a manager or that any particular person is the manager. The question whether a person before the Court is the manager of a joint family is usually a question of fact to be dealt with like any other question of fact. In one of the cases now before us, the plaintiff claims to be the manager of a joint family and must be allowed an opportunity of proving his allegation if it is denied. In the other case, it has been found that the appellants are the managers of a joint family.

Both on principle and on authority, I am of opinion that the manager of a joint Hindu family suing as such can maintain a suit alone for the recovery of a mortgage-debt due to the family and that a suit can be maintained against the manager of a joint family alone to enforce a mortgage against property belonging to the family. If the manager sufficiently represent the family, the provisions of Order XXIV, rule 1, are complied with.

In conclusion, I desire to refer to the cases of *Gendan Lal* v. *Babu Ram* (33) and *Nathi Lal* v. *Lala* (34), in the decision of which I took part. In the former it was neither alleged nor proved that the family had a manager who could represent the absent member and, as my judgment shows, it was not even contended that the absent member was sufficiently represented by any person before the Court, a circumstance which supports what I have said about the practice of this Court in recent years. In the latter case a judgment was delivered which covered several cases. Some members of the families of the plaintiffs had not been

(33) 9 A. L. J. 86; 13 Ind. Cas. 197.
(34) 9 A. L. J. 410; 14 Ind. Cas. 35.

made parties. We were disposed to hold that managing members could sue on behalf of the joint families to which they belonged, but none of the plaintiffs had sued as managers and in some of the cases at all events it was impossible to presume that the managers were before the Court. Consequently, we disposed of the appeals on another ground. I agree with the order proposed by the learned Chief Justice in this case.

BY THE COURT.—The order of the Court is that the appeal be dismissed but we make no order as to the costs in this Court. We extend the time for payment for six months from this date.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 1217 OF 1910.
March 6, 1912.
Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

HARI LAL SINGHA AND OTHERS—DEFENDANTS—APPELLANTS
versus
RUP MANJORI BURMONI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Lease—Indefinite term—Heritability—Inference from circumstances—Lease for building and residential purposes—Degraded woman—Undegraded relation—Power to inherit—Divergence of judicial opinion.

A lease for an indefinite term is not necessarily heritable.

Tej Chund v. *Sreekanth Ghose*, 6 W.R. (P.C.) 48; 3 M. I. A. 261 and *Burdakanth Roy* v. *Aluk Munjooree Dasiah*, 4 M. I. A. 321, followed.

But it is open to a Court to hold from the circumstances of a particular case that the lease-hold interest was intended to be heritable.

Where there is a lease for building and residential purposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenancy, the lease-hold interest is heritable.

Kishori Lal Roy Chowdhury v. *Krishna Kamini Chowdhurani*, 5 Ind. Cas. 500; 37 C. 377; 11 C. L. J. 401, relied upon.

There is some divergence of judicial opinion upon the point whether an undegraded relation of a degraded woman is not her heir-at-law.

Chatu Kurmi v. *Rajaram Tewari*, 3 Ind. Cas. 374; 11 C. L. J. 124 (F. B.), referred to.

Appeal from the decree of the District Judge of Birbhoom, dated February 2nd 1910, affirming that of the first Munsif of Bolpur, dated May 23th 1909.

Babus *Bipin Bihary Ghose* and *Nagendra Nath Ghosh*, for the Appellants.

Babu *Sajani Kanta Sinha*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in an action in ejectment. The subject-matter of the litigation, a parcel of homestead land, admittedly belonged to one Krishna Mohini Dasi, who died in March, 1908. On the 22nd April 1908, her interest as tenant was purchased by the plaintiff from her brother, Krishna Das. Three days later, the defendants, now appellants, purchased the property from the same person. The plaintiff seeks to eject the defendants on the ground that she has a prior title. The defendants resist her claim on a two-fold ground; namely, *first*, that the interest of Krishna Mohini was not heritable, and, *secondly*, that as Krishna Mohini was a woman of ill-fame and an outcast, her brother Krishna Das was not her legal representative. The Courts below have overruled the first contention and have held that the interest of Krishna Mohini was heritable. Upon the second question, they have held that Krishna Das was the brother of Krishna Mohini as alleged by the plaintiff and was consequently the heir-at-law.

In the present appeal, it has been argued, in the first place, on behalf of the defendants that the interest of Krishna Mohini was not heritable and that she held it for life. In support of this proposition, reliance has been placed upon the cases of *Lekhraj Roy* v. *Kanhya Singh* (1) and *Tulshi Pershad* v. *Ram Narain Singh* (2). On the strength of these decisions, it has been contended that a grant for an indefinite term is presumably for the life of the grantee and that the *onus* is upon the plaintiff to establish that the grant in favour of Krishna Mohini was heritable. Now it need not be disputed, as was ruled by the Judicial Commitee in the cases of *Tej Chand* v. *Sreekanth Ghose* (3) and *Burdakanth Roy* v. *Aluk Munjooree Dasiah* (4), that a lease for an indefinite term is not necessarily heritable. At the same time, it

(1) 3 C. 210; 4 I. A. 223.
(2) 12 C. 117; 12 I. A. 205.
(3) 3 M. I. A. 261; 6 W. R. (P. C.) 48.
(4) 4 M. I. A. 321.

must be remembered that it is open to a Court to hold, from the circumstances of a particular case, that the lease-hold interest was intended to be heritable. It was pointed out by this Court in the case of *Kishori Lal Roy Chowdhury* v. *Krishna Kamini Chowdhurani* (5), that where there is a lease for building and residential purposes, in the absence of any intention to the contrary indicated either in the terms of the grant or in the nature of the tenancy, the lease-hold interest is heritable, and the tenancy does not determine by the death of the lessee but vests in his legal representatives who are entitled to give or to receive the usual notices to quit. In the case before us, it appears from the evidence that Krishna Mohini held under a registered *kabuliyat* which has not been produced in evidence; it is presumably in the custody of the superior landlords who, it has been found, have taken the side of the defendants appellants. No steps appear to have been taken for the production of that instrument and it is consequently not unfair to hold that if the deed supported the theory that the grant was personal and not heritable, it would have been produced. In addition to this circumstance, we have the further fact that both the plaintiff and the defendants have treated the interest as heritable. No doubt, as was pointed out by the learned Vakil for the appellants, upon the authority of the decisions of this Court in the case of *Rup Chand Ghosh* v. *Sarveswar Chandra Chandra* (6), which was accepted as good law in *Bipin Behari* v. *Tincowri* (7), such conduct on the part of the defendants does not create an estoppel, but it is open to a Court to hold that the conduct is evidence that the interest, accepted as heritable by the defendant, was in reality of that character; and this is the view adopted by the Courts below. We must, therefore, hold that the finding of the Courts below that the interest of Krishna Mohini was heritable cannot be successfully challenged in second appeal.

It has been argued, in the second place, by the learned Vakil for the appellants that even if the lease-hold interest was heritable, Krishna Das was not the heir-at-law of his sister, and in this connection, reference has been made to the case of *Bhut Nath Mondol* v. *The Secretary of State for India* (8) to show that an undegraded relation of a degraded woman is not her heir-at-law. It is not necessary for the purpose of the present case to discuss whether this proposition is well founded. It is sufficient to observe that, as is shown by an examination of the authorities in the order of reference to the Full Bench in the case of *Chatu Kurmi* v. *Rajaram Tewari* (9), there is some divergence of judicial opinion upon this point. In the case before us, however, it is clear that this point was not taken in the Courts below, and, it is undoubtedly not taken in the grounds of appeal here. The decision of the question involves the determination of a disputed question of fact, namely, whether Krishna Das was degraded in the same way as his sister was. We are of opinion, therefore, that the question ought not to be allowed to be raised at this stage, specially in view of the fact that the brother has been treated by both the parties as the heir-at-law of his sister in the course of their respective transactions.

The result is that both the contentions urged by the appellants fail and the appeal is dismissed with costs.

Appeal dismissed.

(5) 37 C. 377; 5 Ind Cas 500; 11 C. L. J. 401.
(6) 33 C. 915; 10 C. W. N. 747: 3 C. L. J. 629.
(7) 9 Ind. Cas. 3741; 3 C. L. J. 271; 15 C. W. N. 976.
(8) 10 C. W. N. 1085.
(9) 3 Ind. Cas. 374; 11 C. L. J. 124.

ALLAHABAD HIGH COURT.
FULL BENCH.
FIRST CIVIL APPEAL No. 91 OF 1911.
May 27, 1912.
Present:—Sir Henry Richards, KT, K. C., Chief Justice, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.
MADAN LAL—PLAINTIFF—APPELLANT
versus
KISHEN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.
Civil Procedure Code (Act V of 1908), O. I, r. 9,

MADAN LAL *v.* KISHEN SINGH.

O. XXXIV, r. 1—Mortgage suit by manager of joint Hindu family—Other members not impleaded—Parties, non-joinder of, whether fatal to the suit.

Where the manager of a joint Hindu family brings a suit on the foot of a mortgage without impleading the other members of the family as parties to the suit, the suit does not fail on account of the non-joinder.

Kishen Parshad v. *Harnarain Singh*, 33 A. 272; 9 Ind. Cas. 739; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 38 I. A. 45; (1911) 2 M. W. N. 395; *Shamrathi* v. *Kishan Proshad*, 29 A. 311; 4 A. L. J. 194; A. W. N. (1907) 58, referred to.

First appeal from the decision of the Subordinate Judge of Sahjahanpur, dated the 23rd February 1911,

The Hon'ble Dr. *Sunder Lal*, with him Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Benode Behari*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit to realise the amount of a mortgage, dated the 11th August 1884. It was pleaded by way of defence amongst other things that the plaintiff and his minor son Bisheshar Dayal were a joint Hindu family and that the suit could not be maintained because the mortgage was of family property and the son was not made a party. Plaintiff urged against this plea that he was manager and represented the family. Plaintiff also asked that the plaint might be amended by stating therein that he sued as manager. The Court below refused to amend the plaint and dismissed the suit on the ground that the son was a necessary party to the suit.

The appeal has been referred to this Bench because of the conflict of judicial decisions on the question.

Apart from authority, I can see no reason why the son should be a necessary party to the suit. It must be assumed for the purpose of this appeal that the plaintiff is the manager of the family. If before the suit was instituted, the owners of the equity of redemption had been ready and willing to pay off the mortgage, I think it is absolutely clear the plaintiff as manager could receive the mortgage money and give the person paying off the money a good discharge and I can see no reason why the Court should require the presence of any other party.

Order XXXIV, rule 1 of the Code of Civil Procedure, no doubt requires that persons interested in the mortgage security should be parties but I think in a case like the present the son is virtually a party through the manager and that Order XXXIV, rule 1, is substantially complied with.

The same question in principle arose in *Hori Lal* v. *Nimman Kunwar* (1), which was argued before this Bench. In my judgment in that case, I gave my reasons for holding that the manager of a joint family can represent the family. I would allow the appeal and remand the suit.

BANERJI J.—The point raised in this appeal has practically been decided in *Hori Lal* v. *Nimman Kunwar* (1), in which judgment has this day been delivered.

In this case the plaintiff omitted to join with him as plaintiff his minor son who is four years old. For this omission, the suit has been dismissed. It is manifest from the plaint that the debt which the plaintiff seeks to recover is alleged to be a debt due to the joint family of which he and his minor son are members. The mortgages which form the basis of the claim are in favour of Ram Prasad, the grandfather of the plaintiff and the great-grandfather of his son. This is recited in the plaint. At an early stage of the suit, the plaintiff stated to the Court that he was suing in his capacity as manager of the joint family and applied for amendment of the plaint. The Court, in my opinion, improperly rejected the application. The defendants clearly had notice that the plaintiff was suing as manager, I have in my judgment in *Hori Lal* v. *Nimman Kunwar* (1) stated my reasons for holding that where a suit is brought by the manager of a joint Hindu family, the other members of the family must be deemed to be parties to the suit through him and the omission of the names of those members from the array of parties would not be a defect fatal to the suit. Of course, if in a suit like this the other members wish to join or apply to be added as parties the Court should never refuse to add them but the suit ought not in any event to be dismissed if in fact it has been instituted by the manager of the joint family for the recovery of a debt due to the family. As the manager is competent to give a full discharge to the debtor, the latter can have no reason to complain of the omission of the persons whom the manger represents. In this respect, the case of a joint Hindu family is different from that of other joint creditors. The matter is, in my opinion, concluded by the principle of the decision of their Lordships of the Privy

(1) 15 Ind. Cas. 126, *ante*.

Council in *Kishan Prasad* v. *Harnarain Singh* (2). I would allow the appeal, set aside the decree of the Court below and remand the case to that Court for trial on the merits.

TUDBALL, J.—This appeal arises out of a suit for sale on a mortgage against the heirs of the original mortgagor and certain subsequent transferees. It has been dismissed on a preliminary point, the lower Court having held that the plaintiff alone is not competent to maintain the suit.

The original mortgagee was Lala Ram Pershad, the plaintiffs' paternal grandfather, and the plaintiffs' case as disclosed in the plaint was that his grandfather, his father, his uncle and himself formed a joint Hindu family and that the three former having died, he was the sole owner of the mortgage-debt by the right of survivorship and entitled to sue. But it is an admitted fact that the plaintiff has an infant son who is joint with him.

Before the first date fixed for the case, the plaintiff applied to the Court to be allowed to amend his plaint by adding thereto that he was suing as manager of the joint family (consisting of himself and his son). The Court below, without passing any orders on this application, dismissed the suit holding that the amendment could not improve the position of the plaintiff because the manager of a Hindu family cannot sue without joining those interested with him. The decision was based on the ruling of this Court in the case of *Shamrathi* v. *Kishan Pershad* (2).

This decision has since been overruled by their Lordships of the Privy Council. In *Hori Lal* v. *Nimman Kunwar* (1) this Bench has fully discussed the right of the manager of a joint Hindu family to represent the family and have held that he can sue and be sued as such so that the decree under certain circumstances may be binding on the other co parceners. It is unnecessery to repeat what has already been said in the judgments in that case.

In my opinion, the plaintiff ought to have been allowed to amend his plaint and the suit as amended is maintainable. Of course, it is open to the defendants to plead that he is not the manager though, in the circumstances of the case, that appears to be a hopeless plea.

(2) 33 A 272; 9 Ind. Cas. 739; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 38 I. A. 45; (1911) 2 M. W. N. 395.

(5) 29 A. 311; 4 A. L. J. 194; A. W. N. (1907) 58.

I would, therefore, allow the appeal and remand the suit to the lower Court with orders to allow the plaint to be amended and to decide the suit on the merits.

CHAMIER, J.—I agree that the Court below ought to have allowed the plaint to be amended. The question for decision in this appeal appears to me to be whether the manager of a joint Hindu family *suing as such* can maintain a suit alone for the recovery of a mortgage debt due to the family. For the reasons which I have given in my judgment in *Hori Lal* v. *Nimman Kunwar* (1), I am of opinion that he can. I agree in the order proposed by the learned Chief Justice.

BY THE COURT.—The order of the Court is that we allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit the suit under its original number in the register and to proceed to try it on the merits after allowing the amendment of the plaint as prayed for by the plaintiffs. Costs here and heretofore will abide the result. Costs in this Court will include fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 347 OF 1911.

May 15, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

DHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KAHN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitaiton Act (IX of 1908), *s.* 5—*Appeal—Decision of two cross-appeals—Two decrees framed—Appellant believing in the existence of only one decree—Appeal filed against one decree only—Sufficient cause—Arbitration—Award—Parties to pending suit making reference without intervention of Court—Submission and award invalid—Specific Relief Act (I of* 1877), *s.* 21—*Civil Procedure Code* (*Act XIV of* 1882), *ss.* 12, 20, 523, 525—*Civil Procedure Code (Act V of* 1908), *Sch. II, ss.* 17, 20.

Two cross-appeals were decided by an Appellate Court and two separate decrees were framed, one in respect of each appeal. A second appeal was filed in respect of only one decree.

The framing of two separate decrees in the lower Appellate Court was quite unnecessary and the appellant in the second appeal was naturally misled into thinking that only one decree had been drawn up and he consequently appealed from one decree:

Held, that the appellant had sufficient cause, within the meaning of section 5 of the Limitation Act, for not filing the appeal as to the other decree within the

prescribed period of limitation and should be allowed to file a copy of the other decree.

During the pendency of a suit in a Court, it is not open to the parties to refer the matters in dispute to arbitration *without the intervention of the Court*, or, after an award has been made by the arbitrator appointed in this way, to apply to the Court that the award be filed.

Such a submission and the award made in pursuance thereof are quite invalid.

Budha v. *Haku*, 130 P. R. 1882, *Fakir* v. *Jaimal*, 50 P. R. 1891, *Khatija* v. *Ismail*, 12 M. 380, *Kubra Jan* v. *Ram Bali*, 5 A. L. J. 647; A. W. N. (1908) 235; 4 M. L. T. 392, followed.

Ghulam Jilani v. *Muhammad Hassan*, 25 P. R. 1902; 12 M. L. J. 77; 29 C. 167; 29 I. A. 51; 4 Bom. L.R. 161; 6 C. W. N. 226; *Tincowery Dey* v. *Fakir Chand Dey*, 30 C. 218 at p. 228; 7 C. W. N. 180, relied upon.

Harivalabdas Kalliandas v. *Utam Chand Manek Chand*, 4 B. 1; *Salig Ram* v. *Jhunna Kuar* 4 A. 546; *Sheo Dut* v. *Shive Shankar Singh*, 27 A. 53; *Sheo-ambar* v. *Deodut*, 9 A. 168, dissented from.

The provisions of sections 523 and 525 of the Civil Procedure Code, 1882, and sections 17 and 20, Schedule II of the Code of 1908, apply only to cases when there is no suit relating to the same matter already pending between the parties who are affected by the agreement to refer or by the award.

The previously instituted suit is not barred by reason only of an agreement being made between the parties for reference to arbitration without the intervention of the Court.

An award made by an arbitrator in pursuance of such an agreement cannot be taken cognizance of by the Court so as to be made the basis of a proceeding under section 525 of the Civil Procedure Code, 1882

Second appeal from the order of the Additional Divisional Judge, Ferozepore Division, dated the 17th November 1910, reversing that of the Munsif, 1st class, Ferozepore, dated 25th April 1910, decreeing the claim.

Mr. *Duni Chand*, for the Appellants.

Lala *Lajpat Rai*, for the Respondents.

ORDER.—The Pleader for the respondents urges as a preliminary objection that as two cross-appeals were filed by the parties in the Divisional Court and two separate decrees were framed, one in respect of each appeal, and as the appellants have appealed to this Court only from the decree passed in their own appeal, and not from the decree passed in the appeal preferred by the defendants, the present appeal must be dismissed on that ground alone. We think that the framing of two separate decrees in the Divisional Court was quite unnecessary in this case, and that the appellants' Counsel was, therefore, naturally miseld into thinking that only one decree had been drawn up and he consequently appealed from one decree. We have allowed him to file in this Court a copy of the other decree also, and we hold that as to that decree, his clients had sufficient cause within the meaning of section 5 of the Limitation Act for not filing the appeal within the prescribed period of limitation. We now proceed to give judgment in the merits of the case.

JUDGMENT.—The facts, so far as they are material to the decision of this appeal, are briefly as follows:—On the 24th February 1908, the plaintiffs instituted their suit in the Court of the Munsif, 1st class, for possession, by inheritance, of a half share of certain landed and house property left by a collateral relation of theirs, named Parsanna Singh, and they impleaded as defendants certain other heirs of Parsanna Singh entitled to the remaining half of the property and also certain alienees from Parsanna Singh. In the course of the suit, after the defendants had filed their written statements, and the issues were framed by the Court, two of the defendants, who were co-heirs with the plaintiffs to Parsanna Singh's property, namely, Kahn Singh and Gunna Singh, made an application asking for an adjournment of the case on the ground that the parties were contemplating a compromise. The hearing was accordingly adjourned to the 28th of April 1908, and on that date an application was filed by Kahn Singh stating that the matter in dispute between the parties had been referred to the arbitration of five persons on the 25th March 1908, that an award which consisted of an entry made by them in the *bahi* of one Harnama Mal had been given by the said arbitrators, and that according to the award, the defendants were entitled to receive from the plaintiffs Rs. 1,171 before giving up possession of the land. A transliteration of the entry in the *bahi* was filed along with the application. This application was ignored by the Court and the case was proceeded with; and after the evidence produced by the parties had been taken down, the Court proceeded to judgment on the 24th June 1908, and gave the plaintiffs a decree for possession of a half share of the land claimed on payment of Rs. 863-3-6. From the decree of the Munsif, both the parties appealed to the Divisional Court; and the Divisional Judge remanded the case under Order XLI, rule 23, Civil Procedure Code, for a fresh decision,

holding that there had been no proper trial of the suit, as no issue had been framed on the alleged reference to arbitration and the delivery of the award by the arbitrators which were relied upon by the defendants in the course of the suit. On the case coming back, the Munsif allowed the parties to put in fresh pleadings, and upon those pleadings, he framed issues which are printed at page 4 of the paper-book. The third issue which is the only issue with which we are now concerned ran as follows:—

"Did the plaintiffs refer the matter in dispute to arbitration; did they (the arbitrators) make any award: and is it valid and binding on the plaintiffs?"

Upon that issue, the Munsif held that the parties could not refer the matter in difference between them to arbitration during the pendency of the suit in Court. He also held that there was no written agreement to refer to arbitration, that all the parties did not make the reference that no proper inquiry was made by the arbitrators, and that they had made no proper award. He was accordingly of opinion that the plaintiffs were not bound by the award; and he, therefore, decided the suit on the merits with reference to the other issues framed by him, with the result that a decree for the property in dispute was granted to the plaintiffs on payment of Rs. 660. On cross-appeals being filed by the parties, the Divisional Judge, Mr. T. P. Ellis, remanded the case, under Order XLI, rule 25, Civil Procedure Code, for further inquiry as to whether a certain sum of money had been raised by Parsanna Singh for legal necessity, and a return was duly made to the order of remand by the Munsif. The appeals came on for final hearing before another Divisional Judge, Mr. H. A. Rose, and without going into the merits of the case, he held that the award of the arbitrators filed in the Court of the Munsif by the defendants on the 25th April 1908 was valid and was binding upon all the plaintiffs, though one of them Dhan Singh had not been a party to the agreement to refer to arbitration. The learned Judge accordingly accepted the defendants' appeal and granted the plaintiffs a decree in terms of the award, that is to say, he gave them a decree for possession of the property in suit on payment of Rs. 1,171 to the defendants.

The plaintiffs have preferred a further appeal to this Court and the first question for decision is whether during the pendency of the suit in the Court of the Munsif, it was open to the parties to refer the matter in dispute to arbitration without the intervention of the Court and, after an award had been made by the arbitrators, to apply to the Court that the award be filed. The point is not altogether free from difficulty, but after giving our best consideration to the matter, we think that the answer to the question must be in the negative. In support of this view, we may refer to the decisions of this Court reported as *Budha* v. *Haku* (1) and *Fakir* v. *Jaimal* (2) as also to the observations of their Lordships of the Privy Council in *Ghulam Jilani* v. *Muhammad Hassan* (3) and to the opinion expressed by Maclean, C.J., in *Tincovery Dey* v. *Fakir Chand Dey*, (4). The opposite view is supported by *Harivalabdas Kalliandas* v. *Utam Chand Manek Chand* (5); *Salig Ram* v. *Jhunna Kuar* (6) and *Sheo Dut* v. *Shive Shankar Singh* (7).

In *Budha* v. *Haku* (1), the parties to a pending litigation had referred the subject-matter of the claim to arbitration by an agreement which they had executed out of Court. No application was made to make this reference a rule of Court, nor was any proceeding taken by either party to cause the agreement to be filed under section 523 of the Code of Civil Procedure, 1882. At the hearing of the suit, the defendant pleaded the argeement as a bar to its further maintenance and the Court finding that both parties had made the agreement to refer, dismissed the suit leaving either party to take such action as he might be advised under section 523 of the Code. It was held by this Court that the only bar which a reference to arbitration, which had not been made a rule of Court, could be said to create was that provided for in the last clause of section 21 of the Specific Relief Act, which was inapplicable to the case, as the reference relied on by the defendant was made during the pendency, and not before the institution of the suit. The suit could, therefore, proceed notwithstanding the reference to arbitration

(1) 150 P. R. 1882.
(2) 50 P. R. 1891.
(3) 25 P. R. 1902; 12 M. L. J. 77; 29 C. 167; 29 I. A. 51; 4 Bom. L. R. 161; 6 C. W. N. 226.
(4) 30 C. 218 at p. 228; 7 C. W. N. 120.
(5) 4 B. 1.
(6) 4 A. 546.
(7) 27 A. 53.

which had been made out of Court. The question before us was, no doubt, not discussed or decided in that case, but certain observations made by the learned Judges in the course of their judgment have an important bearing on the point. They say: "Now it must be taken as clear law that unless there is something in the Code of Civil Procedure or in some other Act to oust the jurisdiction of the Court, every Civil Court must have power to proceed to a final adjudication of a suit of a civil nature which has once been properly instituted before it.....It is certainly not competent to the parties themselves, by some subsequent act of their own, to deprive the ordinary Courts of the jurisdiction which they otherwise possess. The same principle was laid down in *Khatija* v. *Ismail* (8) and in *Kubra Jan* v. *Ram Bali* (9).

In *Fakir* v. *Jaimal* (2), in which the Court of first instance had dismissed the plaintiffs' suit on the ground that during its pendency an agreement to refer to arbitration had been made between the parties and that the suit could not go on as the plaintiffs' sole remedy was under section 523, Civil Procedure Code, it was held by this Court, following *Budha* v. *Haku* (1), that there was no bar to the suit proceeding, inasmuch as the last clause of section 21, Specific Relief Act, was inapplicable to a case in which a reference to arbitration was made out of Court during the pendency, and not before the institution of a suit. The decisions of the Allahabad High Court in *Salig Ram* v. *Jhunna Kuar* (6) and *Sheoambar* v. *Deolat* (10) were dissented from.

The earlier Allahabad decision just cited is directly opposed to our view. That was a case in which the parties to a suit applied for an adjournment on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made therein disallowing the plaintiffs' claim. It was held by the Allahabad High Court that, under these circumstances, the further hearing of the suit was barred by the last clause of section 21 of the Specific Relief Act. As has been mentioned above, this ruling was dissented from by this Court in *Fakir* v. *Jaimal* (2), but it has been followed by the Allahabad High Court in two later decisions, namely, *Sheoambar* v. *Deodat* (10) and *Sheo Dat* v. *Shiv Shankar Singh* (7). In the last mentioned case it was held that where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of section 523 of the Code of Civil Procedure or not. After citing the previous decisions of their own Court on the point, the learned Judges go on to observe at page 55: "It appear to us that, having regard to the sections of the Code of Civil Procedure, dealing with the subject of arbitration, section 523 was intended to have effect in a case such as the present. Section 506 and the following sections, up to section 522, deal with cases in which the parties to a suit desire to leave the matters in difference between them to arbitration and apply to the Court for an order of reference. Those are not cases like the present. In such cases, there are provisions for all the necessary steps following upon an order of reference by the Court. But section 523 refers to cases in which persons, whether they be litigants or not, themselves agree, independently of the Court, to refer the matter in difference between them to arbitraiton, and ask the Court to have the agreement filed; then section 525 enables parties who have agreed to refer their differences to arbitration and have obtained an award to have that award filed in Court. The course which the appellants in the present case ought to have taken is that provided by section 523. They omitted to follow that course, and despite the fact that they had agreed to refer the dispute to arbitration, proceeded to carry on the litigation. We think it would be most inconvenient if two simultaneous proceedings in respect of disputes were allowed, namely, arbitration proceedings and proceedings before a Court of justice."

In *Harivalabdas Kalliandas* v. *Utam Chand Manak Chand* (5), it was held that under sections 523 and 525 of the Civil Procedure Code (Act X of 1877), parties to a suit as well as persons not engaged in litigation may

(8) 12 M. 380 at p. 386.

(9) 5 A. L. J. 647; A. W. N. (1908) 235; 4 M. L. T. 392.

(10) 9 A. 168.

agree to refer matters in dispute between them to private arbitration without the intervention of the Court, and may apply to have the agreement filed; and that the mere fact that a suit is pending with respect to the matters in dispute, is not of itself a sufficient reason to induce the Court to refuse to file the agreement. At page 3 of the report, the learned Judges say: "It was next contended that section 523 is not applicable to matters in difference *in a suit*; and that the earlier sections in the Chapter, which provide for the case of *parties to a suit* desiring to refer matters in difference to arbitration, are alone applicable to such a case. We think, however, that the very general language of sections 523 and 525 forbids this conclusion. Those sections contemplate arbitration without the intervention of the Court by 'any persons' and with respect to 'any matter', and contain no express exception as to parties to a suit or to matters in litigation in a suit actually pending. Moreover, it is to be remarked that there is an absence of any expression in section 506 showing an intention to forbid arbitration by parties to a suit without the intervention of the Court. Undoubtedly, the procedure in such cases, as provided by sections 523 and 525, *viz.*, a separate suit, is not the best adapted to a case where the matters are already before the Court; and will necessitate an application for stay of proceedings in that suit. It is, therefore, probable that the particular case in question was not present at the time to the minds of the framers of those sections. But, having regard to the general scope of the provisions in this Chapter, we do not think that that consideration is sufficient to outweigh the inference to be drawn from the very general language of these sections. Whether the existence of a suit, in which the matters in difference are in litigation, may under special circumstances afford sufficient cause, as contemplated by sections 523 and 525, for not filing the agreement to arbitrate, it is not necessary to decide."

With the greatest possible respect to the learned Judges of the Bombay High Court and of the Allahabad High Court, we think that the views expressed by them in their judgments in the above-mentioned cases are not tenable in the face of the observations of their Lordships of the Privy Council in the well-known case of *Ghulam Jilani* v. *Muhammad Hussan* (3). In their judgment in that case, their Lordships analyse the provisions of Chapter XXXVII of the Civil Procedure Code of 1882 relating to arbitration and divide them into three groups. Their Lordships say:—

"The Chapter in the Code of Civil Procedure on *Reference to Arbitration* (Chapter XXXVII) deals with arbitration under three heads:—

1. "Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case, all proceedings from first to last are under the supervision of the Court.

2. Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court."

3. "Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award."..... .....

"In cases falling under Head No. 1, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned, and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point. In cases following under Heads II and III, proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer, or the award, as the case may be—under the cognizance of the Court."

It would appear from these observations of their Lordships of the Privy Council that, according to the Code of Civil Procedure, proceedings under Heads II and III as set out above are intended to be taken only in cases where the parties *without having recourse to litigation* agree to refer their disputes to arbitration, and it is desired either

(1) that the agreement of reference should have the sanction of the Court, for which provision is made by section 523 of the old Code, or

(2) that the award, which has been given by the arbitrators upon a private agreement of reference being made to them, should be given effect to by a Court of Justice, to which end an application under section 525 of the old Code could be made to the Court having jurisdiction over the matter to which the award relates.

If the parties have instituted a suit in Court and the Court is seized of the subject-matter of dispute between them, the only way in which, in the event of their desiring to settle the dispute by arbitration, they can interfere with the trial of the suit by that Court, according to the ordinary rules of procedure, is to apply to it for an order of reference as provided by section 506 of the old Code, and by section 1 of the second Schedule of the new Code. They cannot ignore the existence of the Court or oust its jurisdiction by adopting the expedient of either simply agreeing to refer the matter to arbitration without the sanction of the Court or allowing the arbitrators to make an award upon such reference behind the back, as it were, of the Court. In other words, section 523 and section 525 of the old Code of Civil Procedure, which correspond with section 17 and section 20, respectively, of the second Schedule to the new Code, apply only to cases where there is no pending litigation; and section 506 of the old Code, (corresponding with section 1 of the second Schedule to the new Code), was the only section which applied to arbitration during the pendency of a litigation. Maclean, C. J., expressed the same opinion in *Tincovery Dey* v. *Fakir Chand Dey* (4). At page 228 of the report the learned Chief Justice says: "..... .....Section 523 (Civil Procedure Code of 1882) does not apply to the case of an agreement to refer, where there is a pending litigation. Section 506 appears to apply to the case where parties have agreed to refer in a pending suit, and section 523 to the case where there is no pending litigation. At least, this is the way in which I read the observations of their Lordships of the Judicial Committee in the case of *Ghulam Jilani* v. *Muhammad Hassan* (3) to which I have already referred. It is true that a contrary view was expressed in the case of *Harivalabdas Kalliandas* v. *Utamchand Manekchand* (5), but I doubt if this decision can stand, having regard to the Privy Council case to which I have referred."

Section 523 and section 525 of the Civil Procedure Code of 1882 lay down, as also do the corresponding sections of the second Schedule to the new Code, that the application referred to therein shall be in writing and shall be numbered and registered as *a suit* between the applicant as plaintiff and the other parties as defendants, and that the Court shall direct notice of the application to be given to the parties other than the applicant, requiring them to show cause, within a time specified, why the agreement to refer to arbitration or the award, or as the case may be, should not be filed. These provisions appear to us to indicate that the Legislature intended them to apply to cases where there is no suit relating to the same matter already pending between the parties who are affected by the agreement to refer or by the award mentioned in section 523 and section 525 respectively, for otherwise two suits between the same parties about the same subject-matter would proceed side by side in the same Court with conceivably conflicting results. It is also difficult to see how, in view of the provisions of section 12 of the Code of 1882 (which corresponds with section 10 of the present Code), the *second suit* between the parties initiated by an application filed under section 523 or under section 525 of the old Code (or under the corresponding sections of the second Schedule to the new Code) could be tried, seeing that the previously instituted suit between the same parties and relating to the same subject-matter had not *ex-hypothesi* been disposed of before the institution of the second suit. The provisions of section 20 of the old Code relating to stay of proceedings in a suit did not apply to a case of this kind; and as, in our opinion, the previously instituted suit was [as held by this Court in *Budha* v. *Haku* (1) and *Fakir* v. *Jaimal* (2)] not barred by the last clause of section 21 of the Specific Relief Act, by reason only of an agreement being made between the parties for reference to arbitration, the view taken by the Bombay and Allahabad High Courts as noticed above would lead to anomalous consequences. As was remarked by the learned Judges of the Allahabad High Court in *Sheo Dat* v. *Shev Shankar Singh* (7): "It would be most inconvenient if two simultaneous proceedings in respect of disputes were allowed, namely, arbitration proceedings and proceedings before a Court of Justice." The most reasonable view,

and, in our opinion, the easiest way out of the difficulty would be to hold that proceedings before the Court were the only valid proceedings and that the Court, being properly seized of the matters in difference between the parties, could not take cognizance of arbitration proceedings to which the sanction of the Court had not been accorded in the manner laid down in section 506 of the old Civil Procedure Code or section 1 of the second Schedule to the new Code.

For the foregoing reasons, we hold that during the pendency of a suit between them, the parties in this case were precluded from entering into an agreement to refer to arbitration the subject-matter of the suit and that the award made by the arbitrators in pursuance of that agreement could not be taken cognizance of by the Court so as to be made the basis of a proceeding under section 525 of the Civil Procedure Code of 1882. It follows that the Divisional Judge was in error in accepting the award as a valid adjudication upon the subject-matter of the suit and in passing a decree in accordance with it. We, therefore, accept this appeal, set aside the decree of the lower Appellate Court, and remand the case under Order XLI, rule 23, Civil Procedure Code, to the lower Appellate Court for a decision on the merits. The stamp on appeal shall be refunded and other costs shall be costs in the cause.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1557 OF 1910.

April 26, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

AMBALAVANA CHETTY AND ANOTHER—APPELLANTS

versus

SINGARAVELU ODAYAR AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 139, 140, 142, 144—Landlord and tenant—Dispossession of tenant by stranger—Tenancy from year to year—Abandonment by tenant—Ejectment suit by landlord against trespasser—Limitation.

Where a tenant, who was holding land as a tenant from year to year, was dispossessed by a stranger who, from the date of dispossession, claimed to hold absolutely against both landlord and tenant, the landlord must sue to eject the trespasser before the expiry of 12 years from the date of such dispossession, especially where the land has been abandoned by the tenant more than 12 years before suit.

For such a suit, the cause of action does not arise on the day when the landlord gives notice to the tenant to quit.

Per *Abdur Rahim, J.*—*Quære*:—Whether, when land is in possession of a tenant, the term of whose lease is outstanding, and such tenant is ousted from possession by a trespasser, time will not run against the owner until after the expiry of the term?

Ramanadan Chetti v. *Pulikutti Servai*, 21 M. 288 and *Malamal Illath Krishna* v. *Secretary of State for India*, 19 M. L. J. 347; 4 Ind. Cas. 30; 5 M. L. T. 213, considered.

Per *Sundara Aiyar, J.*—Possession held by a person must be held to be in his own right even in cases that are governed by Article 144 of the Limitation Act, in the absence of any evidence to the contrary or any relationship between the parties or other circumstances that would throw on him the *onus* of proving that he intended to hold possession in denial of the owner's right.

Article 140 of the Limitation Act does not apply to a suit against a tenant, as Article 139 provides limitation for such a suit. The inference to be drawn from Article 140 is, that in a suit against a trespasser by one who had leased his land to a tenant, limitation is not postponed necessarily until his estate falls into possession. If the trespasser asserts only a right of tenancy, then, no doubt, limitation would not commence against the landlord until the tenancy (if his right to it is complete) has come to an end. If he has not acquired by his adverse possession the right of a tenant under the statute, then Article 144 would be applicable, his possession being regarded as adverse to the lessor only when the latter's estate falls into possession.

As against a stranger, the landlord is entitled to recover possession even though his tenant's lease has not been terminated, and when the stranger purports to hold absolutely and not by the acquisition of a prescriptive title as against the tenant, the landlord's cause of action arises on the date of the dispossession of the tenant.

Article 140 of the Limitation Act applies to suits by remainder-men and reversioners against all persons, including trespassers and not merely against persons, holding a limited estate, on the expiration of which the remainder or reversion falls in.

Krishna Govind Dhur v. *Hari Churn Dhur*, 9 C. 367; 12 C. L. R. 19, not approved.

Brajabala Debi v. *Gurudas Mandal*, 33 C. 487; 3 C. L. J. 293, *Rangaswami Iyengar* v. *Krishna Govinden*, (1910) M. W. N. 838; 8 Ind. Cas. 844; 9 M. L. T. 205; *Jagannatha Charri* v. *Rama Rayer*, 28 M. 238, *Innasi Pillai* v. *Sivagnana Desikar*, 5 M. L. J. 95, *Ammu* v. *Ramakrishna*, 2 M. 226; *Chinto* v. *Janki*, 18 B. 51; *Bissessuri Dabeea* v. *Baroda Kanta Roy Chowdry*, 10 C. 1076; *Womesh Chunder Geopto* v. *Raj Narayan Roy*, 10 W. R. 15, *Lekhraj Roy* v. *Court of Wards*, 14 W. R. 395; *Brindaban Chunder Sircar Chowdhry* v. *Bhoopal Chunder Biswas*, 17 W. R. 377, *Ganga Kumar Mitter* v. *Asutosh Gossami*, 23 C. 863, *Gobind Nath Shaha Chowdhry* v. *Surja Kanta Lahiri*, 26 C. 460, referred to.

Thimman Pande v. *The Maharaja of Vizianagaram*, 29 A. 593; A. W. N. (1907) 185; 4 A. L. J. 726; *Ramanadan Chetti* v. *Pulikutti Servai*, 21 M. 288 and *Malamal Illath Krishna* v. *Secretary of State for India*, 19 M. L. J. 347; 4 Ind. Cas. 30; 5 M. L. T. 213, doubted.

AMBALAVANA CHETTY *v.* SINGARAVELU ODAYAR.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suit No. 265 of 1910, presented against the decree of the Court of the District Munsif of Kumbakonam, in Original Suit No. 443 of 1908.

Mr. *T. Narasimha Aiyangar*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.—The Subordinate Judge has not recorded clear findings on the questions,—

(1) How long the 1st defendant or any person who derived his possession from or through him continued to be in possession; and

(2) when and how the 3rd defendant obtained possession of the land.

The findings will be submitted within one month after the recess and seven days will be allowed for filing objections.

Any further question arising in the second appeal is reserved.

In compliance with the above order, the Subordinate Judge of Kubakonam submitted the following

FINDINGS:—I have been asked to submit on the evidence on record findings on the following issues:—

(1) How long the 1st defendant or any person who derived his possession from or through him continued to be in possession?

(2) When and how the 3rd defendant obtained possession of the land?

2. The first issue requires a preliminary finding on the issue as to which persons, if any, derived their possession through or under the 1st defendant. The District Munsif found that Korangu Samu was a tenant of the 3rd defendant's father and the 3rd defendant, and that there is nothing convincing on record to connect the tenancy of plaintiffs' 4th witness with that of Korangu Samu. This Court, on the other hand, says that it is in the evidence of this witness (plaintiffs' 4th witness) that he let into possession one Korangu Samu that the 3rd defendant would appear to have taken possession of the shop from the last named individual, and that so far as the suit site is concerned, any occupation or use thereof by any number of successive persons must be traced to the original permission derived under Exhibit A. The High Court do not consider this as a definite finding, but do not say what facts should be taken as concluded by findings.

3. Defendants Nos. 2 and 3 began to argue before me that the suit site or shop is not included in the title-deeds of the plaintiffs, Exhibits B, G and A. That was not the basis on which the suit was tried and heard before the District Munsif, *vide* para. 7 of his judgment. It was not denied in this Court, too, on the previous occasion. The question of the title being in plaintiffs was not even questioned in the grounds of second appeal. I, therefore, disallowed the new ground of objection to the title and the title-deeds of plaintiffs.

4. It may, therefore, be accepted that plaintiffs, who were the owners of the property, let the 1st defendant into possession under Exhibit A in the year 1888, and that the 1st defendant sub-let the shop to the father of plaintiffs' 4th witness who describes himself as shop-keeper in Exhibit G. The lease, Exhibit A expires, with 30th *Panguni*, *Vikruti* (11th April 1891); and the 1st defendant executed no fresh lease deed thereafter. He says: "First plaintiff did not ask me to renew the lease deed. First plaintiff asked me to execute a fresh lease deed (for) sometime. I did not execute one. I did not pay rent directly to 1st plaintiff." It is not likely that 1st defendant did continue as lessee of the shop even after the period fixed in Exhibit A without giving a renewed rent chit, especially when the 1st defendant was not himself in actual possession. It is also strange that the attestation of Nagalinga who occupied the premises was not secured even on Exhibit A, and that 1st defendant did not secure any rent chit from Nagalinga and after his death from his son (plaintiffs' 4th witness). These considerations, no doubt, throw considerable suspicion on the reality of the 1st defendadt's tenancy itself under the plaintiffs and of the subtenancy of Nagalinga and plaintiffs' 4th witness under 1st defendant. But I am not prepared to attach any importance to these vague suggestions when the 3rd defendant (defence 1st witness) does not himself know who was in possession of the shop prior to Korangu Samu, who was admittedly in actual possession prior to 1894, the date of Exhibit I, according to the case both of the plaintiffs and of the defendants. Plaintiffs' 1st witness, the agent of the plaintiffs' family,

swears to having collected rent from Nagalinga and his son (plaintiffs' 4th witness) till 1892, and files accounts, Exhibits C and D, in corroboration of his evidence. No satisfactory ground is made out for discrediting these pieces of evidence as regards collection of rent: and there is no satisfactory evidence of actual enjoyment of the shop by the 3rd defendant or his father during that period. This version of the collection of rent also relates to the period expressly covered by Exhibit A. I, therefore, find that the 1st defendant through his sub-lessees, Nagalinga, and Swaminadha, (plaintiffs' 4th witness) was in possession of the shop down to the year 1892.

5. The person that came into possession next is Karangu Samu. Plaintiffs claim Korangu Samu as let into possession by their sub-lessee, Swaminatha (plaintiffs' 4th witness), while the 3rd defendent claims him to be his father's lessee. His enjoyment of the shop is admitted by both sides. The only question for consideration is as to whose lessee he was. There is no mention of this personage in any part of the pleadings. Plaintiffs' 1st witness, the agent of the plaintiffs till 1892, makes no mention of Korangu Samu or his getting the shop from plaintiffs' 4th witness or even the fact that plaintiffs' 4th witness had to leave the place for Pondicherry for treatment. Agent Sreenivasa Iyengar, who succeeded plaintiffs' 1st witness, is not put forward, and there is no evidence as to whether he is alive or not. Plaintiffs' 2nd witness who professes to have collected rents of the shop does not mention this occupant's name in his examination-in chief, and it is elicited from him by the defence for the first time, that Ammanpettai Sami Chetty (*alias* Korangu Samu) was also trading in the plaint shop for two or three years and was paying rent. It is curious how this witness who professes to have collected rents from the occupants did not give the names of the occupants till their names were put to him in cross-examination, and how he ridiculously blunders and knows not what he deposes to, when he says "Nagalinga (who died prior to 1890) was in possession of the shop after Sami Chetty (Korangu Samu)." Even Nagalinga's son, Swaminatha (plaintiffs' 4th witness), does not return from Pondicherry till after five or six years later. The B Diary of the suit shows there was an interval between the examination of plaintiffs' 2nd witness and that of plaintiffs' 3rd witness (21st October 1909 to 6th November 1909). This interval appears to have been utilised to put forward for the first time the story of regular letting of the shop by Swaminatha (plaintiffs' 4th witness) to Korangu Samu. Plaintiffs' second witness was not able on 21st October 1909 to depose to this letting, but was content in repeating in re-examination that Sami Chetty (Korangu Samu) was also paying rent to Udayar (plaintiffs). Plaintiffs' 3rd witness (1st defendant) was not quite willing to be the father of this new story and would only depose "Sami Pillai (plaintiffs' 4th witness) let the shop on rent to Korangu Sami Pillai. Sami Pillai (later) said that Sami Pillai had asked him to pay the rent to Sami Pillai. This he said when I asked him to pay rent." Plaintiffs' 4th witness deposes: "After my father's death, I enjoyed it for 2 years. My father died 13—18½ years ago.....I left the shop for rent to Korangu Sami Chetty. He executed lease-deed to me which I lost. I asked Samia Chetty to pay the rent to Someswara Royar (3rd plaintiff) and asked him to pay the amount in my house. I left for Pondicherry for medical treatment for five years in Pondicherry, Mayavaram and other places. I returned to Melakaveri six years ago. When I returned, I was told that Someswara Royar has purchased it from the daughter of one Kumarasawmy Pillai. I have come to Court only this day in connection with this suit. I do not know for how many years my father took the shop on rent. I have not executed any lease-deed. I was paying rent for nearly 30 years. I took no receipt for the rent paid by me. I keep no accounts. There was no settled rent when my father took the lease." It is not possible to say if this is the son of the sub-lessee Nagalinga, from the evidence he gives, and from the stage of the case when he was put forward as witness. His is the only evidence that Korangu Sawmi was his tenant. I am not prepared to attach any weight to such evidence, especially when the agents of plaintiff (plaintiffs' witnesses Nos. 1 and 2) and the 1st defendant himself do not profess any tangible knowledge of the tenant, Korangu Sawmi, in actual occupation of the shop. Defence witnesses Nos. 1 to 5 do not also say if Korangu Samu, who was in possession of the shop, was tenant of plaintiffs or of th

3rd defendant. Korangu Samu is not put forward as witness by either side and the evidence does not show whether he is alive or dead. I, therefore, find that Korangu Samu was in possession of the shop after 1892 for two or three years (*vide* plaintiffs' 2nd witness), but he is not shown to be either the tenant of plaintiffs' sub-lessee or the tenant of 3rd defendant's father.

6. The possession of Korangu Samu carries the history of the suit shop down to about 1894 or 1895. There is no evidence worth the name about the possession of the suit shop in favour of the plaintiffs. The vague statement of plaintiffs' witnesses Nos. 2 and 3 that rent was paid till seven or eight years ago is worthless. Plaintiffs' 4th witness who was the plaintiffs' sub-lessee was away from the place after 1892 and knows nothing about the enjoyment of the suit shop and the payment thereof. Plaintiffs' witnesses Nos. 2 and 3 could not give even the names of the occupants of the shop and how they came into possession of the shop. The defendants' evidence of possession and enjoyment of the shop is cogent and convincing at least from 1895, the date of Exhibit II, if not from 1894, the date of Exhibit I. Exhibit I is unregistered and the tenant that held under it is not called. Exhibit II to VI series show defendants' possession and enjoyment. The Municipal receipts, Exhibit E series and F, are not of much value as showing possession. I, therefore, find that plaintiffs, the 1st defendant or persons that claim under him, are not proved to have been in possession subsequent to 1892, and that the 3rd defendant's father and the 3rd defendant and their lessees have been in possession and enjoyment of the suit shop from 18th December 1895, the date of Exhibit II.

7. The plaintiffs then contended that the enjoyment and possession of the shop is not possession of the site of the shop. It will be remembered that plaintiffs acquired only the bare site under Exhibit B and rented it out to 1st defendant under Exhibit A for the express purpose of putting up a shop for three years. The shop on the site appears to have been only a thatch and was renewed from time to time by the occupants—see Exhibit V and the leases, Exhibits II to IVa. It would, no doubt, be true that persons let into possession by the 1st defendant and those that claim under him cannot set up their own title or possession as well of the thatch as of the land. But where a person whose possession of the shop could not be traced to the 1st defendant or his lessees is in possession and enjoyment of the shop, the argument that such a person must be taken to have prescribed only for the superstructure and not for the site occupied by the thatch is unintelligible. The possession and enjoyment of the thatched shop is exclusive possession of the site as well. The defendants' non-payment of the Municipal taxes till recently and the payment of the same by the plaintiffs relates as well to the title of the thatch as to the site below. Municipal taxes are generally levied for the shop and not for bare sites. I, therefore, find that the possession and enjoyment of the defendants Nos. 2 and 3 covered both the shop and the site.

8. How the 3rd defendant obtained possession of the land is not clear from the evidence. Plaintiffs' 2nd witness does not say how the 3rd defendant came to be in possession of the shop or the land. He admits that Subramania Vadyar (the father of the 3rd defendant) was also in possession of the shop for some time. He does not say that they paid rent to any person or to the plaintiffs. Plaintiffs' 2nd witness, the direct lessee under plaintiffs and his sub-lessee (plaintiffs' 4th witness), do not say anything about the point. The 3rd defendant claimed the shop as his ancestral property, but let in no evidence about it except his own oath. He has given up that case in second appeal—see the grounds of appeal. He alleged in his written statement that the suit land was measured in his name in the survey that took place more than 12 years ago as Survey No. 1338. But the plaintiffs did not choose to question that statement at the trial, and the survey papers have not been put in. It is, however, clear from this evidence set out above, that 3rd defendant's father and after him the 3rd defendant have been in possession and enjoyment of the shop and the land from even prior to 1895, the date of Exhibit II taken by the 3rd defendant only, and that they did not hold under any person but in their own right. I am unable to agree with the observation of

this Court cited above in para. 2 that all possession must be traced to Exhibit A, even where there is no evidence that the persons thus in possession have paid rent or attorned to the plaintiffs or 1st defendant or the sub-lessees. The evidence is that after 3rd defendant came to be in possession, not only he but all the shop-keepers refused to pay rent—see plaintiffs' 2nd witness. I, therefore, find that it is not shown how the 3rd defendant obtained possession of the land and that he, therefore, got into possession on his account and in his own right.

9. In the result, my findings on the issue are:—

(1) That the 1st defendant and his sub-lessees, Nagalinga and Swaminadha, were in possession only till the year 1892, and that Korangu Samu was in possession thereafter till the 3rd defendant's father came into possession some time prior to December 1895, and is not shown to be a person that held under 1st defendant or his sub-lessee, and that the 3rd defendant has been in possession of the land for some time prior to December 1895, at the worst, and that, as it is not shown how he obtained possession or that he obtained possession from or under plaintiffs' lessee or sub-lessees, the 3rd defendant was in possession in his own right and on his account.

This second appeal coming on for final hearing, after the return of the findings from the lower Appellate Court, upon the issues referred by this Court for trial on Wednesday, the 27th day of March 1912, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT

ABDUR RAHIM, J.—It is clear from the facts as found by the Subordinate Judge that the plaintiffs, who are suing to eject the defendants from certain land, which is actually in the possession of the 3rd defendant, have not been in possession of the property since 1892, that in that year the plaintiffs' lessee, the 1st defendant, who, on the expiry of his lease which was for a term, was holding on as a tenant from year to year abandoned the land and that the 2nd and 3rd defendants have been in possession of the land from the end of 1895 asserting an absolute right thereto. The suit was instituted in 1908, *i. e.*, more than 12 years after defendants Nos. 2 and 3 entered upon possession of the land. There can be no doubt that the defendants purported to hold the land adversely to the plaintiffs from the day on which they took possession and unless it is shown that the plaintiffs are entitled to wait as long as they have not given a notice to quit to the 1st defendant, who in fact quitted possession of the land in 1892 and that in the meantime, time will not run against them, the suit must be held to be time-barred. The learned Vakil for the plaintiffs (respondents) has argued that Article 144 of the Limitation Act applies and not Article 142. Even if so, there can be no doubt that the defendants Nos. 2 and 3 asserted a title adverse to the plaintiffs and were in possession in pursuance of such a claim. But reliance is placed on the authority of the cases, [*Ramanadan Chetti* v. *Pulikutti Servai* (1) and *Molamal Illath* v. *Secretary of State* (2)], which lay down that when a land is in possession of a tenant, the term of whose lease is outstanding and such tenant is ousted from possession by a trespasser, time will not run against the owner until the expiry of the term. I do not propose at present to consider whether the law is correctly laid down in these cases as that question was not raised at the bar although my learned brother, whose judgment I have had the advantage of reading, having expressed a doubt as to the correctness of these decisions, the question may have to be re-considered when it is properly raised. Nor is it necessary to consider how far these rulings are applicable in a case when the land at the date of dispossession was in the possession of a tenant from year to year. It is sufficient to say in this case, that the 1st defendant, who at least was a tenant from year to year in 1892 and does not contest the claim of the plaintiff, having abandoned the land for more than 12 years before the suit, there was nothing in the way of the plaintiff's taking steps in time to eject the 2nd and 3rd defendants if he chose to do so.

The result is that the second appeal will be allowed, the decree of the first Appellate Court reversed, and that of the District Munsif restored with costs in this and in the lower Appellate Court.

(1) 21 M. 288.
(2) 19 M. L. J. 347; 4 Ind. Cas. 30; 5 M. L. T. 213.

AMBALAVANA CHETTY v. SINGARAVELU ODAYAR.

SUNDARA AIYAR, J.—In this case the plaintiff instituted a suit to eject the defendants from a plot of land which, according to him, he leased to the 1st defendant for a period of three years in May 1888. The 1st and 2nd defendants alone were made parties to the suit. He stated in his plaint that rent was paid by the 1st defendant up to December 1896. The 2nd defendant was made a party on the ground that he "either through the 1st defendant or by some other means has been enjoying the plaint lands by setting up shop and trading in the plaint land." It is also alleged in the plaint that he gave notice for the surrender of the land on the 4th September 1908. The 1st defendant did not appear to contest the suit. The 2nd defendant denied plaintiffs' right to the land and alleged that he was holding it on lease under one Somasundara Vathiar. The latter person was subsequently made a party to the suit as 3rd defendant. He supported the contention of the 2nd defendant and alleged that the land belonged to him, and that he and his ancestors had been in possession for a very long period. The District Munsif dismissed the suit finding that the land never belonged to the plaintiff and that the 3rd defendant had been in possession prior to the suit for more than 12 years. The Subordinate Judge on appeal reversed the Munsif's decree holding that the plaintiffs' title was proved and also the lease by him to the 1st defendant in 1888. He also found that rent was paid to the plaintiffs by 1st defendant till 1894. He was of opinion that it must be presumed, though the 3rd defendant had been in possession after 1894, that he must have derived his possession from the lessees who entered on the land under plaintiff. The 2nd and 3rd defendants appealed to this Court, a finding was called for on two issues:—

(1) How long 1st defendant or any person who derived his possession from or through him continued to be in possession? and

(2) When and how 3rd defendant obtained possession of the land?

The present Subordinate Judge has submitted findings on these two issues. They are to the effect that the 1st defendant and his sub-lessee were in possession till the year 1892, that one Korangu Samu was in possession thereafter till shortly before December, 1895 and that it was not shown that he held under 1st defendant or his sub-lessee, that 3rd defendant came into possession, at any rate, sometime prior to December 1895, that it was not shown that he obtained possession from or under plaintiffs' lessee or sub-lessees, and that he was in possession in his own right and on his own account. On these findings, it is contended by Mr. T. Rangachariar, the learded Vakil for the respondent, that the Subordinate Judge's decree in plaintiffs' favour must be maintained. He contends that as plaintiffs' lessee held over and paid rent to plaintiff after the expiration of the period of the lease originally given to him, he became a tenant from year to year, that this tenancy was never terminated by notice given either by the plaintiff or by his lessee until the plaintiff did so shortly before the suit, that the possession of the 3rd and 2nd defendants, though it might have been adverse to plaintiff's lessee, could not become adverse to plaintiff himself until the lease to his lessee was terminated by notice and the 3rd defendant did not, therefore, acquire any right against him by limitation. He also contends that the onus was on the 3rd defendant to prove that his possession was not derived from plaintiffs' lessee and that the present Subordinate Judge ought to have presumed that his possession was not adverse even to the lessee. On the latter question, we intimated our opinion at the hearing that we were not prepared to dissent from the finding of the Subordinate Judge. Possession held by a person must be held to be in his own right even in cases that are governed by Article 144 of the Limitation Act, in the absence of any evidence to the contrary or any relationship between the parties or other circumstances that would throw on him the onus of proving that he intended to hold possession in denial of the owner's right. I do not consider it necessary to make any further observations on that point. The question for decision, therefore, is what is the rule of limitation applicable to a case where a person ousts from possession one holding land as tenant of another and the owner institutes a suit for recovery of the land against him, more than 12 years after the dispossession of the tenant. It is admitted that Article 139 of the Limitation Act is not applicable to such a case as it relates only to suits by a landlord to recover possession from a *tenant*, in which case the period of 12 years' limitation will commence to run when the tenancy is deter-

mined. It is contended for the appellant that Article 142 is the one properly applicable to the case, "for possession of immoveable property when the plaintiff while in possession of the property has been dispossessed or has discontinued the possession, and that the plaintiff was dispossessed when his tenant was deprived of possession." The respondent contends that the dispossession of the tenant would not be dispossession of the landlord and that Article 144, the residuary Article, relating to suits for possession of immoveable property or any interest therein, is the one that is applicable to the case. Assuming that the latter Article should be applied, it would make no difference in this case if the 3rd defendants' possession is held to be adverse to the plaintiff. The finding of the Appellate Court is that 3rd defendant held possession of the land in his own right as owner, claiming it as part of his own ancestral property. There can, therefore, be no doubt that so far as his animus was concerned, he did not claim a mere tenancy over the land or anything less than the absolute ownership over it. His possession, therefore, would be adverse to the plaintiff unless it can be held as a matter of law that so long as the plaintiff did not terminate his tenant's holding by giving him notice to quit, 3rd defendant's possession could not be adverse to him. This is, in fact, the contention strenuously urged by Mr. Rangachariar. A person who has given the lease of his land to another is in the eye of the law a reversioner. Article 140 provides that in a suit by a remainder-man or reversioner for possession of immoveable property, the starting point is when his estate falls into possession and Article 141 makes special provision for a suit by one particular class of reversioners, *viz.*, by "a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female." Now Article 140 exempts from its scope a 'landlord,' by providing that it applies only to a suit by a reversioner *other than a landlord*. If it was intended that limitation should always start in the case of a suit by landlord against one who is not his tenant only "when his estate falls into possession," it is not apparent why the statute expressly exempts a landlord from the class of persons to whom Article 140 is applicable. That Article does not apply to a suit against a tenant as Article 139 provides for such a suit. The inference to be drawn from Article 140 appears to be that in a suit against a trespasser by one who had leased his land to a tenant, limitation is not postponed necessarily until his estate falls into possession. If the trespasser asserts only a right of tenancy then, no doubt, limitation would not commence against the landlord until the tenancy (if his right to it is complete) has come to an end. If he has not acquired by his adverse possession the right of a tenant under the statute, then Article 144 would be applicable, his possession being regarded as adverse to the lessor only when the latter's estate falls into possession. But what is the result if the trespasser has, during the period of his possession, claimed to hold as absolute owner. The respondent contends that notwithstanding such claim, the law will not regard his possession as adverse to the lessor but only to the lessee and that the lessor could not maintain a suit in ejectment against a trespasser until the tenancy of the lessee is terminated by efflux of time, by notice to quit or in some other manner provided by law. It is argued that it would be illogical and unjust to the lessor to hold that the trespasser's possession could be adverse to him. This argument would be entitled to much weight if it could be regarded as correct to lay down that a landlord could not sue a trespasser for possession until he has terminated the tenancy of the lessee. The question, therefore, is, "Is a landlord always incapable, unless he has terminated the tenancy of a lessee who has been ousted from possession by a stranger, of maintaining a suit for recovery against the latter? It is clear that a trespasser could not maintain such a proposition on the ground of privity with the tenant as he claims to hold *against* the tenant. The plea must be based on the broad ground that the plaintiff in a suit for ejectment must always establish his own present title to possession and that the trespasser defendant is entitled to set up the right of any third person to possession as against the plaintiff. Such a proposition, though at one time regarded as thoroughly well established, is no longer regarded as universally true, it being now recognized that the plaintiff in a suit in ejectment has only to prove a better title to possession than the defendant. Would this

not be done by his showing that he was in possession through his tenant and could it not be held that such possession is enough to entitle him to recover as against the trespasser, though he might not be entitled to retain possession if his tenant claimed it against him on the ground that the tenancy had not been terminated according to law? Article 140 would seem to proceed on the basis that a trespasser's possession might be a disturbance of the right to possession not only of the tenant but of the landlord. In *Krishna Gobind Dhur* v. *Hari Churan Dhur* (3), Wilson, J., observed:—"Probably in this Article, (*i.e.*, Article 140), the expression other than a landlord, means 'other than a landlord as such suing his tenant'." With all respect, it is difficult to accept this contention as Article 140 is intended to apply to suits by remainder-men and reversioners against all persons including trespassers, and not merely against persons holding a limited estate on the expiration of which the remainder or reversion falls in.

In cases falling under section 335 of the Civil Procedure Code, the High Courts have held in various cases that when a lessee is evicted by a purchaser in execution of a decree, the landlord is also to be regarded as evicted and may apply for relief under the section. See *Braja Bala Devi* v. *Gurudas Mundal* (4), in which the previous decisions are collated. Again it has been held that where a tenant is ousted by a trespasser, the landlord may institute a summary suit for possession under section 9 of the Specific Relief Act. See *Rangaswmi Iyengar* v. *Krishna Govinden* (5), *Jagannatha Charry* v. *Rama Rayer* (6) and *Innusi Pillai* v. *Sivagnanam Desikar* (7). In *Ammu* v. *Ramakrishna* (8), this Court held that where the mortgagee's tenants were dispossessed by the Government and subsequently held as tenants of Government, their possession as tenants of Government would be adverse not only to the mortgagee but to the mortgagor also. The learned Judges, Turner, C. J., and Muthuswami Aiyar, J., observed: "We cannot assent to the contention that so long as the mortgagor is entitled only to the equity of redemption, there can be no invasion of his interest. Of course, there may be cases in which the estate of the mortgagee is alone the subject of trespass and the interest of the mortgagor is not assailed. The title by prescription may be acquired to the estate of the mortgagee leaving the interest of the mortgagor unaffected, *e.g.*, where a wrongful claimant establishes himself in the place of the mortgagee admitting the interest of the mortgagor and claiming rights only on the footing of the mortgage. But there are other cases in which the rights and inerests of the mortgagor and mortgagee are equally invaded, *e.g.*, when under a sale for arrears of revenue the purchaser acquires possession and thenceforward holds adversely both to the mortgagor and mortgagee or when the mortgagor has remained in possession and a stranger ousts him from the lands." The learned Judges go on to say:—"Where the mortgagor may have made over possession to the mortgagee, if the interest of the mortgagor be invaded although he has not actual possession of the land, he cannot bring a suit for *redemption* against the wrong-doer, but a suit for the *recovery of the interest* from which he has been ousted according as he has, or has not, been actually dispossessed of the land. The limitation which would have applied to his suit under the Act of 1871 is prescribed by clause 143 or 145 to the second Schedule of the Act." The same view was held by the Bombay High Court in *Chinto* v. *Janki* (9), dissenting from the earlir decision in *Vithoba* v. *Gonga Ram* (10) and agreeing with *Ammu* v. *Ramakrishna* (8) and *Puttappa* v. *Timmaji* (11). Foulton, J., no doubt, observed that the ouster of the mortgagee unaccompanied by any further acts of aggression cannot give any cause of action to the mortgagor, and he thought that the principle laid down in *Scott* v. *Newington* (12), *viz.*, that where the pledgee of goods in his turn pledges them and the goods ultimately find their way to a stranger, the pledger would be entitled to recover them against a stranger, might not be applicable in India; and Telang, J., observed that according to English Law ejectment against a stranger cannot be maintained in the name of the mortgagor except, perhaps, in circumstances similar to

(3) 9 C. 367; 12 C. L. R. 19.
(4) 33 C. 487; 3 C. L. J. 293.
(5) (1910) M. W. N. 838; 8 Ind. Cas. 844; 9 M.L.T. 205
(6) 28 M. 238.
(7) 5 M. L. J. 95.
(8) 2 M. 226.
(9) 18 B. 51.
(10) 12 B. H. C. R. 180.
(11) 14 B. 176.
(12) 1 M. and R. 253.

those in which the action might be maintained against the mortgagee himself, *i.e*, after payment of the mortgage-money. The learned Judge observed that though the rule in English Law is due to the fact that the legal title is, under English Law, conveyed to the mortgagee, still it would seem that the same rule ought to be applied in India also. Both the learned Judges, however, were of opinion that the trespasser might prove that his possession was in fact adverse to the mortgagor also. The position of a landlord, with respect to his right to eject a trespasser, would seem to stand on a better footing than that of a mortgagor would generally stand. The mortgagor, when he gives possession to the mortgagee, has generally no interest in the land until the mortgage is redeemed. But the lessor is entitled to receive rent from his tenant. If the latter is ousted by a stranger, he cannot claim to recover rent against that stranger. Would it be right then to say that he cannot also get back possession of his land from him? Suppose the tenant is in insolvent circumstnces. He would then be unable to recover his rent unless it be by obtaining a decree against the tenant and putting up the tenancy to sale. Suppose the tenancy is for 50 years and the tenant after his dispossession continues to pay the rent for 12 years but fails to do so subsequently. If the landlord has no right to recover possession against the trespasser, then it would seem that the landlord would not have any remedy at all for the recovery of his rent. For it would seem that a person who acquires a title by adverse possession against a tenant is not bound to fulfil the obligations of the tenant that arise out of his contract with the landlord. See *O'Connor* v. *Foley* (13). There appear to me to be weighty reasons for holding that as against a stranger, a landlord is entitled to recover possession even though his tenant's lease has not been terminated. In *Bissessuri Dabeea* v. *Baroda Kanta Roy Chowdry* (14), it was held that a landlord could claim against a trespasser that possession of the land should be given to his tenant. In *Sarat Chundra* v. *Naritya Gopal* (15), the same view was maintained. There is no inflexible rule of law that a trespasser can refuse to give up possession to a plaintiff, simply because a third party may be entitled to possession as against him (the plaintiff). Thus, there are cases where beneficiaries may sue to compel a trustee to restore possession to the trustee; a senior member of a Malabar *tarwad* is in some cases entitled to recover possession from a person wrongfully holding the property of the *tarwad*, although after getting possession, he may be bound to give up the property to the *karnam*. In *Womesh Chunder Goopto* v. *Raj Narain Roy* (16), a majority of the Court held that the possession of a trespasser would not be adverse to the landlord during the currency of an under-tenure but this decision was passed while Act XIV of 1859 was in force when there was no indication of the adoption of a contrary view by the Legislature such as we observe in Article 140 of the later Limitation Act. A contrary view was taken, on the other hand, in *Lekhraj Roy* v. *Court of Wards* (17) and *Brindaban Chunder Sircar Chowdhry* v. *Bhoopal Chunder Biswas* (18). In *Krishna Gobind Dhar* v. *Hari Churn* (3), already referred to, it was held that the landlord was not bound to sue the trespasser before the termination of the lease to his tenant. That case was followed in *Sharat Sundari* v. *Bhobo Pershad* (19), but there the trespasser asserted only a tenancy right though not on the terms on which the landlord had leased land to his real tenant. See also *Gunga Kumar Mitter* v. *Asutosh Gosami* (20). On the other hand, in *Gobinda Nath Shaha Chowdhry* v. *Surja Kanta Lahiri* (21), Bannerjee and Rampini, JJ., held that the trespasser's possession was adverse when the landlord sued for possession after obtaining relinquishment of his tenant's right and the learned Judges distinguished the earlier cases in *Sharat Sundari* v. *Bhobo Pershad* (19) and *Gunga Kumar Mitter* v. *Asutosh Gosami* (20). In *Kishwar Nath Sahai Dey* v. *Koli Sankar Sahai* (22), in which the facts

(13) (1905) 1 Irish Rep. 1.
(14) 10 C. 1076.
(15) 13 C. L. J. 284; 8 Ind. Cas. 47.
(16) 10 W. R. 15.
(17) 14 W. R. 395.
(18) 17 W. R. 377.
(19) 13 C. 101.
(20) 23 C. 863.
(21) 26 C. 460.
(22) 10 C. W. N. 343.

were very similar to those in the present case, it was held that the trespasser's possession might be adverse to the landlord.

The learned Judges held that the principle of the decisions in *Krishna Gobind* v. *Hari Churn* (3) and *Sharat Sundari* v. *Bhobo Pershad* (19) was not applicable where the tenancy is one from year to year "inasmuch as the landlord could have determined such annual tenure if he were so minded." They directed an inquiry into the question whether, as a matter of fact, the trespasser did hold adversely to the landlord. In *Thamman Pande* v. *The Maharaja of Vizianagaram* (23), the Allahabad High Court preferred to hold that the landlord's cause of action against a trespasser would not arise until the tenancy was terminated The learned Judges draw attention to the observations of Markby, J., in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mukerjee* (24), where that learned Judge said: "By adverse possession I understand to be meant possession by a person holding the land on his own behalf, or some person other than the true owner having the right to immediate possession." But the whole question is whether or not a landlord should be held to be entitled to recover possession against a stranger, notwithstanding that the tenant might be entitled to it as against the landlord. In *Ramanadan Chetti* v. *Pulikutti Servai* (1), this Court, no doubt, held that where there is a lease for a term outstanding, the landlord cannot seek to recover possession as against the trespasser during the currency of the term. See also *Molamal Illath* v. *Secretary of State* (2) and *Narain Das* v. *Lalta Prasad* (25).

But in this case, as in *Kishwar Nath Sahai Dey* v. *Kali Sankar Sahai* (22), there is no outstanding lease for any definite term. It may be doubted whether the decision in *Ramanadan Chetti* v. *Pulikutti Servai* (1) is in accordance with the view held both by this Court and by other High Courts, that a suit under section 9 of the Specific Relief Act may be maintained by the landlord against a trespasser and that the landlord can ask for relief under section 335 of the Civil Procedure Code when his tenant is ousted from possession. On the whole, I am inclined to hold that the landlord's cause of action against a trespasser arises when his tenant is dispossessed if the trespasser claims to hold the land adversely both to the tenant and to the landlord. The difficulty has been avoided in England by appropriate statutory provisions. There in the case of a tenancy from year to year or other period, the landlord's right to enter accrues at the end of the first year or other period from the last receipt of rent whichever last happens and he has 12 years from that time in which he has to assert his right. Under the old law, the landlord might re-enter at the expiration of his lease or within 20 years from that time even though he had during the lease discontinued the receipt of rent from his tenant. Now, if he has discontinued receipt of the rent, he has 12 years from such discontinuance. Both in England and in this country, an equity of redemption and the right of a landlord as reversioner might be acquired by prescription by a stranger even though the mortgage or tenancy may not have come to an end. It seems to be in accordance with this principle to hold that the equity of redemption or reversion might be extinguished during the continuance of the mortgage or tenancy, though it may not vest as such equity or reversion in the person.

The decision of this case, however, need not necessarily be rested on the conclusion I have arrived at on the general question as to the time from which limitation will run against a landlord in a suit against a trespasser. It would appear that in this case the tenant completely abandoned possession of the land in 1892 without paying any rent to the plaintiff, though he did not give any formal notice to him intimating his intention not to hold further as a tenant. In such a case, where the tenancy is only from year to year, it can hardly be said that the tenant had any right which he could successfully assert against his landlord. As pointed out in 15 American Cyclopaedia of Law and Procedure: "An outstanding title sufficient to defeat an action of ejectment must be one which has a present subsisting and operative legal force." *Ram Chung* v. *Gora Chand Chung* (26).

There is yet another ground on which the plaintiff must be held not entitled to recover.

(23) 29 A. 593; A. W. N. (1907) 185; 4 A. L. J. 726.
(24) 4 C. 327.
(25) 21 A. 269.
(26) 24 W. R. 344.

It was not his case that the 3rd defendant acquired the title of the tenant by prescription and that he terminated the tenancy thus acquired by proper notice to quit. In paragragh 5 of the plaint he alleged that the 2nd defendant was somehow holding the land and that he had no right whatever in the plaint land. The title by prescription was acquired by the 3rd defendant and not by the 2nd. The latter was only holding under the former. Admittedly no notice terminating the tenancy was given to the former.

In the result, the second appeal must be allowed.

I concur in the decree proposed by my learned brother.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 196 OF 1910.
December 1, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

DIGBIJOY ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh ATA RAHAMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Receipt of rent from transferee of holding—Receipt not as from transferee but agent of old tenant, effect of—Pleader, authority of—Receipt of claim from transferee and making it over to plaintiff—Whether amounts to recognition of validity of transfer—Pleader—Admission of question of fact, when binds client.

When rent has been received from the transferee of a holding not as a transferee but only as the agent or representative of the original tenant, there is no recognition of the validity of the transfer.

Khoodeeram Chatterjee v. *Rookhinee Boistobee*, 15 W. R. 197, followed.

Sreematty Kurani Dassi v. *Sajoni Kant Singh*, 12 C. W. N. 539, relied upon.

Baroda Charan Dutt v. *Hemlata Dasi*, 3 Ind. Cas. 561; 13 C. W. N. 833, 10 C. L. J. 610, referred to.

In a suit for rent, the tenant alleged that he had transferred the holding, and the transferee was added as a defendant. The latter then made a payment of the amount claimed to the plaintiff's Pleader who certified the payment to the Court and made over the amount to the plaintiff:

Held, that the acceptance of the sum paid by the transferee did not amount in law to a recognition of the validity of the transfer.

Gaur Lal Sirkar v. *Rameshwar Bhumik*, 6 B. L. R. App. 92; *Wilson* v. *Radha Dulari*, 2 C. W. N. 63 and *Rasamory Purkait* v. *Srinath Moyra*, 7 C. W. N. 132, followed.

A Pleader can bind his client by an admission upon a question of fact, provided that such question falls within the scope of the suit in which he has been retained.

Kower Narain Roy v. *Sreenath*, 9 W. R. 485; *Rajunder Narain* v. *Bijai Govind*, 2 M. I. A. 253; *Hingan Lal* v. *Mansa Ram*, 18 A. 384; *Venkata* v. *Bhashyakarlu*, 22 M. 538 and *Nundo Lal* v. *Nistarinee Dassi*, 27 C. 428; 4 C. W. N. 169, referred to.

Therefore, where there is no question as to the liability of a transferee-defendant in a suit against the transferor-tenant, much less is there any question as to the validity of the alleged transfer, it would be beyond the scope of the authority of the Pleader to bind his client by an admission of the validity of the transfer.

Appeal from the decree of the Sub Judge of Hooghly, dated December 9th, 1909, reversing that of the Munsif of that place, dated January 25th, 1909.

Babu *Atul Krishna Roy*, for the Appellants.

Babu *Jadu Nath Kanjilal*, for the Respondents.

JUDGMENT.—This appeal is directed against a decision by which the Subordinate Judge, in reversal of the decree of the original Court, has made a decree in favour of the defendant in a suit for ejectment. There is no controversy as to the circumstances under which the action has been commenced. The plaintiff alleges that the holding in dispute is non-transferable, and that nevertheless the original tenant has transferred it to the defendant by a conveyance executed on the 26th March 1906. He, therefore, seeks to eject the defendant as a trespasser. The grounds upon which the claim is resisted, are three-fold: *first*, that the plaintiff has recognised the defendant as his tenant; *secondly*, that the holding is permanent and transferable, and *thirdly*, that if it is an ordinary occupancy-holding, it is transferable by custom or local usage.

The Court of first instance found in favour of the plaintiff upon each of these points and made a decree in his favour. Upon appeal, the Subordinate Judge has reversed that decision upon the first of the points stated and has dismissed the suit; he has expressed no opinion as to the second and third grounds on which the claim is resisted.

On behalf of the plaintiff, it has been contended in this Court that upon the facts found there has been no recognition of the defendant as tenant by the plaintiff. It is not disputed that on the 17th March 1908,

the plaintiff instituted a suit for rent against the original tenant for the period between April 1904 and December 1907. On the 9th April 1908, the tenant filed a written statement in which he alleged that he had transferred his interest in the holding to the present defendant on the 26th March 1906. The transferee appeared in Court at the same time and prayed that he might be added as a defendant. The Court granted this application and the result was that the transferee was treated as a party defendant. On the same day, the transferee made a payment of the amount claimed in the suit to the Pleader of the plaintiff who certified the payment to the Court. The Court thereupon recorded an order that the suit was dismissed on full satisfaction. It is not disputed that the sum paid to the Pleader was on that very day made over by him to the plaintiff.

The Court of first instance upon these facts held that the acceptance of the sum paid by the transferee to the Pleader of the plaintiff did not amount in law to a recognition of the validity of the transfer. The Sub-Judge has taken a different view and has held that the plaintiff is estopped from questioning the validity of the purchase by the defendant. On behalf of the plaintiff, this view has been controverted on two grounds, namely, *first*, that as the Pleader in his petition to the Court stated explicitly that he had received the money from the transferee *marfatwari*, there was no recognition, and *secondly*, that the act of the Pleader was not binding upon the plaintiff as the Pleader had no authority to recognise the alleged transfer. In our opinion, there is no room for reasonable controversy that the acceptance of the sum paid by the transferee did not amount to a recognition of the validity of the transfer. It is clear from an examination of the terms of the petition that the Pleader acted very cautiously. The petition recited that the sum had been paid through the transferee. The Bengali word used is *marfatwari*. The learned Vakil for the appellant has invited our attention to the cases of *Gaur Lal Sarkar* v. *Rameswar Bhumik* (1), *Wilson* v. *Radha Dulari* (2) and *Rasamoy Purkait* v. *Srinath Moyra* (3), where the earlier authorities on the point will be found collected to show that an acceptance of rent under circumstances similar to those of the present case does not in law operate as a recognition of the validity of the transfer. The cases mentioned undoubtedly support the contention of the appellant. But the case nearest in point is that of *Khoodeeram Chatterjee* v. *Rookhinee Boistobee* (4), which is a direct authority for the proposition that when rent has been received from a transferee not as a transferee but only as the agent or representative of the original tenant, there is no recognition of the validity of the transfer. A similar view underlies the decision in *Kurani Dassi* v. *Sajoni Kant Singh* (5). The view we take is not opposed to the decision in *Baroda Churn Dutt* v. *Hemlata Dasi* (6), where it was ruled that acceptance of rent from a mortgagee of an occupancy-holding in his character as mortgagee amounted to a recognition of the validity of the mortgage. It is obvious that in that case the money was accepted by the landlord from the transferee who professed to act in a particular character and that character was recognised by the landlord. Similar observations apply to the decision in *Thomas Barclay* v. *Syed Hossain Ali Khan* (7), where money was accepted by the landlord with notice that it was deposited by a transferee who claimed protection in that character. The decision of the Judicial Committee in *Naba Kumari Debi* v. *Behari Lal Sen* (8), upon which much reliance was placed by the learned Vakil for the respondent, is also clearly distinguishable. In that case, the money was paid by the occupier who claimed to be a transferee of the disputed tenure, and the receipt granted to him showed that the landlord recognised that he made the payment in his character as transferee. Consequently, the acceptance of money under such circumstances was equivalent to a recognition of the validity of the transfer. It has been argued, however, by the learned Vakil for the respondent that the language of the petition is ambiguous and that as the transferee was an infant on whose behalf the rent was paid

(1) 6 B. L. R. App. 92.
(2) 2 C. W. N. 63.
(3) 7 C. W. N. 132.
(4) 15 W. R. 197.
(5) 12 C. W. N. 539.
(6) 3 Ind. Cas. 561; 13 C. W.N. 833; 10 C. L. J. 610.
(7) 6 C. L. J. 601.
(8) 34 C. 902; 2 M. L. T. 483; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 34 I. A. 160.

by his guardian, the statement in the petition might well be interpreted to mean that the money was received from the infant transferee through his guardian. We are not prepared to accept this ingenious construction. We cannot overlook the fact that the presumption is that the Pleader acted within the scope of his authority. It is now well settled, as is clear from the decision in *Bhut Nath Sircar* v. *Ram Lal Sircar* (9) and *Jagapati* v. *Ekambara* (10), that although a Pleader has no power to compromise a suit unless he is specially authorised in that behalf, he can bind his client by an admission upon a question of fact, [*Kower Narain* v. *Sreenath* (11); *Rajunder Narain* v. *Bijai Govind* (12); *Hingan Lal* v. *Mansa Ram* (13) and *Venkata Narasimha* v. *Bhashyakarlu* (14)], provided that question falls within the scope of the suit in which he has been retained [*Nundo Lal* v. *Nistarinee Dassi* (15); *Swinfer* v. *Chelmsford* (16).] In the case before us, the question in controversy in the suit for rent was the liability of the original tenant defendant to pay to the plaintiff landlord the rent claimed. There was no question as to the liability of the transferee defendant, much less was there any question as to the validity of the transfer alleged. Under these circumstances, it would clearly be beyond the scope of the authority of the Pleader to bind his client by an admission of the validity of the transfer. It was possibly this fact which led the Pleader to act with caution and justifies the language used by him in the petition. We are, therefore, of opinion that there has been no recognition of the validity of the transfer in favour of the present defendant. In this view, the decree made by the Subordinate Judge cannot be sustained.

The learned Vakil for the respondent has, however, strenuously contended that it is possible to support the decision upon a different ground. He has argued that if the payment of the 9th April, 1908, be deemed to have been made not by the transferee as such but as on behalf and for the benefit of the original tenant, there was a recognition of the subsistence of the tenancy in spite of the transfer of the 26th March 1906. Consequently, there has been no abandonment of the tenancy and the defendant is entitled to resist the claim for ejectment on the ground that a subsisting tenancy still intervenes between the plaintiff and the defendant. In support of this proposition, reliance has been placed upon the decision of the Judicial Committee in the case of *Gridhari Lall Roy* v. *Bengal Government* (17). That decision, however, is clearly distinguishable and is of no assistance to the respondent. The decision is merely an authority for the elementary proposition that the plaintiff in an action in ejectment must succeed on the strength of his own title and that it is open to the defendant, though he may have no title, to plead *jus tertii* to defeat the claim of the plaintiff. In the case before us, even if it be assumed that the effect of the acceptance of the money paid on the 9th April 1908, is the recognition of the subsistence of the tenancy up to December 1907, it does not follow that there was any tenancy in existence at the date of the institution of the suit. It is not disputed that at the time when the present action was commenced, the original tenant was not in occupation, and the person in possession was the defendant. It is also not disputed that the defendant came into occupation on the assumption that he had acquired a valid title by purchase, and that his transferee had severed his connection with the holding. Under these circumstances, the legitimate inference is that there had been an abandonment of the tenancy by the original tenant. The defendant, therefore, if the holding is not proved to be transferable, is a trespasser in occupation and is liable to be ejected.

The result is that this appeal is allowed, and the decree of the Subordinate Judge set aside. As the questions raised in the third and fourth issues have been found against the defendant by the Subordinate Judge, the decree of the Court of first instance will be restored. In view of the fact that the defendant paid a sum of money which found its way into the hands of the plaintiff, we direct that each party bear his own costs of the litigation throughout.

Appeal allowed.

(9) 6 C. W. N. 82. (10) 21 M. 274.
(11) 9 W. R. 485.
(12) 2 M. I. A. 253.
(13) 18 A. 384.
(14) 22 M. 538.
(15) 27 C. 428; 4 C. W. N. 169.
(16) 1 F. and F. 619.
(17) 12 M. I. A. 448; 1 B. L. R. 44 (P. C.); 10 W. R. 31 (P. C.).

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 31 OF 1910.
November 21, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
SAJJAD HOSSAIN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAM LAL SHAHU—DEFENDANT—RESPONDENT.

Suit—Institution—Failure to carry out strictly judicial order or statutory direction—Suit allowed to be withdrawn—Payment of defendant's costs made condition precedent to institution of fresh suit—Institution of fresh suit without paying defendant's costs—Costs paid subsequently on date fixed by Court—Suit to be treated as filed on day costs were paid—Judgment—Judgment based on decision of question not in issue, bad.

It cannot be laid down as an inflexible proposition of law that failure to strictly carry out statutory directions or judicial orders does always make it obligatory upon a Court of Justice to dismiss the suit as improperly instituted.

Jagat Tarini Dasi v. *Naba Gopal Chaki*, 34 C. 305; 5 C. L. J. 270 and *Sarat Chandra Banerjee* v. *Apurba Krishna Roy*, 11 Ind. Cas. 187; 15 C. W. N. 925; 14 C. L. J. 55, relied upon.

A suit was allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action, but the payment of the defendant's costs was made a condition precedent to the institution of the fresh suit. The plaintiff brought a fresh suit without paying the costs of the defendant. The Court, upon an objection taken on behalf of the defendant, directed that those costs must be paid within a day, and they were duly deposited:

Held, that the suit was competent, but it must be taken to have been validly instituted only on the day on which the costs were deposited.

Jogi Ahir v. *Bishen Dayal*, 18 C. 83; *Jeun Muchi* v. *Budhiram Muchi*, 32 C. 339; 1 C. L. J. 43 and *Gopi Lal* v. *Lala Naggu Lal*, 10 Ind. Cas. 6; 14 C. L. J. 105; 15 C. W. N. 998, relied upon.

Chandu Lal Khusalji v. *Awad* bin *Umed Sultan*, 21 B. 351, distinguished.

A judgment based upon the decision of a question which was neither raised in the written statement, nor is covered by any of the issues, is bad.

Appeal from the decree of the District Judge of Saran, dated September 29th, 1909, reversing that of the Second Sub-Judge of that District, dated April 19th, 1907.

Moulvis *Syed Shamsul Huda* and *Syed Enayet Karim*, for the Appellants.

Dr. *Rash Behary Ghose* and Babu *Dwarka Nath Mitter*, for the Respondent.

JUDGMENT.—The subject-matter of the litigation which has given rise to this appeal is one-fourth share of *Mouza* Ordewa. The plaintiffs-appellants base their title on a mortgage-deed executed by the owners on the 27th February 1893. The defendant founds his title on a subsequent purchase at a sale held under the Public Demands Recovery Act. The case for the plaintiffs is that the mortgagee enforced his security and obtained a decree on the 16th December 1898, which was subsequently made absolute on the 30th June 1899; thereafter the decree was assigned in their favour on the 19th May 1901. The decree was executed in due course and the property purchased by the plaintiffs. The defendant resisted the claim substantially on the ground that the mortgage was fictitious and that, consequently, the plaintiffs had not acquired any valid title to the property.

In the Court of first instance, the Subordinate Judge held that the mortgage, bond relied upon by the plaintiffs was a genuine transaction. He also found that the consideration for the assignment of the mortgage-decree had been sufficiently proved. In this view, the Subordinate Judge made a decree in favour of the plaintiffs. Upon appeal, the District Judge has reversed that decision. In, an elaborate judgment he has held that the assignment in favour of the plaintiffs was fraudulent, and, so far as we can gather, he was also inclined to doubt the genuineness of the mortgage transaction.

The plaintiffs have now appealed to this Court and on their behalf it has been contended that the judgment of the District Judge is vitiated, because his conclusions are based upon the decision of a question, namely, the true nature of the assignment of the mortgage-decree, which was neither raised in the written statement nor is covered by any of the issues. In answer to this argument, it has been contended on behalf of the defendant that the findings of the District Judge are conclusive and cannot be questioned in second appeal. An attempt has also been made to support the decree of dismissal made by the District Judge on the ground that inasmuch as the suit had been instituted without the previous payment of the costs incurred by the defendant in an earlier litigation relating to the same subject-matter which was withdrawn by the plaintiffs, the suit was not maintainable and was liable to be dismissed on that ground alone. It is necessary to consider, in the first place, the validity of this objection.

SAJJAD HOSSAIN *v.* RAM LAL SHAHU.

It appears from an examination of the record that in the previous suit, the Court granted the plaintiffs leave to withdraw from their suit, with liberty to bring a fresh suit on the same cause of action, provided the defendant was paid his costs of the suit. It was further stated that the payment of costs would be a condition precedent to the institution of a fresh suit, if any, by the plaintiffs. This order was made on the 10th April 1906. It is admitted that on the 5th October 1907, the plaintiffs commenced the present action without the payment of the costs awarded to the defendant. A preliminary objection was thereupon taken by the defendant and the Court directed, on the 26th August 1908, that the costs must be paid within a day. The costs were duly deposited on the day following and the Subordinate Judge held that the suit was competent. In support of this view, the Subordinate Judge appears to have relied upon the case of *Abdul Aziz Molla* v. *Ebrahim Molla* (1). The District Judge has, upon this part of the case, accepted the view of the Subordinate Judge and has distinguished the case of *Hare Nath Das* v. *Syed Hossain Ali* (2), upon which reliance was placed on behalf of the defendant. In this Court, it has been argued by the respondent that as payment of costs was a condition precedent to the institution of a fresh suit by the plaintiffs, the suit cannot be treated as properly instituted. In support of this position, reliance has been placed upon the decision in *Chandu Lal Khusalji* v. *Awad* bin *Umar Sultan* (3). In our opinion, the case just mentioned is distinguishable. No doubt, the order made on the 18th April 1906 ought to have been carried out before the suit was instituted and the suit must be taken to have been validly instituted only on the day on which the costs were deposited. This, however, does not affect the position of the defendant, because no question of limitation arises whether the suit be taken to have been instituted on the 5th October 1907 or on the 27th August 1908. We are, therefore, of opinion that it is not obligatory upon the Court to dismiss the suit on the technical ground that the plaint had been presented before the costs were paid to the defendant. The view we take is supported by the decisions of this Court in the cases of *Jogi Ahir* v. *Bishen Dayal* (4); *Jeun Muchi* v. *Budhiram Muchi* (5) and *Gopilal* v. *Lala Naggu Lal* (6). The cases of *Jagat Tarini Dasi* v. *Nabu Gopal Chaki* (7) and *Sara Chandra Banerjee* v. *Apurba Krishna Roy* (8), show that it cannot be laid down as an inflexible proposition of law that failure to carry out strictly statutory directions or judicial orders does always make it obligatory upon a Court of Justice to dismiss the suit as improperly instituted. We must, therefore, overrule the objection taken on behalf of the respondent.

In so far as the appeal is concerned, it is clear from an examinatien of the written statement and the issues framed in the case that no question was raised as to the fraudulent nature of the assignment of the decree in favour of the plaintiffs. Reliance was particularly placed on behalf of the respondent upon the sixth and the seventh paragraph of the written statement. But it is clear that in these paragraphs, although the mortgage transaction is impugned as fraudulent, no reference is made directly or indirectly to the assignment in favour of the plaintiffs. It is further manifest that no such question was raised in the third issue which is in the following terms:—"Was the mortgage-bond relied on by the plaintiff a sham transaction. Were the decree obtained on it and the sale in execution thereof tainted with fraud?" In our opinion, the District Judge ought not to have determined the question of the true character of the assignment which was not impeached as fraudulent in the Court of first instance. The only question before him was whether the mortgage-bond, which was the foundation of the title of the plaintiffs, was or was not a genuine transaction

The result, therefore, is that this appeal must be allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be re-heard.

(1) 31 C. 965.
(2) 10 C. W. N. 8; 2 C. L. J. 480.
(3) 21 B. 351.
(4) 18 C. 83.
(5) 32 C. 339; 1 C. L. J. 43.
(6) 10 Ind. Cas. 6; 14 C. L. J. 105; 15 C. W. N. 998.
(7) 34 C. 305; 5 C. L. J. 270.
(8) 11 Ind. Cas. 187; 15 C. W. N. 925; 14 C. L. J

The District Judge will first consider the question raised in the third issue. If that issue is answered against the plaintiffs, the suit must be dismissed. If it is answered in favour of the plaintiffs, the questions raised in the fourth, fifth and sixth issues must be considered. The costs of this appeal will abide the result.

Appeal allowed.

PUNJAB CHIEF COURT.
FULL BENCH.
SECOND CIVIL APPEAL NO. 43 OF 1910.
May 23, 1912.
Present:—Mr. Justice Robertson, Mr. Justice Rattigan and Mr. Justice Shah Din.
GANESHA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MUL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 462, 506—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, and Sch. II, Para. 1—Application to Court for reference to arbitration, whether an "agreement"—Guardian ad litem or next friend of minor, whether can make application without leave of Court, or whether he can agree to be bound by oath of the other party without such leave—Leave to be expressly recorded—Effect of absence of such leave—Agreement void against minor but only voidable against other parties—Minor—Duty of Court.

Under the Civil Procedure Code of 1882, as well as under the Code of 1908, the guardian *ad litem* of a minor defendant, or the next friend of a minor plaintiff, must obtain the express sanction of the Court, if he wishes, on behalf of his ward, to refer the matter in dispute or any question involved in the suit to arbitration; and an omission, on the part of such guardian or next friend, to obtain such sanction has the effect of making all proceedings consequent on such reference *voidable* against all parties other than the minor. In other words, an application of the guardian or next friend under section 506 of the former Code or under Schedule II, para. 1 of the present Code, comes within the purview of section 462 of the former Code or Order XXXII, rule 7 of the present Code, as the case may be, and unless the leave of the Court is expressly obtained and recorded, the application to refer will have the same effect, and be open to the same objections, as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court expressly recorded in the proceedings.

The leave or sanction of the Court must be obtained and must be expressly recorded if the reference to arbitration is to be *valid* for all purposes and against all parties including the minor, but in a case where such sanction has not been obtained, the reference is not necessarily invalid or void. The minor alone can claim to avoid it.

A reference to arbitration, is an agreement with reference to the suit and as such within the purview of the general provisions of law embodied in section 462 of the former Code and Order XXXII, rule 7 of the present Code.

A reference to arbitration, under section 462 of the Code of 1882, or under the first para. of the second Schedule to the present Code, has "reference to the suit," for it is only matters in difference in the suit that can be so referred to arbitration through the Court. Therefore, an application preferred to the Court by the parties, agreeing to make such reference, is an "agreement."

The provisions of section 462 of the Code of 1882 or of Order XXXII, rule 7 of the present Code are enacted for the protection of minors who are unable to look after their own interests and to whom the Court stands in a *quasi*-tutelary position. The guardians and next friends of minors are not invariably honest, and even if honest, are sometimes careless and occasionally lacking in intelligence. Therefore, the duty of safeguarding the interests of the minors, so far as is practicable, is thrown upon the Courts.

Quære—Whether the express sanction of the Court is not needed when a guardian or next friend of a minor agrees, on his behalf, to be bound by the oath of the other party to the suit?

Second appeal from the order of the Additional Divisional Judge, Ferozepore, Division, dated 2nd August 1909, confirming that of the District Judge, Hissar, dated 18th January 1909, dismissing the claim.

Mr. *Beni Parshad Khosla* and Lala *Lajpat Rai*, for the Appellants.

Lala *Dwarka Das*, for the Respondents.

ORDER OF REFERENCE.

The facts of the present case are as follows:—

The village *manza* Bhoda Khera, in the Hissar District, was originally owned by the Skinner family and was sold in its entirety on the 7th January 1893 to one Sheikh Allah Dia of Delhi.

Fourteen persons, who owned occupancy-rights in the village, brought a suit for pre-emption in respect of the sale, and among the plaintiffs was Rawal, the grandfather of the present plaintiffs. The claim for pre-emption was dismissed by the Sub Judge, Hissar, whereupon the pre-emptors appealed to this Court and it was during the pendency of that appeal that Rawal died and as his son Lakha, the father of plaintiffs, had pre-deceased him, the plaintiffs were brought on the record as his representatives with Bishna, their paternal grand-uncle, as their guardian *ad litem*. The appeal was decided in favour of the

pre-emptors on the 12th April 1897, and they were accordingly granted a decree conditional on the payment of Rs. 11,320 to the vendee.

It appears that the pre-emptors had been compelled to borrow large sums of money from one Jallu for the purposes of this case. Subsequently, Jallu pressed for payment, and in order to pay him off, the pre-emptors had recourse to present defendants, Mul Chand and Behari Lal, and executed a mortgage-deed (containing a conditional sale clause) in favour of the latter for Rs. 28,000. This mortgage-deed was signed among others by Bishna acting both for himself and as guardian of the present plaintiffs who were then minors.

The consideration for the mortgage was stated to be,—

(1) Rs. 13,716 and Rs. 457 both due to Jallu.

(1) Rs. 1,800 due on book accounts by Rawal, deceased, and Purkha, another of the pre-emptors, and

(3) Rs. 12,027 received in cash at home on the 27th April 1897, *i.e.*, two days before the execution and registration of the mortgage-deed.

On the 19th August 1898, the said mortgagees sued for possession of the land in accordance with the terms of the mortgage-deed and on, the 8th October 1898, obtained an *ex parte* decree against all the mortgagors, Bishna being specified in that plaint as the guardian *ad litem* of the minors. Subsequently, Bishna and others applied to have the *ex parte* decree set aside on the ground that no summons had been received by them, and that they had no notice of the suit. It is not clear whether the Court was satisfied of the truth of this allegation or not, but it passed an order to the effect that the *ex parte* decree would be set aside on the applicants' paying a sum of about Rs. 300 to the mortgagees within a specified period. This sum was not paid and the application was consequently dismissed.

The mortgagees thereafter pressed for payment of the debt due on the mortgage with the result that a fresh arrangement was come to between the parties, and on the 6th January 1899, a sale-deed was executed by the original mortgagors whereby $\frac{1}{3}$rd of the village was sold outright to Mul Chand and Behari Lal for an ostensible consideration of Rs. 17,940. On this occasion, no cash was paid to the vendors but the original mortgage-debt was reduced by the said amount and the remaining $\frac{2}{3}$rds of the village continued under mortgage for Rs. 16,000. This sale-deed was executed on behalf of the present plaintiffs (who were then still minors) by their mother, *Musammat* Shero, acting as their guardian. The original mortgage-deed of the 29th of April 1897 still remained in force as regards the $\frac{2}{3}$rds of the village and on the 19th of January 1903, the mortgagees sued for foreclosure of that mortgage. In that suit the present plaintiffs were represented by their mother, *Musammat* Shero, as guardian *ad litem*, and notice was issued to her in that capacity though we are unable to find upon the record any order formally appointing her guardian *ad litem*.

The mortgagees' claim for foreclosure was contested by all the parties interested including *Musammat* Shero, and it was pleaded in answer to the claim that the consideration for the mortgage of the 29th April 1897 had not fully passed, and that in any event the sale of the one-third of the village on the 6th January 1899 had been intended to put an end to the mortgage and to relieve the remaining $\frac{2}{3}$rds of the property from that incumbrance. Issues were framed, and evidence was taken but on the 18th of November 1903, all the mortgagors including *Musammat* Shero, who purported to act on behalf of the present plaintiffs, and the mortgagees presented a joint application under section 506, Civil Procedure Code of 1882, to the Court to the effect that they desired to refer the dispute to the arbitration of two men, namely, Lala Har Sarup, *Sahukar*, and Sanwan, *Bishnoi*, *Sarbrah Lambardar* of this village. The dispute was referred accordingly, and on the 14th of January 1904, the said arbitrators gave an award in which all the points involved in the dispute were decided in favour of the mortgagees. Various objections to the award were taken by the mortgagors but were all overruled by the Additional District Judge who, on the 23rd of January 1904, passed a decree in favour of the mortgagees based on that award. The mortgagors including *Musammat* Shero appealed from that decree to this Court, but it was held that no appeal lay and that there was no ground for interference on the revision side. After this decision, four suits were

brought by some or other of the representatives of mortgagors with a view of escaping the consequences of the decree of the 23rd of January 1904, and in one of these cases, namely that of *Sada Sukh* v. *Mul Chand*, which was finally decided by a Division Bench of this Court, the questions involved were very similar to the questions before us for decision in the present case, (See Civil Appeal No. 129 of 1908). In all these cases, the mortgagees were successful, and the present suit constitutes the fifth occasion since the decree on the award on which they have had to meet objections on the part of the mortgagors.

The present plaintiffs claim possession of 1/31st share of the said land in *Mauza* Bhoda Khera and the claim is based upon the grounds,—

(*a*) that the decree based on the award of the arbitrators is not binding upon the plaintiffs because

(1) the Court did not in express terms sanction the reference to arbitration so far as the interests of plaintiffs (minors) were concerned (section 462 and section 506, Civil Procedure Code of 1882), and

(2) *Musammat* Shero was guilty, as guardian, of gross negligence in permitting the dispute to be referred to arbitration, especially to the arbitration of a man who was partial to the mortgagees and of a man (Sanwan Mall) who, though a *Bishnoi* and *Sarbrah Lambardar*, was illiterate and a creature of the mortgagees; and

(*b*) that in any event the sale of the 6th of January 1899, is assailable by the plaintiffs and that it should not be held to be binding on them as it was in no sense effected for their benefit or for any necessary purpose.

Plaintiffs concede that the two items of Rs. 13,716 and Rs. 457, which formed part of the consideration for the mortgage of the 29th April 1897, cannot be assailed, as these sums were unquestionably paid to Jallu, the man who originally advanced money for the purposes of the pre-emption suit. In the lower Courts, there was some dispute regarding the item of Rs. 1,800 alleged to have been due from Rawal and Purkha on book accounts, but it was tacitly admitted before us that this item also could not be successfully challenged. The real contention between the parties centres round the item of Rs. 12,027 and with this item we shall have to deal presently. But before proceeding to do so, we may note that plaintiffs' claim has been dismissed in its entirety by the Courts below.

The District Judge found that plaintiffs were bound by the acts of their grand-uncle and mother, and that their suit was, in his words, "quite absurd."

The learned Divisional Judge agreed that the plaintiffs' claim, however viewed, was unsustainable. He admitted that there were some points about the alleged payment of Rs. 12,027 which were open to suspicion, but after a careful consideration of the facts and the argument addressed to him, he found that that sum had in fact been paid to the mortgagors, that there was good reason for holding that the minors' share of that amount (which at the most amounted to about Rs. 370) had been paid to their guardian and had been used in settling the claim which one Sewa had against the estate of their grandfather, Rawal, and that neither Bishna nor *Musammat* Shero had been guilty of any such negligence as would enable the plaintiffs to undo what those persons, acting as their guardians, had done on their behalf. The learned Judge accordingly dismissed their appeal with costs.

Plaintiffs' further appeal to this Court has been argued before us at great length, and we have very carefully listened to the arguments and studied the evidence on the record. We may conveniently discuss the case first with regard to the merits, and secondly with regard to the law points involved.

As regards the first part of the case, we may say at once that we are not satisfied that plaintiffs have shown that their mother and *de facto* guardian, *Musammat* Shero, was guilty of such negligence as would justify us in setting aside the sale of the 6th January 1899 in which she joined, or (apart from other considerations) the mortgage of the 29th April 1897 and subsequent proceedings thereupon. The whole of the argument upon this part of the case revolves round the alleged payment of Rs. 12,027 to the mortgagors; and it may beriefly be thus summarised:—There is no proof that this large sum of money was actually paid to the mortgagors, while the fact that it was said

to have been paid at home two days before the registration of the mortgage-deed raises strong suspicion as to its genuineness; that in any event it is not shown that any part of the said sum was received by the minors, or was for their benefit, that Bishna acted negligently in not having the *ex parte* decree obtained by the mortgagees on the 8th October 1898 set aside, so far as the minors were concerned; that in view of the above mentioned facts, *Musammat* Shero, when purporting to act as the guardian of her minor sons, was grossly negligent of their interests when she

(1) joined in the sale of the 6th January 1899, which was in no way for their benefit:

(2) consented to the dispute in the subsequent foreclosure proceedings being referred to arbitration at all; and

(3) agreed to accept Har Sarup and Sanwan as arbitrators.

In our opinion, *Musammat* Shero was guilty of no negligence and acted throughout in the best interests of the minors. There may be some suspicion as to whether the full sum of Rs. 12,027 was actually paid to the mortgagees, and the fact that so large a sum was not paid before the Sub-Registrar does undoubtedly lend colour to the suggestion that there was something not quite above board in connection with it. But we cannot lose sight of the fact that in every decision which has been given upon this point, up to date payment of the amount has been found established, and in the present case the Courts below are agreed in holding that, it was made and there are good and substantial reasons in support of this finding, for it is almost incredible that 14 adult men of understanding would on several occasions have admitted receipt of so large a sum if in fact it had been a purely fictitious item. The minors' share in the sum was of almost insignificant value, about Rs. 370, and we cannot agree that *Musammat* Shero was neglectful of their interests when she accepted it as an established charge upon their property. All the male members of the family, including Bishna, the minors' paternal grand-uncle, had acknowledged its correctness as affecting their own shares, and it is absurd to argue that a woman ought to have been more careful than they (who knew the facts more thoroughly) were in connection with their own interests. In the case of *Sada Sukh* v. *Mul Chand*, to which reference has been made, the same question arose and with regard to the same transaction, and in their judgment in that case, the learned Judges who decided the appeal to this Court, observed:—

"As regards the second point, we agree with the Courts below in holding that the mother of the plaintiff-appellant acted quite properly and within her rights as *de facto* guardian of her son in joining the male members of her family, who were quite competent to safeguard their common interest, in selling one-third share of the village lands in 1899 and in subsequently agreeing to refer the matter in dispute to arbitration in the course of the foreclosure suit brought by the present respondent. It is difficult to see what other action the plaintiff-appellant's mother could have taken to protect his interests, and except indulging in generalities of an abstract character, which do not affect the practical aspects of the matter, the plaintiff-appellant's Counsel was unable to tell us in what way the lady could have acted save in concert with her near relations in safeguarding her sons' rights in the land;" (see Civil Appeal No. 129 of 1908).

We see no justification for taking a different view of the facts in the present case where another mother is charged, upon practically the same facts, with neglect of her son's rights.

Mr. Lajpat Rai contended that *Musammat* Shero should not have agreed to the sale of the 6th January 1899, *firstly*, because Bishna had negligently allowed the *ex parte* decree of the 8th October 1898 to pass unchallenged, and, *secondly*, because the minors did not in any way benefit by that sale. But we fail to see how *Musammat* Shero could, with any hope of success, have disassociated herself from the acts of the male mortgagors who were adults and who were concerned equally with the minors in both these proceedings. Even if Bishna had been negligent in allowing the *ex parte* decree to stand—a point which is by no means clear—it must be remembered that that decree was passed against all 14 mortgagors, the majority of whom undoubtedly accepted it as binding upon them, while even the small minority, who, with Bishna, were at first inclined to dispute it, subsequently decided to take no further action with regard to it. In these circumstances, the plaintiffs' mother

might with every reason have concluded that it would be a waste of her son's money to contest a decree which all the male members had agreed to accept. Furthermore, it is not clear how *Musammat* Shero could have challenged that decree once Bishna had had an opportunity of setting it aside and had decided to leave it alone.

Then as to the second point, there is, we think, force in Mr. Dwarka Das' argument, founded upon the judgment of the Divisional Judge, that the mortgagors as a body might well have thought it to their advantage to be given the right to redeem part of the land on payment of Rs. 16,000 instead of being obliged to redeem the *whole* on payment of Rs. 28,000 (or more, when interest was added), and that it was to secure this right that they agreed to sell $\frac{1}{3}$rd of the land for Rs. 18,000.

So far then as the sale is concerned, we cannot agree that plaintiffs have established any negligence on the part of their mother.

Then, as to the proceedings in the foreclosure suit. In that suit all the mortgagors stoutly contested the right of the mortgagees to foreclose, and pleaded that full consideration for the mortgage had not passed, etc. But in the course of proceedings they all agreed that the matters in dispute should be referred to the arbitration of two men, of whom one, Har Sarup, was a *Sahukar* and the other, Sanwan, the *Sarbrah Lambardar* of the village and of the same caste as the mortgagors. In face of the fact that all the male defendants agreed to this reference, we are not surprised to find that the two women, who acted as guardians *ad litem* of their respective sons, also agreed to it, and we are of opinion that in so agreeing they acted reasonably. *Musammat* Shero had no reason to suppose (so far as we can see) that the arbitrators would not act justly in dealing with the case, and it is absurd to denounce her conduct simply because the arbitrators' award eventually went against defendants. Har Sarup, no doubt, was a person of the same caste as the mortgagees, but Sanwan was, on the other hand, a leading man of the village and would be likely to see that justice was done to his caste fellows. Moreover, that *Musammat* Shero and the other defendants in the foreclosure case were not careless of their interests and were anxious to do all they could to defeat the mortgagees is proved by the fact that when the award was made, they at once took objections to it on every conceivable ground and even went to the length of preferring an appeal from the decree based on that award to this Court.

Taking all the facts into consideration, we are not satisfied that plaintiffs have established such negligence on the part of *Musammat* Shero as would justify us on that ground, in setting aside either the sale of the 6th January 1899 or the decree based on the award of the arbitrators, dated the 23rd of January, 1904.

It remains now to deal with the legal questions. These are two and both relate to the validity of the decree just mentioned. Mr. Lajpat Rai contends that that decree is not binding on the minors for two reasons,—

(1) because *Musammat* Shero had not been formally appointed guardian *ad litem* of the minors in the foreclosure suit and that, therefore, no act on her part, though she purported to act as their *de facto* guardian, can in law bind them; and

(2) because the Court did not in express terms sanction the reference to arbitration, whereas by law no such reference could be made, in a case where minors were concerned, without such express sanction.

The first point was not seriously pressed, and it is sufficient to say that, when the facts are as here, the weight of authority is distinctly against the contention, [see *Dhanpat Mal* v. *Khazana* (1); *Wullan* v. *Banke Behari Pershad Singh* (2) and *Cf. Hanuman Prashad* v. *Muhammad Ishaq*(3); *Ram Chandra Das* v. *Joti Prasad* (4)]. In the foreclosure proceedings, *Musammat* Shero duly appeared on behalf of her minors and as their guardian *ad litem* represented them throughout the case, their interests being thus duly protected and in no way prejudiced by the absence of a formal order appointing her such guardian. In these proceedings, the interests of the present plaintiffs were comparatively trifling and so far as we can see, their mother did everything in her power to assert their rights, and none-the-less so because she acted in concert with the male members of the family whose interests

(1) 67 P. R. 1897.
(2) 30 C. 1021 (P. C.).
(3) 28 A. 137, 2 A. L. J. 615; A. W. N. (1905) 229.
(4) 29 A. 675; A. W. N. (1907) 225.

were far greater. We hold, therefore, that plaintiffs were in no sense prejudiced by the omission of a formal order appointing *Musammat* Shero to be their guardian *ad litem*.

The second question is not so easily disposed of. The suit was proceeding in Court when all the parties filed an application under section 506, Civil Procedure Code of 1882, praying that the matters in dispute between them might be referred to the arbitrament of the two persons specified in the application. In accordance with this application, the said matters were referred by order of the Additional Divisional Judge, dated the 24th December 1903, but admittedly the Court passed no formal order expressly sanctioning such reference so far as the interests of the minor defendants were concerned. Mr. Lajpat Rai's contention is that a formal sanction of the Court was absolutely necessary and that in the absence of such, the whole of the proceedings subsequent to the application under section 506 are null and void so far as the present plaintiffs are concerned. If this contention is sound, the decree based on the award of the arbitrators will not be binding on the plaintiffs and, so far as they and the mortgagees are affected, the parties will be relegated to the positions they respectively occupied before the disputes in the foreclosure suit were referred to arbitration. In support of his contention, Mr. Lajpat Rai relies upon the decision of a Division Bench of this Court reported as *Hira* v. *Dina* (5) and an analogous ruling of the Madras High Court in *Lakshmana Chetti* v. *Chinnathambai Chetti* (6).

On the other hand, there is a direct decision of the Allahabad High Court in *Hardeo Sahai* v. *Gouri Shankar* (7) and certain *obiter dicta* in *Uda* v. *Mul Chand* (8) and *Annada Krishna Dey* v. *Jogendra Nath Dey* (9).

The question then is, whether an application under section 506, Civil Procedure Code of 1882 (second Schedule, rule 1), to refer matters in dispute in a pending suit to arbitration, is an "agreement" or "compromise" within the meaning of section 462, Civil Procedure Code of 1882 (Order XXXII, rule 7 of the present Code.)

(5) 37 P. R. 1895.
(6) 24 M. 326.
(7) 28 A. 35; A. W. N. (1905) 171; 2 A. L. J. 493.
(8) 4 P. R. 1907; 10 P. W. R. 1907.
(9) 8 C. L. J. 294.

There is force in the arguments on both sides and, in view of the conflict of authority, and as we ourselves, as at present advised, are inclined to accept the view of the Allahabad High Court, we deem it necessary to refer this question to a Full Bench.

The actual question referred is as follows:—

When a guardian *ad litem* of minor defendants applies under section 506 of the former Code, or under Schedule II, rule 1 of the present Code of Civil Procedure, to the Court in a pending suit for an order of reference to arbitration, is it essential for the validity of any such reference that the Court should in express terms sanction the reference under section 462 of the former Code or Order XXXII, rule 7 of the present Code?

Lala *Lajpat Rai*, for the Appellants.

Rai Bahadur Lala *Sukh Dial*, for the Respondents.

OPINION OF THE FULL BENCH.

RATTIGAN, J.—The question referred to the Full Bench is as follows:—

"When a guardian *ad litem* of minor defendants applies, under section 506 of the former Code, or under Schedule II, para. 1 of the present Code of Civil Procedure, in a pending suit for an order of reference to arbitration, is it essential for the validity of any such reference that the Court should in express terms sanction the reference under section 462 of the former Code or under Order XXXII, rule 7 of the present?"

This is a question of some little difficulty, and I confess that at one time I inclined to the opinion that the answer to it should be in the negative. After more careful consideration, however, and, in view of the arguments urged before us, especially by Mr. Lajpat Rai, I have come to a somewhat different conclusion. My opinion now is that both in cases governed by the provisions of the Code of 1882 and in cases governed by the provisions of the present Code, the guardian *ad litem* of a minor defendant, and I might add, the next friend of a minor plaintiff, must obtain the express sanction of the Court, if he wishes, on behalf of his ward, to refer the matter in dispute or any question involved in the suit to arbitration, and that an omission on the part of such guardian or next friend to obtain such sanction will have

the effect of making all proceedings consequent on such reference *voidable* against all parties other than the minor. In other words, I hold that an application of the guardian or next friend under section 506 of the former Code, or under Schedule II, para. 1 of the present Code, comes within the purview of section 462 of the former Code or Order XXXII, rule 7 of the present Code, as the case may be, and that unless the leave of the Court is expressly obtained and recorded, the application to refer will have the same effect, and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court expressly recorded in the proceedings. I give my answer in these terms because the question put to us is not, I think, very satisfactorily expressed. The leave or sanction of the Court must be obtained and must be expressly recorded if the reference to arbitration is to be *valid* for all purposes and against all parties, including the minor, but it does not follow that in a case where such sanction has not been obtained, the reference must necessarily be invalid or void. The minor alone can claim to avoid it, [though *Ghulam Ali Shah* v. *Shahabal Shah* (10) and *Kashi Ram* v. *Bawa Tola* (?) (11) are authorities for the proposition that in certain cases his suit may be unsuccessful] but it is, of course, open to him, if so advised, to affirm and ratify the reference and all subsequent proceedings.

There is a singular dearth of authority upon the question before us and practically the only direct decision upon it is that of a Division Bench of this Court, reported as *Hira* v. *Dina* (5), and even in that case there is no discussion of the question. The learned Judge simply followed an *obiter dictum* in the judgment given by Sir Meredyth Plowden in *Malik Sorab* v. *Anokh Rai* (12) and upon its authority held that "the reference to arbitration is an agreement" with reference to the suit "within the meaning of section 462" of the Code of 1882 and that the guardian was not authorized to enter into it without the leave of the Court which must be given in express terms.

(10) 3 P. R. 1905; 87 P. L. R. 1905.
(11) 3 P. R. 1902 (?).
(12) 18 P. R. 1891.

In *Lakshmana Chetti* v. *Chinnathambi Chetti* (6), there is an expression of opinion to the same effect, while, on the other hand, we have certain *dicta*, *per contra*, in *Hardeo Sahai* v. *Gouri Shankar* (7), *Uda* v. *Mul Chand* (8) and *Annada Krishna Dey* v. *Jogendra Nath Dey* (9).

I have given these opinions, which are, of course, entitled to every weight, my best consideration, and the conclusion at which I have arrived is, as expressed in *Hira* v. *Dina* (5), that the reference to arbitration is an agreement with reference to the suit and as such within the purview of the general provision of law embodied in section 462 of the former Code and Order XXXII, rule 7 of the present Code. The reference to arbitration under section 506 of the Code of 1882 or under the first para. of the 2nd Schedule to the present Code unquestionably has "reference to the suit," for it is only matters in difference in the suit that can be so referred to arbitration through the Court. Then, is the application preferred to the Court by the parties an "agreement"? Obviously it is so, for it is only when all the parties agree to make such reference that the application can be entertained, and the application must be preferred by them all. In the present Code, this point has been made quite clear, para. 1 of the 2nd Schedule providing that where in any suit all the parties interested "agree" that any matter in "difference between them", the Court shall, etc. Section 506 of the former Code was not so explicit. It provided that "if all parties to a suit desire that any matter in difference between them in the suit be referred to arbitration," the Court shall etc. But I do not think that there has been any change in the law. Before all the parties can apply to the Court for an order of reference, it is clearly necessary that they should have agreed *inter se* to refer the matters in dispute to arbitration, and their joint application necessarily pre-supposes an agreement between them. In all these cases, therefore, (1) there is an agreement between the parties, and (2) such agreement has reference to the pending suit. Upon what ground, then, can it be urged that the wide and general provisions of section 462 of the Code of 1882 or of Order XXXII, rule 7 of the present Code are inapplicable? Those provisions were enacted for the protection of minors who are unable to look after their

own interests and to whom the Court stands in a *quasi* tutelary position. Is, then, the Court to which in all other cases an agreement or compromise with reference to the suit, made by a guardian or next friend, has to be submitted for sanction, bound in cases such as the present to allow the guardian or next friend to refer the matters in dispute to any arbitrator selected by the parties? And if it does so simply as a matter of course and without regard to the interests of the minor, is the latter to be held bound by the award of the arbitrator or arbitrators? Or, has the Court power to refuse to make such reference when it is of opinion that the questions involved, or the persons nominated as arbitrators, are such that it would be prejudicial to the interests of minors, who cannot look after their own interests, to permit the reference? The general policy of the law, no less than the language of the relevant sections of the Code, clearly imply that such agreements to refer must, to be absolutely binding on the minors, be sanctioned in express terms by the Court. Parties to a suit who are of age must be left to look after their own interests, and if they enter into an agreement, or compromise or if they decide to refer their dispute to arbitration, the Court has no further concern in the matter. But, unfortunately, guardians and next friends of minors are not invariably honest and, even if honest, are sometimes careless and occasionally lacking in intelligence and the duty of safeguarding the interests of minors, so far as is practicable, is therefore, thrown upon the Courts. Bearing this in mind, I can find no justification for the view that the Courts are precluded from exercising this duty where the guardian or next friend appears and states that he has agreed with the other party to make a reference to arbitration, and this, too, though the matter in dispute may be wholly unsuitable for such reference or the arbitrator nominated may be quite unfit.

In arriving at this conclusion I am not unmindful of the cases in which it has been held that the express sanction of the Court is not needed when a guardian or next friend of a minor agrees, on his behalf, to be bound by the oath of the other party to the suit. [*Malak Sorab* v. *Anokh Rai* (12); *Sheo Nath Saran* v. *Sukh Lal Singh* (13); *Chengal Reddi* v. *Venkata Reddi* (14)]. Speaking with every deference, I must confess that I find some difficulty in following the *ratio decidendi* of these cases or in fully appreciating the subtle distinction between them and the class of cases with which we are dealing. It seems to me that the High Court of Allahabad was justified in remarking that if section 462 does not apply to these cases, *a fortiori* it would not apply to the proceedings taken under Chapter XXXVII of the Code of 1882 [*Hanuman Parshad* v. *Muhammad Ishaq* (3)]. However, Sir Meredyth Plowden was of the opposite opinion [see *Malak Sorab* v. *Anokh Rai* (12)] and I need say no more with reference to these cases than that the actual question there involved is not now before us, and we are not called upon to decide as to the correctness or otherwise of the proposition there laid down.

For the reasons given, I would reply to this reference in the terms I have stated above.

ROBERTSON, J.—I concur with my brother Rattigan.

Section 462 of the Civil Procedure Code of 1882 runs as follows:

"No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor."

It is quite clear that a reference to arbitration requires an agreement to refer to arbitration, and that such an agreement has reference to the suit. Such an agreement, therefore, comes within the purview of section 462 of the Code of 1882 and of Order XXXII, rule 7. I have nothing to add to what has been written by my brother Rattigan.

SHAH DIN, J.—I agree in the answer to the reference as proposed by my brother Rattigan.

(13) 27 C. 229.

(14) 12 M. 483.

ICHHAMOYI DEBI *v.* NIL MONI MUKHERJI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1553 AND 1674 OF 1909.

February 15, 1912.

Present:—Mr. Justice Coxe and Mr. Justice Imam.

ICHHAMOYI DEBI—PLAINTIFF—APPELLANT

versus

NIL MONI MUKHERJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Daughter capable of child-bearing—Capacity of bearing children, when ceases—Woman of 63, living with husband for 43 years without having child, whether to be regarded capable of child-bearing.

It may be difficult to lay down any general rule as to when a woman's capacity for bearing children can be said to cease. But a woman of 63, who has been living with her husband for 43 years without having a child, cannot be regarded as capable of bearing children.

Appeal from the decree of the Sub-Judge of Bardwan, dated April 26th, 1909, affirming that of the Officating Munsif of Kalan, dated September 25th, 1907.

FACTS.—These were two suits for declaration of title and possession. The case of the plaintiff was as follows: That one Nilkamal Sarkar was the original proprietor of the disputed properties, and he and after his death his widow, Bhagabati Dasi, and daughter, Mon Mohini Dasi, were owning and holding possession adversely to others for upwards of 12 years; that at the time of the said Nilkamal Sarkar's death, his widow, Bagabati Dasi, and married daughter, Monmohini Dasi, were alive; that on the death of Bhagabati, the daughter Monmohini inherited the properties; that after her death on 9th *Kartik* 1301 B. S., two persons, named Banku Behari Sarkar and Charu Chandra Sarkar, who were the grandsons by son of the said Nilkamal's paternal grandfather, Doyaram Sarkar, became the actual heirs of Nilkamal Sarkar and obtained all his properties; that they obtained a succession certificate from the District Court; that with the permission of the District Judge, they sold by a registered deed of sale the properties in suit to the plaintiff for Rs. 182 on *Chaitra* 11th, 1304 B. S.; that as the said deed of sale was executed before the permission of the District Judge had been obtained, the said Banku Behari and Charu Chandra again executed a second deed of sale on *Fulgoon* 16th, 1312 B. S. and had the same duly registered; that by this second deed they confirmed and validated the first sale; that the said Monmohini had a son by the name of Krishnadhone Ghose who had died prior to the death of Monmohini, Nilkamal and Bhagabati Dasi; that Krishnadhone had a son named Priya Nath Ghose who lived in the same mess with Bhagabati and Manmohini and was brought up by them and acted as their *Muktear*; that the said Priya Nath had no right whatever to the properties of Nilkamal; that Priya Nath died about two years before the death of Monmohini; that the defendant No. 1 gave it out that he had purchased the properties in suit *benami* in the name of his own relation, the defendant No. 2, from Anusila Dasi, widow of the said Priya Nath Ghose and that the defendants dispossessed the plaintiff from the properties in 1305 and 1312 B. S.

The defence, *inter alia*, was to the effect that at the time of the death of Bhagabati Dasi, Monmohini was not likely to become the mother of a son and, therefore, she did not come to inherit her father and could not so inherit; that at the time of the death of Nilkamal, he had no other near male heir than Priya Nath Ghose mentioned by the plaintiff; that Nilkamal left his permission with Bhagabati to allow the said Priya Nath Ghose to alienate all his (Nilkamal's) properties; that with a view to accelerate the inheritance of Priya Nath, Bhagabati executed a registered deed of gift in favour of Priya Nath who possessed the properties in suit for upwards of 12 years and then on his death his widow, Anusila Dasi, sold the same to the defendant, and that, therefore, the suit was barred by limitation.

Both the Courts below held that Monmohini was about 63 years of age when Bhagabati Dasi, her mother, died (1288 B. S.) and that for about 43 years Monmohini bore no children when her mother died, and, therefore, she had become incapable of bearing children and hence, on the death of Bhagabati, the succession opened to the reversionary heirs of Nilkamal in 1288 B. S. as Monmohini was no heir to her according to the Hindu Law; that her possession or that of her grandson after 1288 was adverse to the reversionary heirs

of Nilkamal, who had lost all right and interest to the estate of Nilkamal by the lapse of time, and hence the plaintiff by her purchase from Banku Sarkar and Charu Sarkar in 1304 acquired no right at all, as they, her vendors, never obtained possession. The suit was, therefore, dismissed by both the Courts below. The plaintiff appealed to the High Court.

Babu *Debendra Chandra Mallik*, for the Appellant.

Babu *Shiva Prosonna Bhattacharyya*, for the Respondents.

JUDGMENT.

S. A. No. 1556 of 1909.

It is unnecessary for us to go into all the points raised in this appeal as it must necessarily fail on the point of limitation.

The plaintiffs have never been in possession of this property and the only way in which they could succeed was by proving that one Monmohini who died in 1301 had a widow's estate in the property at the time of her death, the suit having been brought within 12 years from that date. It is found by the Courts below that she had not a widow's estate in the property because in the year 1288, when the succession might have opened to her, she was incapable of child bearing and, therefore, under the Bengal School of law, was not entitled to succeed. The Subordinate Judge finds that in 1288 Monmohini was 63 or 64 years old. Her husband was still alive and it does not appear that she had been separated from him. Although she had had a son who had died, she had had no children for 43 years. From these facts, the Subordinate Judge inferred that she was incapable of child-bearing. It is impossible for us to say that the learned Subordinate Judge committed any error of law.

It may be difficult to lay down any general rule as to when a woman's capacity of bearing children can be said to cease. But there is no case in the books which would justify a conclusion that a woman of 63, who had been 43 years living with her husband without having a child, must be regarded as capable of child-bearing.

On the facts of this particular case, there is no error of law in the view that has been taken by the Subordinate Judge and, that being so, the appeal must be dismissed with costs.

This judgment will govern S. A. No. 1674 of 1909.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1030 OF 1911.

May 21, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge.

Musammat HARNAM KAUR—DEFENDANT—APPELLANT

versus

SOHAN SINGH—PLAINTIFF—RESPONDENT

Limitation Act (IX *of* 1908), *ss.* 5, 14—*Probate—Receiver, appointment of—Appeal to Divisional Court—Subsequent appeal to High Court—Sufficient cause—Exclusion of time—Minority of appellant, effect of.*

In an application for grant of Probate of a Will, a Receiver of the property of the deceased was appointed by the District Judge. Against this order, an appeal was preferred to the Divisional Court which returned the appeal for presentation to the High Court. When the appeal was presented to the High Court, the period of limitation had expired but the appellant, who was a minor, sought the benefit of section 5 of the Limitation Act:

Held, (1) that as section 86 of the Probate and Administration Act clearly specified the High Court as the Appellate Court, the appeal was filed in the Divisional Court by carelessness and not by mistake of law;

(2) that there was no sufficient cause for not filing the appeal in the High Court within the time prescribed;

(3) that the time taken up in the Divisional Court could not be excluded;

(4) that the fact that the appellant was a minor did not justify extension of the period of limitation.

Miscellaneous appeal from the order of the District Judge, Lyallpur, dated the 27th April 1911, appointing Jowala Singh as Receiver of the property of Natha Singh, deceased.

Mr. *Nanak Chand*, for the Appellant.

Bakshi *Tek Chand*, for the Respondent.

JUDGMENT.—A belated preliminary objection that the appeal to this Court is barred by limitation must be allowed. It should have been taken at the hearing of the 16th instant, but as it has been taken now, I have no alternative, having regard to *Sant Singh* v. *Qaim* (1), which is directly

(1) 118 P. R. 1908.

in point, to allowing it. Section 86 of the Probate and Administration Act (V of 1881), under which an appeal lies, specifies the High Court as the Appellate Court. No one who reads the section could have interpreted the section as meaning that an appeal lay to the Divisional Court. There was no room for mistake, and the error must have been due to carelessness and not to any mistake of law.

The fact that the appellant is a minor, represented by his mother, does not, in my opinion, justify extension of the period of limitation.

The appeal was filed in the incompetent Court by a Pleader, and the order under appeal does not necessarily injure the appellant even if erroneous.

The appeal is dismissed, but, having regard to the fact that the objection was not taken on the 16th instant, I leave the parties to bear their own costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 147 OF 1910.

May 21, 1912.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Richardson.

MOHESH NARAIN ROY—DEFENDANT—APPELLANT

versus

MAHARAJ BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Landlord and tenant—Non-transferable occupancy-holding—Landlord taking mortgage of holding—Whether evidence of transferability—Purchaser of holding—Taking assignment of mortgage from landlord—Knowledge of landlord of previous purchase of assignee from tenant—Estoppel—Whether landlord estopped from denying assignee's right—Fraud upon assignee.

The fact that the landlord himself took a mortgage of a certain non-transferable occupancy-holding under him, would, by itself, be no evidence of transferability of *jotes*, because a landlord himself can purchase or take a mortgage of a holding though non-transferable.

The defendant purchased a non-transferable occupancy-holding in execution of his own mortgage decree. The plaintiff-landlord held a mortgage of the same holding, and the defendant took an assignment of the mortgage for consideration. The plaintiff had full knowledge of the purchase of the holding by the defendant and of the fact that he was taking the assignment in order to perfect his title. The plaintiff subsequently sued the defendant for recovery of possession, on the ground that as the holding was non-transferable, the defendant got no title from his purchase:

Held, that the plaintiff-landlord was estopped from denying that the defendant had acquired a right to the *jote*. To allow the landlord to succeed would be to encourage a fraud upon the defendant.

Appeal from the decree of the District Judge of Birbhum, dated September 4th, 1909, affirming that of the Munsif of Rampurhat, dated December 22nd, 1908.

Dr. *Rash Behary Ghose* and Babu *Brojendra Nath Chatterjee*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Sarat Kumar Mitra*, for the Respondent.

JUDGMENT—This appeal arises out of a suit by a landlord to recover *khas* possession of the lands of certain *jotes* purchased by the defendants-appellants at a sale in execution of a mortgage-decree on the ground that occupancy-holdings are not transferable without the consent of the landlord. The Court of first instance decreed the suit and that decree was confirmed on appeal. The defendants have appealed to this Court.

It appears that the lands in suit, which constituted five different occupancy-holdings and stood in the names of several persons, belonged to one Protab Bag. The defendants took a mortgage of the *jotes* from Protab Bag in July 1895. The plaintiff-resonent, who is the landlord, took a mortgage of the *jotes* from Protab's mother, Jogeshdari, in March 1897. A rent suit was, however, brought against Protab as the tenant by the plaintiff and the decree was paid up by the defendant by depositing the decretal amount in Court and the same was withdrawn by the plaintiff. Subsequently, the defendants purchased the *jotes* at sales held in execution of a decree upon their mortgage.

The *jotes* being non-transferable occupancy-holdings, the defendants did not acquire a title to the lands by their purchase at the auction-sale unless their purchase was recognised by the plaintiff. The plaintiff, on the other hand, had money due to him under a mortgage of the *jotes* executed by Protab's mother, Jogeshdari, in his favour.

Under these circumstances, the defendants paid Rs. 200 to the plaintiff and took an assignment of the mortgage from the plaintiff in the name of their *mohurrir*, one Hari Makhan. The main question raised in this appeal is what is the legal effect of this assignment.

The deposit of the amount due under the rent-decree referred to above and the withdrawal of the same by the plaintiff do not amount to any recognition of the defendants as tenants because the defendants had not then purchased the *jotes* and were in the position of simple mortgagees and the deposit was made in the name of the judgment-debtor. The fact that the plaintiff himself took a mortgage of the *jotes* would by itself be no evidence of transferability of the *jotes* because a landlord himself can purchase or take a mortgage of a holding though non-transferable.

It is contended, however, on behalf of the appellant, that the defendants by taking an assignment of the mortgage from the plaintiff in the name of their *mohurrir* redeemed the plaintiff's mortgage, and that the plaintiff, in allowing the defendants who had purchased the *jotes* to redeem his mortgage, was estopped from denying that they had acquired a right to redeem, in other words, that they had acquired a valid title by their purchase and reference is made to Bigelow on Estoppel, page 685, in support of that contention.

No doubt, the mere assignment of the mortgage by the plaintiff to another would not by itself amount to anything more than a representation that the mortgage was valid and could be enforced against the *jotes*, and it is contended on behalf of the respondent that that is the only effect of the assignment. But in the present case, the plaintiff assigned his mortgage on the *jotes* to the defendants with full knowledge of their purchase and of the fact that they were taking the assignment in order to perfect their title which was not valid unless recognised by him. The question is whether, under these circumstances, the plaintiff, the landlord, can turn round and say that though he assigned a mortgage on the *jotes* to the defendants for value, though the defendants took the assignment because they had purchased the *jotes* and though he was aware of their purchase, the defendants had no right to the *jotes* because occupancy-holdings were not transferable without his consent. To allow the landlord to do so would, in our opinion, be to encourage a fraud upon the purchaser. We are of opinion that, in the circumstances of the present case, the plaintiff is estopped from denying that defendant had acquired a right to the *jotes*.

It was contended, on behalf of the respondents, that the defendants relied upon the alleged payment of *nazar* in support of their story of recognition of their purchase by the plaintiff, and the payment of the *nazar* having been disbelieved by the Courts below, the defendants are not entitled to rely upon the assignment of the mortgage. It is true the defendant's story of the alleged payment of the *nazar* has failed but it was never the plaintiff's case that there was any agreement that defendant would be recognised on payment of *nazar*. It cannot be said, therefore, that the recognition of the defendant in this case depended upon the payment of the *nazar*, although the defendant set up a false case that *nazar* had been paid.

In the written statement, the defendant pleaded estoppel on the ground that the plaintiff himself had taken a mortgage and transferred the same to one Hari Makhan and it would seem that the estoppel there pleaded was with reference to the question of transferability of the *jotes*. But (as pointed out by the Munsif) the defendant No. 1 in his deposition admitted that Hari Makhan was their *benamdar* and that the assignment of the mortgage was really taken by them in the name of Hari Makhan, and it is found on the evidence that that is so. The fifth issue raised in the case, *viz.*, "Is plaintiff estopped from bringing the suit" is wide enough to cover the question of estoppel in the form in which it has been pressed in this Court. In deciding the 5th issue, the Munsif considered the effect of the assignment of the mortgage and held that the assignment could not help the defendants in any way. The defendants challenged the correctness of the above finding in appeal, but the learned Judge overruled the plea of estoppel though on a different ground. The assignment of the mortgage by the plaintiff to the defendant is a fact admitted and found by the Courts below. Under the circumstances, we are of opinion that the mere fact that the true legal effect of the assignment was not precisely formulated in the written statement does not prevent us from giving proper legal effect to the assignment, and doing justice in the case.

We accordingly hold that plaintiff is estopped from denying the title of the defendants as tenants and, reversing the decrees of the Courts below, dismiss the suit. Under

the circumstances of the case, we direct that each party do bear his own costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1024 OF 1911.

May 22, 1912.

Present:—Mr. Justice Banerji.

PARAG—PLAINTIFF—APPELLANT

versus

JAGANNATH AND OTHERS—DEFENDANTS—RESPONDENTS,

Sale—Joint sale to two persons—Consideration paid by one vendee—Right of other vendee to recover his share of property.

Certain immoveable property was purchased by two persons jointly. One of them alone paid the consideration and took possession of the property.

Sometime afterwards, the vendee who was not in possession brought a suit for possession:

Held, that the suit for possession ought to be decreed on the condition of the plaintiff paying his share of the consideration-money as the ownership in the property vested in both the vendees as soon as the sale was complete.

Rajnath (Baijnath) Singh v. *Paltu*, 5 A. L. J. 96; A. W. N. (1908) 38; 30 A. 125, *Shib Lal* v. *Bhagwan Das*, 11 A. 244, followed.

Second appeal from the decision of the District Judge of Banda, dated 26th May 1911.

Mr. *Damodar Das*, for the Appellant.

Mr. *Purushottam Das Tandan*, for the Respondent.

JUDGMENT.—The Courts below appear to have misconceived the real nature of the claim. The plaintiff brought the suit for a declaration that he had a half share in a certain enclosure and he claimed possession of that share. His allegation was that he and the first defendant Jagannath jointly purchased the enclosure from one Ram Prasad, who was the owner of it, for Rs. 150, that the sale-deed was obtained *farzi* in the name of the second defendant, Debi Prasad, and that Debi Prasad had executed a sale-deed in favour of the third defendant in collusion with the first defendant. Jagannath admitted that the house had been purchased jointly by him and the plaintiff. But he stated in his written statement that the whole amount of the consideration was paid by him and that, therefore, the plaintiff was not entitled to obtain possession of a half share of the enclosure. Both the Courts below seem to have thought that if non-payment of consideration by the plaintiff was proved, that would be sufficient to entail the dismissal of his claim. This view is manifestly incorrect. If, as was admitted, the property was purchased jointly by the plaintiff and Jagannath in equal shares, the non-payment of consideration by the plaintiff would not prevent the ownership as to a half share vesting in him. That ownership was acquired as soon as the sale was effected. The full amount of consideration was paid to the vendor in this case. So that upon a sale being made in favour of the vendees, the ownership of the property became vested in the vendees as soon as the sale was completed. This was held in *Rajnath (Baijnath) Singh* v. *Paltu*(1), which followed the earlier case of *Shib Lal* v. *Bhagwan Das* (2). What happened in this case was this. Rupees 150, the consideration for the sale was paid to the vendor by the defendant Jagannath and the latter debited the plaintiff in his account-books with half of the amount of the consideration, namely, Rs. 75, practically as money advanced to him, so that in reality the plaintiff did pay consideration to the vendor by borrowing his share of it from the defendant Jagannath. It has been found by the Courts below that the plaintiff has not re-paid to Jagannath the amount which he so borrowed. But that was not sufficient to justify the dismissal of the suit. Jagannath himself in his written statement says that the condition was that he was to take the property unless the plaintiff paid him the latter's share of the purchase-money, namely, Rs. 75. That amount being still due to Jagannath, the only equity to which Jagannath is entitled is that the decree in the plaintiff's favour for possession must be subject to the payment to Jagannath of Rs. 75, which is still due to him according to the findings of the Courts below. The result is that I allow the appeal and I make a decree in the plaintiff's favour for possession of a half share of the *bara* in question on the condition that the plaintiff do pay to Jagannath within two months from this date Rs. 75 (rupees seventy-five only), being one half of the consideration for the sale, and direct that on his failure to make such payment within the aforesaid period, the suit shall stand dismissed with costs in all Courts. In

(1) 5 A. L. J. 96; A. W. N. (1908) 38; 30 A. 125.
(2) 11 A. 244.

the event of his making the payment as aforesaid, the parties will abide their own costs in all Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 511 OF 1911.

May 21, 1912

Present:—Sir Henry Richards, KT, K. C., Chief Justice, and Mr. Justice Tudball.

GUPTESHWAR RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

RATE KRISHNA RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Co-sharer of equal degree joining in sale a co-sharer of inferior degree—Loss of preferential right.

Where a co-sharer of equal degree joins in the sale a co-sharer of an inferior degree, he forfeits his right as such and a suit for pre-emption can lie against him.

Second appeal from the decision of the District Judge of Gorakhpur, dated 24th January 1911.

Mr. *Parmeshwar Dayal*, for the Appellants.

Mr. *Girdhari Lal Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiffs alleged that a custom of pre-emption prevailed and that one of the vendees, although he had an equal right with the plaintiffs, had lost his right by joining with him in the sale a person, who though a co-sharer had an inferior right to the plaintiffs. The defendants alleged that there was no custom of pre-emption and that the joining of a person, who was a co-sharer, although his right was inferior, did not entitle the plaintiff to pre-emption even on the assumption that a custom of pre-emption prevailed in the *mahal*. Neither side gave oral evidence but there was adduced in evidence the *wajib-ul-arz* of 1833, the *wajib-ul-arz* of 1860 and certain decrees in some of which it was held that a custom existed and in others that it did not exist. The learned Munsif considered the evidence carefully and came to the conclusion that the custom existed. He also held that the joining in the purchase of a person who had inferior rights to the plaintiffs forfeited the right of the vendee whose right was equal to that of the plaintiffs.

The learned District Judge's judgment is not so satisfactory. He decided the case entirely on the words of the *wajib-ul-arz* of 1860. In this, we think he was wrong. He ought to have considered the evidence adduced by both parties and come to a conclusion whether or not the custom existed. As, however, we have all the evidence before us, we think that there is no necessity, especially where no oral evidence was adduced, to put the parties to the unnecessary expense of a further hearing. Mr. Parmeshwor Dayal has called our attention to the history of the village in the *Kaifiyat Nizamat*, which he strongly relies upon as showing that no custom existed. He has also called our attention to the fact that the decree in which the custom was upheld was a compromise decree. The *wajib-ul-arz* of 1833 states the right of pre-emption in general terms. The *wajib-ul-arz* of 1860 states it with much more particularity. It gives a right, *first*, to a near co-sharer and, *secondly*, to a co-sharer in the *thok*. The defendant No. 1 is a co-sharer in the same *khata* with the plaintiff. The other vendee is a co-sharer in the same *thok* but in a different *khata*. We think both the Courts below were correct in holding that a co-sharer in the same *khata* was a nearer co-sharer than a co-sharer in another *khata* though in the same *thok*. We also think that if we assume the custom of pre-emption to exist, a vendee, although having an equal right with the plaintiff, loses his right when he brings in as a co-vendee a co-sharer having an inferior right. It is urged that the bringing in of a co-sharer, even though his right is inferior, is very different from introducing a stranger. It is admitted that the introduction of a stranger forfeits the right of the co-sharer against whom pre-emption is sought. We, however, can recognise no distinction in principle between the introduction of a stranger and the introduction of a person having an inferior right to the pre-emptor. If it were otherwise, pre-emption as between co-sharers could always be defeated if one co-sharer having an equal right could be induced to join in the purchase.

The question remains whether or not we should hold that the custom of pre

emption has been proved to exist. With regard to the litigation, it shows this much that the right of pre-emption has constantly being claimed. Unfortunately, it would appear that the question was never tried out in any previous litigation in the way. We think it ought to have been tried out, namely by hearing and considering the evidence adduced by the parties *pro* and *con*. The cases were generally decided solely upon the actual words appearing in the *wajib-ul-arz*: and, as we know, it very seldom happens that any two Judges take precisely the same view of the meaning of those words. We, therefore, think that, in the circumstances of the present case, the reference to the previous litigation shows little more than that the right of pre-emption has been from time to time claimed. In our opinion, and on the authority of *Returaji Dubain* v. *Pahalwan Bhagat* (1), the reference to the right of pre-emption in these two *wajib-ul-araiz* raised a *prima facie* case that a custom of pre-emption prevailed on the village. It is said that the history of the village, as set forth in the *Kaifiyat Nazamat*, shows that no custom of pre-emption could ever have arisen and this is sufficient to rebut the *prima facie* case established by the plaintiffs.

Having carefully considered this document, we do not think that in the present case it does rebut the plaintiffs' case.

The history of the village shows that the *zemindari* is a very old one. So far as the *Kaifiyat Nizamat* goes, it does not show that there was ever a transfer or sale subsequent to the year 1833. There were auction-purchases but in these cases the right of pre-emption would not be set up. It is urged that the property came into the single possession of a Raja in 1220 *Fasli*. Even this is not very conclusive, because we find the next Settlement was not made with the Raja but apparently with the same family who were the proprietors before the Raja came in. It is, therefore, probable that the Raja's interest was of a temporary character. On the whole, we think that the plaintiff established the existence of the custom of pre-emption he set up. This being so, the decree of the Court below was correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 33 A. 196; 7 Ind. Cas. 680; 7 A. L. J. 1040.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 809 OF 1911.

May 23, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Tudball.

NIAZ FATIMA—DEFENDANT—APPELLANT

versus

TAMIZ BEGAM—PLAINTIFF—RESPONDENT.

Pre-emption—Bhai bhatija hakiki—*Sister, whether included in the term*—Wajib-ul-larz.

A sister is included in the terms *bhai bhatija hakiki*.

Second appeal from the decision of the District Judge of Mainpuri, dated the 6th of May 1911.

Mr. *Muhmmad Ishaq*, for the Appellant.

Mr. *Ghulam Mujtaba*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. Both the plaintiff and vendee are co-sharers but the plaintiff is the own sister of the vendor while the vendee is alleged to be a more distant relative. The existence of the custom of pre-emption is admitted and there is no dispute that such a custom exists. The only question is whether or not the Courts below were justified in holding that the plaintiff has sufficiently established a preferential right by adducing the *wajib-ul-arz*. According to the *wajib-ul-arz*, the custom is that the property must first be offered to *bhai bhatiji hakiki*, that is to say, own brothers and nephews. The parties are Muhmmadans. The Courts have considered that a sister should be included in the expression "bhai." We are unable to say that this decision was wrong under the circumstances of the present case. We, therefore, dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 125 OF 1910.

November 30, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

MENAJUDDI BISWAS—PLAINTIFF—APPELLANT

versus

TOAM MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Party—Necessary party—Application to set aside sale—Transferee from auction-purchaser, whether necessary party—Reversal of sale—Transferee of auction-purchaser not made party—Transferee not bound by reversal of sale.

No person should be deprived of his property in any judicial proceeding unless he has had an opportunity of being heard.

Re Hammersmith Rent-charge, 4 Exch. 87; 7 D. & L. 41; 19 L. J. Ex. 66; 14 Jur. 917, relied upon.

A transferee from an auction-purchaser is a necessary party to a proceeding for reversal of the execution-sale when such proceeding is commenced after the transfer has been effected.

A landlord purchased in execution of a rent decree the holding in arrears and sub-let it to the defendant. The tenant judgment-debtor applied for reversal of the sale, but the sub-lessee was not made a party to the application. The sale was set aside, and the tenant brought this suit to recover possession:

Held, that as against the defendant, the sub-lessee of the auction-purchaser, the plaintiff acquired no valid title in spite of the reversal of the sale as he, the defendant, was not made a party to the proceeding for reversal of the sale.

Bibi Sharofan v. *Mahomed Habibuddin*, 10 Ind. Cas. 148; 13 C. L. J. 535; 15 C. W. N. 685, followed.

Appeal from the decree of the Sub Judge of Jessore dated November, 29, 1909, affirming that of the Munsif of Jhenidah, dated December 19th, 1908.

Babu *Narendra Kumar Bose*, for the Appellant.

Babu *Jogendra Nath Mukherjee*, for the Respondents.

JUDGMENT.—The question of law which calls for decision in this appeal is, whether a transferee from the execution-purchaser is a necessary party to a proceeding for reversal of the execution sale, when such proceeding is commenced after the transfer has been effected.

The circumstances under which the question arises are not disputed. The plaintiff-appellant claims to be the tenant of a holding which was sold for arrears of rent by the landlord on the 16th July 1906. The landlord himself became the purchaser and the sale was confirmed on the 27th August following. He sub-let the land to the defendant on the 2nd May 1907. The plaintiff, whose interest, if any, had been extinguished by the execution-sale, subsequently applied for reversal of the sale and on the 9th May 1908, an order was made by which the sale was cancelled. The order was made by consent of the decree-holder and the judgment-debtor; but the Court added that grounds had been made out for reversal of the sale under section 311 of the Code of 1882. The sub-lessee was not a party to these proceedings and he naturally declined to vacate the land in favour of the plaintiff. Thereupon, the plaintiff commenced the present action on the 27th June 1908. It is manifest that as against the sub-lessee of the auction-purchaser, the plaintiff has acquired no valid title in spite of the reversal of the sale. The auction-purchaser was a necessary party to the proceedings for reversal of the sale [*Bibee Sharofan* v. *Muhammad Habibuddin* (1).] At the time when the sale was set aside on the 9th May 1908, the interest of the auction-purchaser had partially vested in the sub-lessee, who had acquired a valid title under the lease in his favour. The effect of the order of cancellation of the sale was to affect his interest behind his back. Now, it is an elementary principle that no person is to be deprived of his property in any judicial proceeding unless he has had an opportunity of being heard [*Re Hammersmith Rent-charge* (2)]. Here, the defendant is sought to be affected without an opportunity afforded to him to defend his rights. It is thus plain that the plaintiff has not acquired any valid title as against the sub-lessee of the auction-purchaser. The result, therefore, is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 10 Ind. Cas. 148; 13 C. L. J. 535; 15 C. W. N. 685.

(2) 4 Ex. 87; 7 D. & L. 41; 19 L. J. Ex. 66; 14 Jur. 917.

RAGHO PROSAD *v.* MEWA LAL.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

January 23, 1912.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Kunwar RAGHO PROSAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

Lala MEWA LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Execution sale—Priority—Decree on mortgage—Suit for dower by mortgagor's wife—Pauper suit—Decree against mortgagor only—Decree for Court-fee against amount decreed and against husband—Collector realising amount by sale of mortgaged property—Right of purchaser—Sale in execution of mortgage decree—Purchase by mortgagee—Priority of title—Crown debt—Civil Procedure Code (Act XIV of 1882), s. 411.

A mortgagee obtained a decree for sale upon a mortgage executed by a Muhammadan. The decree was under execution when the wife of the mortgagor brought a suit *in forma pauperis* against her husband and the mortgagee, claiming from her husband a lakh of rupees on account of her dower and alleging that that sum was charged on the mortgaged property in priority to the mortgage. The suit was decreed against her husband, but dismissed against the mortgagee, and it was ordered that the amount of Court-fees, which would have been paid by the plaintiff, should be the first charge on the amount decreed and also should be recoverable from the husband.

The Collector then obtained execution of the decree as to the Court-fee against the mortgaged property which was sold and the defendant in the present suit became the purchaser. Subsequently in execution of his mortgage-decree, the mortgagee purchased the property and brought this suit for possession against the first purchaser:

Held, that the decree in the suit for dower did not create any charge on the mortgaged property in favour of the Government, and, therefore, the Government had no right to sell the mortgaged property to realise the amount of the Court-fee and the purchaser had got no title by his purchase.

It is only when claims of the Crown and claims of common persons come into competition that the Crown is preferred. But it is a matter of common justice and of common honesty that the Crown has no more right than a common person to seize *A.*'s property and apply it in or towards the discharge of a debt due from *B.*

Appeal from a decree of the Allahabad High Court dated December 2nd, 1908, affirming that of the Sub-Judge of Allahabad, dated September 19th, 1906.

FACTS.—The facts of this case are sufficiently stated in the judgment of their Lordships. The suit, which was instituted by the respondents to recover certain property, was decreed by both Courts in India. The judgment of the High Court, after stating the facts of the cases, concluded as follows:—

The main contention which has been raised before us by the learned Vakil for the appellants is that the defendants-appellants, having purchased the property at a sale for the realization of Court-fees, acquired an absolute title to it, discharged of any right which the plaintiffs-mortgagees had under their mortgages or under the sale in execution of the decree obtained by them. It appears to us that there is no substance in this contention. The appellants purchased *pendente lite* and in effect purchased nothing, as the mortgagor's equity of redemption passed to the plaintiffs under the sale made to them by the Court. The appeal is in fact concluded by the decision of a Full Bench of this Court in the case of *Dost Muhammad Khan* v. *Mani Ram* (1). The facts of that case are on all fours with those of the present. It was there held that a sale subject to a mortgage of property belonging to the defendant in a suit brought *in forma pauperis* for the purpose of realizing the Court-fee payable to Government by the plaintiff, does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage. In that case, as here, the existence of the mortgage was notified at the sale to the defendants-appellants. The learned Subordinate Judge in his judgment states that the plaintiff's mortgages were all notified at the sale and the defendants purchased the property with notice thereof. This is not disputed. There is in addition to this the fact, as we have stated, that a decree for sale had already been passed and that the defendants purchased *pendente lite*. There is no force, therefore, in this contention.

The next point is that the suit is barred by the provision of section 244 of the Code of Civil Procedure. The argument of the learned Vakil for the appellants is that the defendants, being purchasers of the interest of the mortgagor in the mortgaged property, are his representatives within the meaning of that section, and he submits that the plaintiffs ought in execution proceedings to have applied for and obtained possession. We do not think that there is any force in this contention. The plaintiffs were under

(1) 29 A. 537; 4 A. L. J. 720; A. W. N. (1907) 157.

no obligation to make the defendants parties to the execution proceedings in the suit brought upon their mortgages nor to the application in execution for possession. The only possession which the Court could grant was formal possession. They obtained formal possession and thereupon the execution proceedings determined. This case is similar to the case of *Wilayati Begam* v. *Nand Kishore* (2), in which it was held that a separate suit under similar circumstances was not obnoxious to the provisions of section 244. I, therefore, am of opinion that the appeal ought to be dismissed with costs.

The appellants, who were defendants in this suit, appealed against the decree of the High Court to His Majesty in Council.

Messrs. *Ross* and *Kenworthy Brown*, for the Appellants:—The order as regards the Court-fees payable to Government was made under the Code of Civil Procedure (Act XIV of 1882), section 411. Under this order, the Collector on behalf of Government applied for execution. The property in suit was put up for sale and purchased by Rai Bahadur, the father of the appellants, on the 22nd July 1899. What was really attached and sold was the equity of redemption left in the mortgagor after the decree of the 16th May 1896 was made.

[LORD MACNAGHTEN:—The mortgagor had no such right. He was entitled only to surplus money.]

This point was not dealt with in the Courts below. They decided that the appellants purchased the equity of redemption, which, it is submitted, was not lost when the decree absolute was made in the mortgagee's suit. The right to redeem was not lost until the sale in execution of that decree was confirmed on the 29th October 1902, which was subsequent to the appellants' purchase. *Faiyaz Husain Khan* v. *Prag Narain* (3).

[LORD ROBSON: You never asked to redeem.]

[SIR JOHN EDGE referred to section 86 of the Transfer of Property Act (Act IV of 1882)].

That section refers only to the case of a decree for foreclosure. Reference was also made to sections 87, 88 and 89 of that Act. The effect of passing a decree for sale, even if that decree is made absolute, is that the equity of redemption remains until the sale in execution of that decree is confirmed. The order for sale does not pass the property in the mortgagee. The mortgagor had possession, which could not be taken away from him until the time prescribed in section 89 of the Transfer of Property Act. There was a right in the land on the part of the mortgagor which was available for sale under the Collector's order for sale and was purchased by the appellants.

[SIR JOHN EDGE: Whose title did the appellants get ?] They got all that the Crown had.

The appellants' sale certificate dated the 19th September 1899 stands good until it is set aside. The time allowed to set aside the sale is one year from the date of the certificate, and as that period has already elapsed, the suit is barred: *Malkarjun* bin *Shidramappa Pasari* v. *Narhari* bin *Shivappa* (4). The respondents were substantially parties to the suit and cannot plead ignorance.

[MR. AMEER ALI: The suit was dismissed against the respondents, and the decree made, charged the dower, but not the property in suit, which was not sold in that suit, but under certain other proceedings, to which the respondents were not made parties.]

When the sale in execution of the mortgagee's decree took place, there was nobody representing the appellants on the record. They had the legal estate and the right to redeem and also to possession. These rights cannot be taken away unless the appellants were brought on the record as parties to the suit. They could have been brought on the record under the Code of Civil Procedure, section 372, which is the same as Order XVII, rules 3 and 5 of the Rules of the Supreme Court, 1883; Daniel's Chancery Practice, (7th Edition), page 250. Reference was also made to the Civil Procedure Code, section 310 and the Transfer of property Act, section 52.

The Collector relied upon the case of the *Collector* of *Moradabad* v. *Muhammad Daim Khan* (5), and confirmed the sale to the appellants. When the rights of a subject collide

(2) 30 A. 231; A. W. N. (1908) 95; 5 A. L. J. 547.

(3) 34 I. A. 102 at p. 106; 11 C. W. N. 561; 4 A. L. J. 344; 5 C. L. J. 563; 17 M. L. J. 263; 9 Bom. L. R. 956; 2 M. L. T. 191; 29 A. 339; 10 O. C. 314.

(4) 27 I. A. 216; 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 10 M. L. J. 368.

(5) 2 A. 196.

with those of the Crown, the latter must prevail: *New South Wales Taxation Commissioners* v. *Palmer* (6) and *Attorney-General for New South Wales* v. *Curator of Intestate Estates* (7).

[SIR JOHN EDGE: If the Crown has any superior right, why does not section 411 of the Code of Civil Procedure say so ?]

[LORD ROBSON. In those cases the question involved was one of concurrent titles.]

They, however, lay down the principle.

[SIR JOHN EDGE: You say that the Crown and the Government are the same .]

Yes, my Lord.

[SIR JOHN EDGE: That is not so.]

At one time in this case two executions subsisted, one by the respondent and the other by the Collector on behalf of Government. Both executions were in force at one point of time before either was executed, and the instant they thus concurred, the King's prerogative to be preferred attached: *Attorney-General* v. *Leonard* (8).

Messrs. *De Gruyther*, *K. C.* and *A. P. Sen* for Mr. *Dube*, for the Respondents.

JUDGMENT.

LORD MACNAGHTEN:—This is an appeal from a decree of the High Court at Allahabad, which affirmed a decree of the Court of Small Causes there, exercising the powers of a Subordinate Judge.

The suit was brought by the respondents, Mewa Lal and Lachmin Narain, to recover property of which they had been deprived through the intervention of a Government official who attached it and got it sold in order to satisfy a debt due to Government from somebody else.

The facts are undisputed.

On the 17th of December 1895, the respondents, who were mortgagees of shares in seven villages belonging to their mortgagor, one Tufail Ali Khan, obtained the usual decree for sale. The 17th of April 1896 was the date fixed for payment of principal, interest, and costs which amounted in all to Rs. 19,290-9-6. The mortgagor made default. On the 23rd of April 1896, the mortgagees applied for an order absolute. The order was drawn up on the 16th of May following. On the 24th of March 1897, an application was made for execution of the decree by sale of the mortgaged property, and on the 26th of April 1897, the execution case was transferred to the Collector's Court as the property was ancestral. The decree came into the hands of the Sale Officer on the 8th July 1897.

In the meantime, the wife of the mortgagor brought a suit *in forma pauperis* against her husband, Tufail Ali Khan, and the respondents, claiming from her husband a lakh of rupees under a contract of dower, and alleging that that sum was charged on the mortgage property in priority to the mortgages, the subject of the decree of the 17th of December 1895. On the 11th of May 1897, the suit was decreed with costs against Tufail Ali Khan, but dismissed with costs as against his mortgagees, and it was ordered that the amount of Court-fees, which would have been paid by the plaintiff had she not been allowed to sue as pauper, should be the first charge on the amount decreed to the plaintiff, and should also be recoverable from the defendant Tufail Ali Khan.

The order as regards the Court-fees payable to Government was in accordance with the directions of section 411 of the Civil Procedure Code, 1882, as to pauper suits. That section is in the following terms:—

"411. If the plaintiff succeed in the suit, the Court shall calculate the amount of the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper ; and such amount shall be a first charge on the subject-matter of the suit, and shall also be recoverable by the Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable under this Code."

There was an appeal to the High Court but it was dismissed with costs.

So the respondents succeeded in preserving the priority of their encumbrances and in maintaining the decree of the 17th of December 1895. With this success all their troubles began. The Collector on behalf of Government applied for and obtained execution of the decree of the 11th of May 1897 not against Tufail Ali Khan against whom the suit was decreed, but against the mortgaged property, in regard to which the suit failed. That execution case was also sent to the Collector's

(6) (1907) A. C. 179; 96 L. T. 278; 14 Manson, 106; 23 T. L. R. 304; 76 L. J. P. C. 41.

(7) (1907) A. C. 519; 77 L. J. P. C. 14; 23 T. L. R. 752.

(8) (1888) 38 Ch. D. 622; at p. 625; 57 L. J. Ch. 860; 52 L. T. 624; 37 W. R. 24.

Court. It was received by the Sale Officer on the 18th of February 1898, more than six months after the receipt of the decree of the 17th of December 1895. However, the Sale Officer fixed one and the same day, the 22nd of July 1899, for sale in both cases. And when the day of sale came, he put the property up for sale under the decree of the 11th of May 1897, and it was sold to Rai Bahadur, the father of the appellants, for Rs. 1,529, an amount just sufficient to satisfy the claim of the Government.

The mortgagees' decree was returned to the Civil Court with a statement that no property was left for sale in connection with that decree. In taking this course the Sale Officer, according to the opinion of the Collector, acted legally. Possibly, said the Collector, he might have put the property up for sale under the mortgagees' decree, "proclaiming at the same time the debt due to Government as an encumbrance to be satisfied by the purchaser," but there was no material irregularity. In the Collector's opinion, the authorities clearly affirmed "the principle that the Government takes precedence of all other creditors, whether or not they have a lien on the property."

At the instance of the mortgagees, the Civil Court directed that the property should be put up for sale again under the decree of the 17th of December 1895. Ultimately the mortgagees bought it for Rs. 18,365. They obtained formal possession. But it seems that Rai Bahadur had already obtained possession under his sale certificate. Both parties then exerted themselves to collect rents. Then followed a struggle for mutation of names. The Assistant Collector dismissed an application for that purpose by the mortgagees, blaming them for trying to avoid payment of the Government dues "instead of quietly paying off" the Court-fees and getting the property sold in satisfaction of their large debt. After a learned argument he held that the wording of section 411, Civil Procedure Code, was clear that the Government dues were the first charge on the property, and that Rai Bahadur had consequently a preferential claim. Then the mortgagees appealed to the Collector. He took the same view, after argument, though he confessed that he "had not hitherto realised that the position of the Crown in such matters was so strong." Lastly, the mortgagees applied to the Commissioner on second appeal. He, too, rejected their application, in the first instance on reading the record, and then on an application for revision after hearing the parties at considerable length, who "argued as to the equity and legal rights of the case." As to the merits he pronounced no opinion. He thought it essentially a case for the Civil Court. But, he added, that until the question was determined by a competent Court, he did "not think that any fairer decision could be come to than that at which the Collector arrived."

So at last the mortgagees betook them to the Civil Court, to which they ought to have applied long before in a regular suit. The Judge of first instance ordered that the respondents should be put in possession of the property, and declared that they were the absolute owners. An appeal to the High Court was dismissed with costs. But the learned Judges, after argument, came to the conclusion that there was a substantial question of law involved, and gave leave to appeal to His Majesty in Council.

Their Lordships are at a loss to discover what question of law is involved in this case. So far as can be gathered from the judgments in the Collector's Court, the validity of the sale to Rai Bahadur was rested on two grounds (1) on the terms of section 411 of the Civil Procedure Code, and the decree of the 11th May 1897, and (2) on the prerogative of the Crown. As to the first point, the claim put forward on behalf of the Government is absurd. The decree of the 11th of May 1897 did not create or purport to create any charge on the mortgaged property in favour of the Government. The Government had no right to attach the property and sell it in execution under that decree, though, of course, such interest, if any, as remained in the mortgagor from whom the Court-fees were declared to be recoverable, might have been reached by a proper proceeding. The order for the first sale was, therefore, without jurisdiction. The sale passed no property to the person declared purchaser. On the second point, the claim advanced by the Collector on behalf of the Government is a preposterous claim. It is only when claims of the Crown and claims of "common persons" (to use an old expression) "concur" or come into com-

petition that the Crown is preferred. The Crown has no more right than a "common person" to seize *A.*'s property and apply it in or towards the discharge of a debt due from *B.* That is not a question of law. It is a matter of common justice, and it may be added, of common honesty.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs.

Appeal dismissed.

Attorney for the Appellants: Mr. *Douglas Grant.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers* and *Nevill.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 15 OF 1911.

May 23, 1911.

Present:—Mr. Evans, J. C.

GIRDHARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JASWANT SINGH—PLAINTIFF AND *Seth* SITA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V. of 1908), s. 105 (2), O. XLI, r. 23, O. XLIII, r. 1 (u)—Appeal against order of remand—Decision of first Court on remand order no bar to appeal—Court of appeal, power of—Settlement Circular No. 63 of 1863, legal force of—Grove-holder of long standing, position of.

Where a Court of first appeal, setting aside the decision of the Court of first instance on a preliminary point, remands the case for decision on the merits and there is an appeal against the order of remand, the fact of the case being decided by the Court of first instance in accordance with the remand order before the appeal comes on for hearing, is no bar to its being heard and disposed of.

Raresur Singh v. *Sheo Din*, 12 A. 510 and *Babu Lal* v. *Ram Kali*, 3 A. L. J. 40; A. W. N. (1906) 28, relied upon.

A Court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not but also whether the decision is correct or not and to dispose of the suit accordingly.

Hasan Ali v. *Siraj Husain*, 16 A. 252, *Badam* v. *Imrat*, 3 A. 675, *Loki Mahto* v. *Aghoree Ajail Lal*, 5 C. 144; 4 C. L. R. 465, *Bhau Bala* v. *Bapaji Bapuji* 14 B. 14 and *Sankaran* v. *Raman Kutti*, 20 M. 152, followed.

Settlement Circular No. 63 of 1863 has not the force of law and the position of a grove-holder who has, been in possession of the trees of a grove for a long period, whether he be a mere tenant or one of the old proprietary body, is not, in respect of under-proprietary rights, in any way different from that of any other person who claims those rights.

Umrao Singh v. *Ali Raza Khan*, 1 O. C. 231, followed.

A claimant to under-proprietary rights on the basis of prescription is bound to prove his claim according to the provisions of the Oudh Sub-Settlement Act of 1866.

Maharaja Jagatjit Singh Bahadur v. *Suraj Bakhsh Singh*, 8 O. C. 144 and *Raja Raghwan Bakhsh Singh* v. *Mazhar Husain*, 9 O. C. 167, relied upon.

Appeal against the order of the Subordinate Judge, Sitapur, dated 21st December 1910, reversing that of the Munsif, Kheri, dated 25th July 1910.

Pandit *Jag Mohan Nath Chak*, for the Appellants.

Babu *Lachhman Das*, for the Respondents

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Sitapur remanding the case to the Court of first instance for decision on the merits.

The plaintiff instituted a suit on the 11th January 1910, asking for a declaration that he was under-proprietor of two groves Nos. 109 and 149 and that a decree for possession of grove No. 149 be granted to him. The cause of action was alleged to be an adverse order of the Commissioner, dated the 28th January 1903. The issues were somewhat inconveniently arranged in the Court of first instance. The first and principal issue on which the whole case depended was whether the plaintiff was under-proprietor of the land of groves Nos. 109 and 149. The other issues related to limitation, *res judicata* and other pleas raised in defence. On the first issue, it was found that the plaintiff was not an under-proprietor and the suit was dismissed accordingly. The learned Subordinate Judge on appeal found that the plaintiff had established his under-proprietary title and remanded the case for decision on the merits. The present appeal has been preferred by two of the representatives of the original defendants.

A preliminary objection is taken that the order remanding the case for decision on the merits was passed on the 21st December 1910. In the meantime the case has been decided by the Court of first instance in accordance with the remand order on the 5th April 1911, and it is urged on the strength of certain rulings of the Allahabad High Court, in the cases of *Ikram un-nissa* v. *Muham-*

mad Wazir (1) and *Karori Mal* v. *Sahodra* (2), that this appeal cannot now be proceeded with.

In these cases, the High Court merely stated that it was not the practice to dispose of the appeal against the order under remand in circumstances like the present one, but this view of the law has expressly been dissented from by the same High Court in the cases of *Rameshur Singh* v. *Sheo Din* (3) and *Babu Lal* v. *Ram Kali* (4) and I have no doubt that I have jurisdiction to dispose of this appeal.

Another preliminary objection taken is that this Court has only power to decide whether the order of remand was in accordance with law or not and there is no jurisdiction to decide whether the decision on the preliminary point was correct or not and it is urged that this is a matter which can only be decided when the final appeal is heard against the order of the first Court, dated the 5th April 1911.

Here, again, the authorities are all against the respondents, In the case of *Hasan Ali* v. *Siraj Husain* (5), the first Court found that the suit was barred by section 13 of the Code of Civil Procedure, 1882. The District Judge on appeal held a contrary view and remanded the case under section 562 of the Code. The learned Judges of the High Court held that the suit was barred by section 13 and they proceeded to remark as follows:—"It is contended that we cannot pass a decree dismissing the appeal in the Court below. In our opinion, we can dispose of the appeal in the Court below as the defendant-appellant having succeeded in this appeal on the ground that section 13 of the Code applied to the suit, the suit must necessarily be dismissed as barred *in limine*. If we were simply to set aside the order of the Court below and tell the Court below that it was to dismiss the plaintiffs' appeal to it, as section 13 applied, we should be merely putting the parties to extra expense and adding a useless stage to the procedure of the case. This is the view of the law which has been taken by this Court in previous cases." This view of the law has also been accepted in a Full Bench decision of the same High Court in *Badam* v. *Imrat* (6) and by the Calcutta, Bombay and Madras High Courts; see *Loki Mahto* v. *Aghoree Ajail Lal* (7); *Bhau Bala* v. *Bapaji Bapuji* (8) and *Sankaran* v. *Raman Kutti* (9).

Both these preliminary objections fail and I proceed to decide the case on the merits. The suit by the plaintiff was for a declaration that he had under-proprietary rights in the land of two groves. The learned Subordinate Judge held that he was entitled to a decree. I am of opinion that his decision is incorrect. I accept the facts as found by the lower Court and shortly stated they are as below:—

The ancestors of the plaintiff were *zemindars* of the village until 1820 A. D. and they lost their proprietary possession from about that time. Grove No. 109 was planted by a female relation of the grandfather of the plaintiff before 1820. The plaintiff instituted a suit for possession of this grove against one Subha Singh, a nephew of this lady's husband, and obtained a decree for the trees only. He did not obtain a decree for under-proprietary rights in the land during the settlement operations. Grove No. 149 was planted by two men called Ambar Singh and Bhagol Singh before 1820. Ambar Singh was the plaintiff's grandfather. No decree at all was obtained with respect to this grove. It may be assumed for the purposes of this appeal that the plaintiff and his ancestors have enjoyed the produce of the grove from before 1820 up to institution of the suit and there is no proof that any of the *zemindars* were at any time able to eject them from it. In these circumstances, the learned Subordinate Judge appears to have relied upon Settlement Circular No. 63 of 1863 as an authority for holding that the plaintiff is entitled to the decree asked for. He remarks as below :—

"He (Munsif) has evidently misunderstood the scope of the Circular No. 63 of 1863, which declares the status of such grove-holders as the plaintiff's ancestors and which status does not extinguish by the close of the Settlement operations. The status continues and can be declared at any time if not lost by prescription."

(1) A. W. N. (1882) 53.
(2) A. W. N. (1884) 5.
(3) 12 A. 510.
(4) 3 A. L. J. 40; A. W. N. (1906) 28.
(5) 16 A. 252.
(6) 3 A. 675.
(7) 5 C. 144; 4 C. L. R. 465.
(8) 14 B. 14.
(9) 20 M. 152.

On appeal, it is contended that there is no authority for the assumption that the provisions of the Cricular No. 63 of 1863 have the force of law. In my judgment if that Circular were strictly applied, it is possible that the plaintiff might have some ground for claiming under-propietary rights with respect to grove No. 149 as his position might possibly come in class No. 1 referred to in paragraph 3 of that circular. But I can find no authority for the contention that this Circular has the force of law and the following passage from paragraph 5 of the Circular in question shows this clearly:—"I am well aware that different usages prevail in different districts, and, indeed, in different *ilakas* of the same district, but I think that the great majority of cases that will come before you will be capable of being classified under one of the four classes above detailed. I have merely endeavoured to lay down some general rules for your guidance in carrying out the instructions contained in Circular No. 20 of 1863 under the heading 'groves'." Circular No. 20 of 1863 which is referred to is merely a circular forwarding instructions for the preparation of the Administration Papers in villages under Settlement, and this circular contains instructions showing how groves should be classified in this paper. There is also a distinct authority of this Court. It is to be found in the case of *Umrao Singh* v *Munshi Ali Raza Khan* (10). That was a case in which the right of tenants to remain in possession of the trees in groves after they have left their villages was discussed and on page 251, Mr. Chamier remarks as below:—

"It was suggested that 'Grove Circular' had the force of law. That is not so. It was not issued under Legislative authority, nor does it purport to lay down the law on the subject. Major MacAndrew was, in my opinion, in error in describing the Circular as the 'Local Law.'"

I am not aware that the position of a grove-holder, who has been in possession of the trees of a grove from a long period, whether he be a mere tenant or one of the old proprietary body, is with respect to under-proprietary rights in any way different from any other person who claims those rights. The learned Pleader for the plaintiff-respondent appears to think that there is some peculiar sanctity attached to the land of a grove which places it in a position entirely different from other land. For this contention he can cite no authority. The under-proprietary right claimed by the plaintiff-respondent in this case is a right based on prescription. It is not a right based upon any alleged grant or purchase and, therefore, the claimant is bound to prove his claim according to the provisions of the Oudh Sub-Settlement Act of 1866 and the law on the subject has been clearly laid down by this Court in the case of *Maharaja Jagatjit Singh* v. *Suraj Bakhsh Singh* (11), followed in *Raja Baghwan Bakhsh Singh* v. *Mazhar Husain* (12).

It is obvious that the plaintiff-respondent, according to his own case, cannot fulfil the conditions laid down in rule 10 of the rules attached to Act XXVI of 1866. It is not pretended that this land was ever held by his ancestors as *sir* or *nankar* when they were in proprietary possession of the village before 1820. I understand that the Pleader for the plaintiff-respondent means to urge that these rules are not exhaustive and that under-proprietary rights can be established otherwise. If that is the case, the burden lies heavily on the plaintiff-respondent to show how the under-proprietary rights claimed by him could be established according to law. For the reasons stated above, Circular No. 63 of 1863 cannot have the force of law and I am of opinion that the decision of the lower Court is incorrect. The plaintiff-respondent has not established an under-proprietary title.

I accept the appeal and, setting aside the order of the lower Appellate Court, restore that of the Court of first instance, dated the 25th July 1910 It follows from this that the order of the first Court, dated the 5th April 1911, which was passed on an incorrect order of remand has no force and is not binding upon the parties. The appellants are entitled to their costs throughout.

Appeal accepted.

(10) 1 O. C. 231.

(11) 8 O. C. 145.

(12) 9 O. C. 167.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 732 OF 1910.

January 19, 1912.

Present:—Mr. Justice Sundara Aiyar.

S. VENKATARAMANA IYER—PETITIONER

versus

KITTAMMAL AND OTHERS—RESPONDENTS.

Pauper suit—Application for leave to sue as a pauper—Question to be determined--Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5.

In an application for leave to sue as a pauper, the Court is bound to inquire into and determine the question of plaintiff's pauperism, unless it is satisfied that, under Order XXXIII, rule 5, plaintiff's allegations do not show a cause of action.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Coimbatore, dated 28th June 1910 in Original Petition No. 181 of 1910.

Mr. *M. K. Narayanaswami Iyer*, for the Petitioner.

Mr. *T. R. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—This is an application to revise an order of the District Judge of Coimbatore rejecting an application for leave to institute a suit as a pauper. The Judge has recorded no finding on the question of the plaintiff's pauperism, but has found that the petitioner was not entitled to sue as reversioner. This finding is based on a reported judgment of this Court in *Govindayyar* v. *Dorasami* (1). The judgment shows that the decision of this Court was based on grounds special to the parties in that case. It would not affect the plaintiff.

Apart from this circumstance, Order XXXIII, rule 5, entitles the Court only to see whether the plaintiff's allegations do not show a cause of action. The plaintiff does not admit that the 1st defendant was the adopted son of the deceased Subbier either in his plaint or at his examination. The judgment referred to by the learned Judge was not put in evidence. If it had been, he would probably have found out that the decision in that case could not be relied on against the petitioner. As the Judge has not found that the allegations made by the petitioner do not show a cause of action, I must hold that he was not entitled to reject the petition without inquiring into the

(1) 11 M. 5.

question of the petitioner's pauperism, and that he exercised a jurisdiction not vested in him in doing so.

The learned Vakil for the respondents says that the petitioner deliberately included a claim for moveables which was barred in order to make it appear that the Court-fees payable on the plaint would be much more than the property possessed by him. The petitioner's admission, when he was examined, shows that this observation is well-founded. But even deducting that amount, the property possessed by the plaintiff appears to be insufficient to cover the Court-fees on the remainder of the claim. It may be, as urged by Mr. Krishnaswami Iyer, that the petitioner has other property; but the Judge has not decided that question. He would, no doubt, be entitled to reject it, if he found that the petitioner was possessed of sufficient property to enable him to pay the Court-fees due on his plaint.

It is also urged on behalf of the respondents that this Court should not interfere as the petition was presented on the 91st day after the order was pronounced deducting the time allowed for obtaining copies. Assuming that the petition was put in one day after the ninety days allowed in the case of appeals, I am not prepared to reject the petition on this ground. It cannot be said that there has been any excessive delay in the presentation of the petition.

In the result, I set aside the order of the lower Court and direct that the petition be restored to the file and disposed of afresh according to law. The costs of this petition will abide the result.

Petition remanded.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT CALCUTTA.

January 23, 1912.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

JEOLAL MAHTON AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LOKE NARAYAN MAHTON AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—*Partition, suit for—De*

fence that plaintiff's father had got his share and was expelled from family—Re-appearance of plaintiff in village—Limitation.

A suit was brought for partition of plaintiff's share in family property. The defence was that plaintiff's father was expelled from the family for some scandalous conduct and that he had received his share of the property. The evidence established that the plaintiff re-appeared in the village where the family revised, that he took up his abode there, that he was recognized as a member of the family and that no case of exclusion from the joint property could be made out against him till five or six years before suit:

Held, that the suit should be decreed.

Appeal from the judgment of the High Court (Mookerjee and Holmwood, JJ.) at Calcutta, dated April 4th, 1907, reversing that of the Sub-Judge of Bankipore, dated June 23rd, 1904, and decreeing the suit of the plaintiffs.

The defendants appealed.

Messrs. *L. DeGruyther*, *K. C.*, and *Dunne*, for the Appellants.

Mr. *Bhugwandin Dube*, for the Respondents.

JUDGMENT.

LORD MACNAGHTEN.—This case was heard *ex parte*. The suit was brought by one Loke Narayan Mahton and his three sons as members of a joint undivided Hindu family under the *Mitakshara* Law, asking for a declaration that they were entitled to one-third share of the family property, and for an order for partition on that footing. The defence was that Jiaram Mahton, Loke Narayan's father, who was the son of Pokhan Mahton, was expelled from the family in 1874 in consequence of some scandalous conduct which brought upon him the displeasure of the *zemindar* in whose service the family were employed—that on his expulsion there was a partition so far as he was concerned, and he then received his share of the family property which had been all acquired in the service of the *zemindar* by Pokhan and his sons, and that thereupon Jiaram disappeared with his wife and his son Loke Narayan, who was a mere child at the time, and so his connection with the family came to an end. It was also contended that the plaintiffs' claim was barred by the law of limitation.

The suit was dismissed with costs in the Court of the third Subordinate Judge of Patna. On appeal to the High Court at Calcutta, this judgment was reversed and a decree was pronounced in favour of the plaintiffs.

The evidence is very voluminous and very contradictory. The oral testimony on both sides seems to be even more than usually untrustworthy. After a most elaborate and careful review of the whole case, from which nothing of importance appears to be omitted, and to which nothing can be usefully added, the learned Judges of the High Court came to the conclusion that the case set up of Jiaram's expulsion in 1874 and the alleged partition of the family property on that occasion failed completely. Then they proceeded to consider the position of affairs when Loke Narayan re-appeared in 1889 after his father's death and took up his abode in the village where the surviving members of the family lived. The view of the Court was that he was then recognised as a member of the family, and that no case of exclusion from the joint property could be made out against him till five or six years before suit, when there appeared to have been exclusion from commensality but no partition of the family property.

The case was very fully and very ably presented to this Board by the learned Counsel for the appellants, but their Lordships are not satisfied that there is any ground for disturbing the judgment of the High Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Milner* and *Bickford*.

Solicitors for the Respondents: Messrs. *Barrow*, *Rogers* and *Nevill*.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1182 OF 1909.

January 24, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Miller.

SAVIRIMUTHU MOOPAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SATTAN CHINNAPPAN SAVARIMUTHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Practice—Decision not different from the case of either party—Unsustainable.

In re GANAPATHI PILLAI.

The Court should not decide a suit in a way which is not the case of either party and on a matter on which no issue was raised.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 14 of 1908, presented against the decree of the Court of the District Munsif of Srirangam, in Original Suit No. 111 of 1906.

Mr. *S. Swaminadhan*, for the Appellants.

Mr. *S. T. Srinivasa Gopalachariar*, for the Respondents.

JUDGMENT.—The District Judge has decided the case on a finding that there is no evidence that the building was ever dedicated to religious uses. But this was not the case of either party and was not a matter on which any issue was raised.

We must set aside the decree of the District Judge and remand the appeal for disposal according to law.

It is open to the District Judge to settle fresh issues, if he finds it necessary to do so. Costs in the Court will abide the result.

Suit remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 445 AND 446 OF 1911.

February 2, 1912.

Present:—Mr. Justice Sundara Aiyar.

IN NO. 445 OF 1911.

In re GANAPATHI PILLAI AND OTHERS—DEFENDANTS—PETITIONERS

IN NO. 446 OF 1911.

PANCHABAKESA IYER—DEFENDANT—PETITIONER

Provincial Small Cause Courts Act (IX of 1887), s. 25—Finding opposed to evidence—Power of High Court to interfere in revision—Acknowledgment of payment by one trustee without actual receipt of money—Such acknowledgment not binding on the institution.

Even if a finding of fact arrived at by a lower Court is entirely opposed to the evidence, the High Court has no power to interfere in revision under section 25 of Act IX of 1887.

A mere acknowledgment of payment by one of the trustees who did not really receive the money cannot bind the institution.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the Subordinate Judge of Mayavaram at Kumbakonam, dated 6th March 1911, in Small Cause Suits Nos. 2211 and 2210 respectively of 1910.

In re ATYAM VENKIAH.

Mr. *T. M. Krishanswami Iyer*, for the Petitioners.

JUDGMENT.—The only point urged in support of these petitions is that one of the trustees, Panchapagesa Iyer, having received the rent sued for and acknowledged the receipt of it, the plaintiff is not entitled to recover it again from the defendant. But the lower Court has found that the rent was not really paid to Panchapagesa Iyer.

It is stated that this conclusion is entirely opposed to the evidence, but I have no power to interfere even if that be so. I am also unable to hold that a mere acknowledgment of payment by one of the trustees who did not really receive the money can in any way bind the institution. I dismiss the petitions.

Petitions dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 811 OF 1911

January 25, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re ATYAM VENKIAH AND OTHERS—PLAINTIFFS—APPELLANTS.

Res judicata—*Agreement to maintain defendant in consideration of Will—Prior suit on agreement by defendant for arrears of maintenance and decree therein—Present suit by plaintiff to set aside agreement—Plaintiff not entitled to rely on events prior to former suit—Subsequent events disclosing intention to defeat the Will—Not a sufficient cause of action.*

By an agreement, Exhibit I, the plaintiff agreed to give maintenance to the defendant in consideration of her executing a Will bequeathing all her moveable property to him after her death. The defendant instituted Original Suit No. 160 of 1907 for two years' payment due to her under Exhibit I and obtained a decree. Then the plaintiff sued for a declaration that there was a failure of consideration for Exhibit I and, therefore, the agreement could not be enforced against him:

Held, (1) that the plaintiff could not rely on events prior to Original Suit No. 160 of 1907 to avoid the agreement, as he was bound to put forward in that suit *all* pleas which would entitle him to get the Court to hold that the agreement was not enforceable against him;

(2) that the only events subsequent to that suit alleged as entitling him to relief, *viz.*, that the defendant made false complaints to the Police of loss of some properties included in the Will and also concealed some of them in a third person's house, disclosed no cause of action to avoid Exhibit I, and that the allegation of a mere intention on her part to defeat the bequests was not sufficient.

KHADAM HUSSAIN KHAN *v.* MURAD BIBI.

Second appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 242 of 1910, presented against the decree of the District Munsif of Ellore, in Original Suit No. 611 of 1908.

Mr. *T. Prakasam*, for the Appellant.

JUDGMENT.—I am of opinion that the decision of the lower Courts on the 4th issue, namely, whether the claim is *res judicata*, is right. The defendant instituted Original Suit No. 160 of 1907 for two years' payments due to her according to Exhibit I and obtained a decree. The plaintiff was bound to put forward in that suit *all* pleas which would entitle him to get the Court to hold that the agreement was not enforceable against him; any plea not then urged could not be gone into now.

The only question, therefore, is whether there are any allegations in the plaint of events subsequent to that suit which would entitle the plaintiff to avoid the document. The plaintiff alleges that the defendant made a false complaint of the loss of some of the properties which are included in the Will, made by her, that the Police who investigated the case found that her allegations were false, and that the defendant, with a view to defeat the bequests made by her, concealed some of the property in the house of a third person. The question is whether these allegations are sufficient to show that there was failure of consideration subsequent to the decision in Original Suit No. 160 of 1907. I think it cannot be doubted that the allegation of a mere intention on the part of the defendant to defeat the bequests is not sufficient to give the plaintiff a cause of action to avoid the document. If there were some disposition made by her in favour of third parties which would defeat the bequests, that, no doubt, would be sufficient. If there were an allegation that she deprived herself of her possession in such a manner that they would no longer be under her control, that also might be sufficient. But a statement that she had concealed the properties in the house of a third person does not, I think, amount to an allegation that, by depriving herself either of the ownership or of the possession of the properties, she had defeated the provisions of her Will.

I am constrained to hold that there are no allegations in the plaint of any event subsequent to the suit of 1907 which disclose a cause of action to avoid Exhibit I. It is, no doubt, true that in the case of a Will dealing with moveable property, the position of the legatee is extremely precarious. But that is the plaintiff's fault for he agreed to give maintenance to the defendant in consideration of a Will dealing with moveable property.

I dismiss the second appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL APPLICATION No. 395 OF 1911.

January 19, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Johnstone.

KHADAM HUSSAIN KHAN—DEFENDANT—PETITIONER

versus

Musammat MURAD BIBI—PLAINTIFF—RESPONDENT.

Appeal to Privy Council—Stay of execution—Civil Procedure Code (Act V of 1908), Order XLV, r. 13.

Where permission to appeal to the Privy Council is granted, execution should not generally be stayed unless the execution would so upset things that in the event of the appeal being successful, the *status quo ante* could not be restored or could be restored only with great difficulty. Execution of the decree should not be stayed on the mere allegation that the applicant will suffer much loss.

Application, under Order XLV, rule 13 (2) (*c*) of the Civil Procedure Code, for stay of execution proceedings and for leave to appeal to His Majesty in Council.

For the previous stage of this litigation, see 114 P. W. R. 1911; 12 Ind. Cas. 49.

Mr. *Grey* and Rai Bahadur Lala *Sukh Dyal*, for the Petitioner.

The Hon'ble R. B. *Shadi Lal*, for the Respondent.

JUDGMENT.—We have to-day granted to Khadim Hussain Khan defendant-respondent leave to appeal to His Majesty in Council and have now to deal with his application for stay of execution pending decision of the appeal. In his application defendant-respondent merely says that he will suffer much loss, if execution is allowed to proceed. Before us it is explained that the property dealt with in the decree is joint property, that decree-holder is a widow with a life-interest only, and that defendant-respondent is prepared to give security for three or four years' mesne profits,

if necessary. He also offers to pay to the widow any reasonable maintenance allowance that the Court may fix.

The state of affairs appears to be that petitioner is in physical possession, while mutation has been effected in favour of respondent, *i. e.*, the widow, who is paying the land revenue and has already obtained a decree for her share of the produce of four harvests, and intends to go on suing from time to time, if necessary, on the strength of the entries in the Revenue Records and the decree now under consideration.

In these circumstances, it is clear that appellant must show some "special" cause for stay of execution; Order XLV, rule 13 requires this; and it may be said generally that execution should not in such a case as this be stayed, unless the execution would so upset things that, in the event of the appeal to the Privy Council being successful, the *status quo ante* could not be restored or could be restored only with great difficulty. Here we can find no such thing. Execution will merely involve the continuance by the widow of demands for share of produce and, on refusals, suits by her—a condition of affairs already in existence. She is prepared to give security for restitution upto three or four years' share of produce.

Mr. Grey for petitioner alleges that the widows' brother, who is an enemy of his client, manages her affairs and that confusion and disturbance will be caused by his managing her half share on the basis of joint possession. But this seems to us no argument at all for staying execution:

In our opinion, our own decree is correct, and if it is upheld, sooner or later the decree must be executed, and, presumably, whenever it is executed, this difficulty about the widow's manager will arise. It seems to us that the postponement of this difficulty by means of an appeal against a decree, that we at present consider a just decree, is no good ground for refusing to a decree-holder her natural right to reap the fruits of her decree.

We refuse to stay execution indefinitely, but we direct that within a month the decree-holder do furnish in the executing Court security for three years' share of produce of the land covered by the decree, and that until the security is furnished, the execution of the decree should be stayed. No costs.

Application dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 194 OF 1910.

January 17, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

PONNA KRISHNAVASUDEMUDU AND ANOTHER—PETITIONERS—DEFENDANTS—APPELLANTS

versus

KOUVIRIRI BASURI REDDI—PLAINTIFF—COUNTER-PETITIONER.

Practice—Return of summons—Order of Court—Clearness.

When summonses are returned unserved, the Court should pass subsequent orders very clearly, stating the delay for non-service, etc. A vague order to the effect "no vigilant stops are taken to secure attendance of witnesses" is not sufficient.

Appeal against the order of the Subordinate Judge's Court of Kishna at Ellore, dated the 30th April 1910, in C. M. P. No. 378 of 1910 in O. S. No. 55 of 1909.

Mr. *T. Prakasam*, for the Appellant.

Mr. *P. Narayanamurti*, for the Plaintiff.

JUDGMENT.—We are unable to sustain the order appealed against. The Subordinate Judge does not say that the time between the 22nd March and the 4th April would ordinarily not be sufficient for serving summonses on the witnesses. He says:—"No vigilant steps were taken by the petitioner to secure the attendance of his witnesses." This is vague, and we are not clear as to what he means. He does not say there was any defect in the summonses. The return of the summonses unserved for want of jurisdiction may have been due to a mistake on the part of the Court in not sending them to the proper authority for service. We may observe that in a case of this sort, the lower Court ought to send up the summonses for the inspection of this Court. We set aside the order and direct the petition to be restored to the file and disposed of afresh according to law. The costs of this appeal will abide the result.

Petition remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 69 OF 1911.

January 12, 1912.

Present:—Mr. Rafique, A. J. C.

Rao BHAN PARTAB SAHI—PLAINTIFF APPELLANT

versus

SHEO DAT BAHADUR SINGH—DEFENDANT—RESPONDENT.

Res judicata—*Suit for rent—Ex-proprietary tenant's liability to pay rent fixed by Revenue Courts.*

Where a former suit for arrears of rent brought by the plaintiff against the defendant was dismissed on the ground that the plaintiff had failed to prove the defendant to be a tenant-at-will: *Held*, that it did not operate as *res judicata* to bar a subsequent suit for recovery of rent for the same period against the defendant as an ex-proprietary tenant.

Zamorin of Calicut v. *Narayana Murayana Mussad*, 22 M. 323, relied upon.

A *Zemindar's* right to claim rent against an ex-proprietary tenant at the rate fixed by the Revenue Courts accrues not merely from the date on which the rent is so fixed but from the date on which the ex-proprietary tenancy arises.

Herdeo Bakhsh v. *Sri Pargash Singh*, 12 O. C. 35; 1 Ind. 689, followed.

Appeal against the decree of the Officiating District Judge, Rae Bareli, dated 2nd August 1911, modifying that of the Deputy Collector, Sultanpur, dated 26th May 1911.

Mr. *Masaldan*, for the Appellant.

Mr. *Bhawani Bakhsh*, for the Respondent.

JUDGMENT.—It appears that the defendant-respondent executed a deed of mortgage on the 17th of June 1902, in favour of the Raja of Hasanpur in respect of 23 villages in lieu of Rs. 1,25,000. On the 11th of January, 1904, he mortgaged nine villages out of the 23 villages mortgaged to the Raja of Hasanpur to the plaintiff-appellant. The latter redeemed the prior mortgage of the 17th of June 1902. The plaintiff-appellant instituted four suits in the Court of the Assistant Collector of Sultanpur in October 1908 for the recovery of arrears of rent for 1313 to 1316 *Fasli* in respect of the land situated in five of the mortgaged villages. The suits were resisted on the ground, among others, that the defendant-respondent was in possession of the land of which the rent was claimed as *sir* and *khudkasht* as an ex-proprietary tenant and, as no rent had been fixed between him and the plaintiff-appellant, the suits could not be maintained. The Assistant Collector admitted the plea of the defendant-respondent and dismissed the claims. On appeal to the District Judge the decree of the first Court was affirmed on the ground that the plaintiff-appellant had failed to prove as alleged in the plaint that the defendant-respondent was a mere tenant-at-will. Subsequently, in June 1910, the Revenue Courts, at the instance of the plaintiff-appellant, fixed the rent of the *sir* and *khudkasht* found in the possession of the defendant respondent. The order of the Revenue Court fixing the rent was made under section 36, clause (2), of the United Provinces Land Revenue Act.

On the 11th of March 1911, the plaintiff-appellant instituted two fresh suits in the Court of the Assistant Collector of Sultanpur for the recovery of rent of *sir* and *khudkasht* in the possession of the defendant-respondent in the villages of Ganeshpur and Rudauli on the basis of the rent fixed by the Revenue Courts in June 1910. The two claims related to the arrears of rent for 1315 to 1318 *Fasli*. The claim of the plaintiff-appellant was resisted on the ground, among others, that it was barred by section 11 of the Code of Civil Procedure. The first Court decreed the claim. The defendant-respondent preferred an appeal to the District Judge who held that the claim with regard to 1315 and 1316 *Fasli* was barred by *res judicata*, because the prior claim for arrears of rent included the claim for those years. The plaintiff-appellant challenges the finding of the learned Judge in his second appeal before this Court. The reasoning of the learned Judge as to why section 11 of the Code bars the claim for the years 1315 and 1316 *Fasli* is not quite intelligible to me. The prior claim of the plaintiff-appellant was dismissed on the ground that he had failed to prove that the defendant-respondent was his tenant-at-will. In the present case, his allegation is that the defendant-respondent is an ex-proprietary tenant. The case of *Zamorin of Calicat* v. *Narayanan Mussad* (1) is to the point. The head-note of the case is as follows:—

"In a previous suit in which plaintiff had been a party, it had been attempted to assert plaintiff's title to a piece of land occupied by the defendants by proving that they held the same by virtue of an alleged specific lease. The Court had held that no such lease had been executed. Plain-

(1) 22 M. 323.

In re RANGACHARIAR.

tiff now claimed the land as belonging to his *devasom*, and sued to recover it on the strength of his title; he also set up the alleged lease once more: *Held*, that though the question of the validity of the lease was *res judicata*, plaintiff was at liberty to sue also on the strength of his title independently of the lease, and he was not estopped from so suing by the fact that the former suit had been based on the lease alone."

It is evident from the principle laid down in the above case that the dismissal of the prior claim of the plaintiff-appellant on the ground that he had failed to prove the defendant-respondent to be a tenant-at-will does not estop him from suing the latter as an ex-proprietary tenant. I hold that the bar of *res judicata* does not apply to the present claim with regard to 1315 and 1316 *Fasli*. The general agent for the respondent contends that the claim of the plaintiff-appellant, so far as it relates to the arrears prior to the 10th of June 1910, the date on which the rent was fixed, should be held to be not entertainable. In other words, his contention is that the right of the plaintiff-appellant to claim arrears of rent accrued on the date the Revenue Courts fixed the rent payable by the defendant-respondent. This contention is negatived by the case of *Hurdeo Bakhsh* v. *Sri Pargash Singh*(2), the head-note of which is as follows:—

"Where the respondent sued, the appellants for rent of lands of which they had become the ex-proprietary tenants under section 126 of the Land Revenue Act, *held*, that the rent determined under section 36, clause (2), though subsequent to the institution of the suit, took effect retrospectively from the date on which the ex-proprietary tenancy arose."

It is clear from this ruling that the order of the Revenue Courts fixing the rent of an ex-proprietary tenant has a retrospective effect. The contention of the respondent's agent is, therefore, disallowed.

I allow the appeal, set aside the decree of the District Judge and restore that of the Court of the Assistant Collector with costs in all Courts.

Appeal allowed.

(2) 12 O. C. 35; 1 Ind. Cas. 689.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 875 OF 1911.

January 26, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re RANGACHARIAR AND ANOTHER—DEFENDANTS—APPELLANTS.

Limitation Act (XV of 1877), Sch. II, Art. 142—Plaintiff's possession—Form of issue—Appeal—Judgment—High Court's power—Appeal—Second.

In a suit for possession falling under Article 142 of the Limitation Act, 1877, the issue should properly be "whether the plaintiff was in possession within 12 years prior to the suit."

The High Court will, in second appeal, satisfy itself only with regard to the lower Appellate Court having applied its mind to the evidence on record and pronounced its finding upon a consideration of the evidence.

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 537 of 1909, presented against the decree of the Court of District Munsif of Poonamalle, in Original Suit No. 546 of 1908.

Mr. *A. Kirshnasami Iyer*, for the Appellants.

JUDGMENT.—It is urged that Exhibit III has been misconstrued, and that it shows that the plaintiff was really entitled only to one-quarter of half a *pangu* and not a half *pangu*. The appellant has been unable to show that this construction of Exhibit III was urged before the lower Courts and the document has not been placed before me. Both Courts find that the plaintiff proved his possession of half the *pangu* within 12 years prior to the suit.

It is urged that the form of the issue relating to possession is incorrect inasmuch as it ran in these terms:—"(*iii*) Whether the defendants have acquired any title by adverse possession?" No doubt in a suit for possession falling within Article 142 of the Limitation Act, the issue should properly be:—"Whether the plaintiff was in possession within 12 years prior to the suit?" Possibly, the form of the issue was due to the fact that another issue was framed, *viz.*, the 2nd:—"Whether the plaintiff has acquired any title by adverse possession and whether the alleged trespass is true?" The question, as raised in the issues, was whether the plaintiff or the defendants were in possession and the Munsif found that the plaintiff was. The Appellate Court concurs in this finding. It is contended that the judgment does not conform to the requirements of the Statute inasmuch as it does not show that the

Judge dealt with the evidence on record. Appellate judgments coming up before this Court are, indeed, sometimes undesirously laconic. But in second appeal, this Court has to consider whether, in the circumstances of each case, it is able to come to the conclusion that the Judge in the Appellate Court applied his mind to the evidence on record and intended to pronounce his finding upon a consideration of the evidence.

In this case, the Appellate Court concurs in the conclusion of the first Court and as I read the judgment, the Judge apparently concurred also in the reasons given by the Munsif.

In such a case, it cannot be said that those reasons must be set out again in the judgment of the Appellate Court. The Munsif, in deciding whether the oral evidence of the plaintiff or the defendants was more entitled to weight, took into consideration his finding on the question of title. I have no doubt that he was right in doing so.

I dismiss the second appeal.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 61 OF 1911.

December 21, 1911.

Present:—Mr. Lindsay, A. J. C.

HUB LAL AND OTHERS—DEFENDANTS

versus

GANGA AND OTHERS—PLAINTIFFS.

Appeal against an order of remand—Order of remand carried out by first Court no bar to appeal—Civil Procedure Code (Act V of 1908), s. 105 (2), O. XLI, r. 23, O. XLIII, r. 1 (u).

Where a suit has been remanded under Order XLI, rule 23 of the Code of Civil Procedure, the fact that before the appeal against the order of remand is filed, the order of remand has already been carried out by the first Court, is no bar to the hearing of the appeal.

Uman Kuari v. *Jarbandhan Pathak*, 5 A. L. J. 447; A. W. N. (1908) 195; 4 M. L. T. 162, followed.

Gulzari Mal v. *Kabir-un-nissa*, 30 A. 191; A. W. N. (1908) 76; 5 A. L. J. 270; and *Salig Ram* v. *Brij Bilas*, 4 A. L. J. 562; A. W. N. (1907) 234; 29 A. 659, referred to.

Appeal against the order of the Subordinate Judge, Barabanki, dated 6th July 1191, reversing that of the Munsif, Fatehpur, dated 18th May 1911.

Mr. *G. H. Thomas*, for the Appellants.

Babu *Rudra Datta Sinha*, for the Respondents.

JUDGMENT.—This is an appeal against an order made by the Subordinate Judge of Barabanki in his appellate jurisdiction. The order of remand is expressed to have been made under the provisions of Order XLI, rule 23, of the Code of Civil Procedure and the question for determination here is whether or not that order was a valid one. For the appellants it is contended that the order was not a valid one inasmuch as the first Court had not disposed of the suit upon a preliminary point. A preliminary objection to the hearing of this appeal was raised on behalf of the respondents. The learned Pleader for the respondents called attention to the fact that before the present appeal was filed, the order of remand passed by the learned Subordinate Judge had already been carried out by the first Court. He relied upon the rulings reported as *Gulzari Mal* v. *Kabir-un-nissa* (1) and as *Salig Ram* v. *Brij Bilas* (2). These rulings were rulings under the old Code of Civil Procedure, 1882, and, no doubt, so far as they are applicable to the present Code, do support the respondents' preliminary objection. On the other hand, Counsel for the appellants referred to a Full Bench ruling of the Allahabad High Court in *Uman Kuari* v *Jarbandhan Pathak* (3), by which the rulings above referred to were overruled. He also relies upon section 105 (2) of the present Code of Civil Procedure, according to which a party who wishes to challenge the validity of an order of remand must seek his remedy by appeal. He cannot now await, as he might have done under the old Code, the final decision of the case and challenge the validity of the order of remand in an appeal preferred against the final decree in the case. It seems to me quite clear that the ruling reported as *Uman Kuari* v. *Jarbandhan Pathak* (3), is an authority which should be followed. I, therefore, overrule the preliminary objection. On the merits,

(1) 30 A. 191; A. W. N. (1908) 76; 5 A. L. J. 270.
(2) 4 A. L. J. 569; A. W. N. (1907) 234; 29 A. 659.
(3) 5 A. L. J. 447; A. W. N. (1908) 195; 4 M. L. T. 162.

there can be no question that the appeal ought to be decreed. When the case was before the Munsif, he raised 8 issues on the pleadings. All of these he decided with the exception of issue 7, a finding upon which was rendered unnecessary by the findings on the other issues. This being so, the Subordinate Judge's order of remand is entirely erroneous. It is not correct to say that the suit was decided in the first Court on a mere preliminary point. I accept this appeal, set aside the order of remand and all the proceedings subsequent to it and direct that the case be taken up again by the Subordinate Judge and that it be decided by him in appeal in accordance with law. The respondents will pay the costs of this appeal.

Appeal accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 149 OF 1911.

March 11, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

Musammat HUKAM KAUR—DEFENDANT—APPELLANT

versus

BIHARI LAL—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Alienation—Sale by one co-owner of his share—Co-sharers' incompetency to contest validity of the sale—Adverse possession by co-sharer—Consideration.

In a suit for possession by a purchaser of a share in the joint property, the vendor's co-sharers cannot successfully contest the *bona fides* or validity of the sale on the ground of want of or inadequacy of the consideration so long as the vendor himself is satisfied.

A co-sharer's possession cannot be considered to have become adverse unless and until he sets up his own title by some overt act.

Second appeal from the order of the Additional Divisional Judge, Delhi Division, dated 9th November 1910 modifying that of the District Judge, Gurgaon, dated 15th August 1910, dismissing the claim.

Lala *Dwarka Das*, for the Appellant.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts will appear from the judgments of the lower Courts. Plaintiff, as purchaser from Chajia, defendant No. 1, sued for the share of the latter as heir of Dula and Rura, his father and uncle, in certain joint land. The first Court dismissed the suit as barred by time, but the lower Appellate Court has found the claim to be within time, so far as Dula's share is concerned, and has decreed it to that extent.

Kahna, son of Chunna, one of the co-sharers, has filed a further appeal to this Court.

Lala Dwarka Das opened his argument by remarking that plaintiff's purchase from Chajia was not a *bona fide* one and that his claim was speculative. We do not, however, see what right appellant has to contest the *bana fides* of the sale. The matter is between plaintiff and the vendor alone, and does not concern appellants at all. If the plaintiff has not paid full consideration for the purchase, that fact does not affect his claim in any way; if Chajia is satisfied, no one else has any right to object.

Appellant's Counsel next argued that Dula became absent some time between 1877 and 1883, and we note that he was recorded as absent and out of possession in the latter year.

Upon his death, however, in 1887, his mother acting as guardian of his son, Chajia, got mutation of his share affected in the latter's name, but it was agreed that Chunna should remain in possession until Chajia attained his majority. Chunna's possession thereafter was certainly permissive and on behalf of the minor, Chajia. The latter according to the first Court's finding attained his majority 14 years before he instituted this suit, and Lala Dwarka Das argues that his client's possession became adverse from the date when Chajia reached this age. We are unable to accept this argument. Chunna was himself a co-sharer and his possession cannot be considered to have become adverse unless and until he set up his own title by some overt act. This he did not do.

Nor can it be held that Chajia abandoned the land merely because he did not seek re-entry for 14 years after attaining his majority.

He is a simple minded person and was probably not sufficiently well off to resume possession or to recover the land for himself, so he took something from the plaintiff and sold him his rights.

Under the circumstances, the latter is entitled to the decree granted to him, and we dismiss the appeal with costs. Plaintiff put

in cross objections to-day but we refused to consider them as they were out of time and no good reason was shown why we should admit them to a hearing.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 571 OF 1910.

February 8, 1912.

Present:—Mr. Justice Sundara Aiyar.

SUBRAMANIA PILLAI—PLAINTIFF—PETITIONER

versus

DAKSHNAMURTHI MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Assignment of debt—Fraud on creditors—Creditor entitled to impeach such assignment and attach the debt—Purchaser of debt at Court-auction entitled to the same rights—Whether debtor entitled to say that he is bound to pay one claimant and not another.

A. assigned to *B.* a debt due to himself with the object of defeating his creditors. Notice of assignment was given to *A.*'s debtor.

Subsequently, *C.*, one of *A.*'s creditors, attached the debt in execution of a decree. The debt was sold and purchased by *D.* In a suit by *B.* against the debtor and *D.* for recovery of the debt:

Held, that *D.* was entitled to impeach *B.*'s right on the ground that the assignment was intended to defeat *A.*'s creditors.

Although as between a transferor and his transferee, an assignment may be complete, the creditors of the assignor are not bound by it, if it be in fraud of creditors, and they are entitled to attach the property assigned as being still the property of the assignor, so far as the debts are concerned.

If there are two competing claimants to the same debt, the debtor is entitled to say that one of them is the person really entitled to payment from him and not the other. The debtor is entitled to refuse to pay the amount to the person who is not really entitled to payment. Although a creditor has notice of an assignment, there is no duty at law on him, under the old Code of Civil Procedure, to bring it to the notice of the attaching Court.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Tinnevelly, in Small Cause Suit No. 1476 of 1909.

Mr. *M. D. Devadoss*, for the Petitioner.

Mr. *N. R. K. Tatachariar*, for the Respondents.

JUDGMENT.—This is an application to revise the judgment of the Subordinate Court of Tinnevelly in Small Cause Suit No. 1476 of 1909. The plaintiff is the assignee of the rights of Nallakannan, a ticket-holder in a *chit* conducted by the 1st defendant. Defendants Nos. 2 to 4 are the sons of the 1st defendant. The plaintiff gave notice of the assignment made to him to the 1st defendant. Subsequent to this notice, Nallakannan's right was attached by Subramania Pillai, who had obtained a decree against Nallakannan, and was brought to sale and purchased by the 5th defendant. The result is, there are two persons claiming the rights which Nallakannan originally had—the plaintiff who got an assignment from him, and the 5th defendant who purchased his right in Court-auction. The 5th defendant contended that the assignment in favour of the plaintiff was intended to defraud the creditors of Nallakannan and that, therefore, he and not the plaintiff was entitled to recover from the 1st to the 4th defendants the amount due for the ticket. This plea has been upheld by the Subordinate Judge, who finds that out of the consideration of Rs. 140 for the assignment, Rs. 105 was not paid for discharging a debt due by Nallakannan, as alleged by the plaintiff. The remaining Rs. 35 is said to have been paid to Nallakannan in cash before the Sub-Registrar. That amount is not said to have been used for the purpose of discharging any other debt of Nallakannan. I must accept the finding that the assignment in the plaintiff's favour was intended to defeat the creditors of Nallakannan. In fact the petition does not impeach the finding.

The question raised by the learned Counsel for the petitioner is that, even taking this to be the fact, he is entitled to recover, as his assignment, which was by a registered instrument, was completed by notice being given to the 1st defendant. There can be no doubt that the assignment was complete as between the plaintiff and Nallakannan and could not be impeached by the latter. But I think it is settled law that, although as between the transferor and transferee in the case of an assignment which is intended to defeat creditors, the assignor's rights must be regarded as having vested in the assignee, the creditors of the assignor are not bound by such an assignment and are entitled to attach the property assigned as being still the property of the assignor so far as the debts are concerned. It is the practice for creditors to attach property fraudulently assigned away by their judgment-debtors as being still property

available for the satisfaction of their debts in execution of their decrees. When such an attachment is made, the assignee puts in a claim petition and the question is tried by the Court, whether the assignment is valid as against creditors, or invalid and, therefore, as not standing in the way of execution by the creditor who attaches the property as still belonging to the judgment-debtor so far as the satisfaction of the creditor's decree is concerned. And if the claim is allowed or disallowed and a regular suit is instituted either by the judgment-creditor or by the assignee, the validity of the assignment is determined in an original suit. So far, therefore, as Subramania Pillai, who obtained the decree against Nallakannan Pillai, was concerned, he must be regarded as having been entitled to attach the property notwithstanding the assignment in the plaintiff's favour; and if he could do so and impeach the plaintiff's right as assignee, I can find no good reason for holding that the purchaser at a sale held in pursuance of his attachment cannot also impeach the plaintiff's right.

The 5th defendant must have the same rights as Subramania Pillai to call in question the assignment in the plaintiff's favour; for otherwise the privilege that a decree-holder has to attach property that has been fraudulently assigned away, would be practically useless. I must, therefore, hold that the 5th defendant is entitled to show that his purchase is good as against the plaintiff's rights as assignee from Nallakannan Pillai.

Mr. Deva Doss contended that even then the 1st defendant and his sons, defendants Nos. 2 to 4, are bound to make payment to the plaintiff. I am unable to uphold this argument. If there are two competing claimants to the same debt, it is clear, in my opinion, that the debtor is entitled to say that one of them is the person really entitled to payment from him and not the other. It is argued that when Subramania Pillai attached the debt, it was the duty of the 1st defendant, who had already received notice of the plaintiff's assignment, to say that he had already received notice that Nallakannan had made an assignment in the plaintiff's favour. I can find no authority for holding that there was any such duty in him at law. Under the present Code, which provides for garnishee proceedings, a debtor would, no doubt, have to state whether there is really any debt due by him. But under the old Code, debts attached were often sold and there was no duty on the part of the debtor to admit or deny the existence of a debt in execution proceedings. It was quite open to him to wait until the purchaser at Court-auction sued him for the debt. He could then deny that what was sold by Court was absolutely worthless, as no debt was due by him at all to the judgment-debtor whose property was attached. I am, therefore, of opinion that it was open to the 1st defendant to contend that he was bound to make payment to the 5th defendant and not to the plaintiff. Besides, it is difficult to see how the plaintiff suffered any prejudice by the first defendant not bringing the plaintiff's assignment to the notice of the Court when the 5th defendants made the attachment.

It is then alleged by the learned Counsel that his client was a *bona fide* assignee for consideration without notice. I can find no trace of any such plea having been raised in the lower Court, nor does the plaintiff say so in his evidence. I am, therefore, unable to allow this question to be argued here for the first time.

It is also suggested that probably the attachment by Subramania Pillai and the purchase by the 5th defendant were all collusive transactions brought about by Nallakannan himself or by the 1st defendant. And attention is drawn to the fact that, when the plaintiff gave notice of assignment in his favour, the 1st defendant stated that there had already been an oral assignment in favour of Subramania Pillai, the very person who subsequently attached the debt in execution of his decree. Here, again, the contention was not raised in the lower Court and I cannot entertain it in revision.

I must, therefore, hold, on the finding that the assignment in the plaintiff's favour was intended to defeat the creditors of Nallakannan, that the purchase by the 5th defendant at Court-sale must be upheld as against the plaintiff, and that the 1st defendant, the debtor, is entitled to refuse to make payment to the plaintiff.

The petition must, therefore, be dismissed with costs.

Petition dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 517 OF 1911.

March 21, 1912.

Present:—Mr. Justice Scott-Smith.

TIRHU—APPLICANT—APPELLANT

versus

LACHHMAN—DEFENDANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), *s.* 13—*Husband claiming to be guardian of his minor wife—Absence of proper inquiry.*

A husband may in many cases be a suitable guardian of his minor wife but the question must be settled, one way or the other, after proper inquiry as contemplated by section 13 of Act VIII of 1890.

An order made without proper inquiry is bad and ought to be set aside.

Miscellaneous civil appeal from the order of the District Judge, Kangra District, dated 17th February 1911.

Mr. *Nand Lal*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the District Judge, refusing Tirhu's prayer to be appointed guardian of the person of his minor wife, who is at present living with her father.

The District Judge made no inquiry as contemplated by section 13 of the Guardians and Wards Act. He did not even take the statements of the parties, but only those of their Pleaders.

A husband may in many cases be a suitable guardian of his minor wife, but the question can hardly be settled without inquiry in the way adopted by the District Judge. I accept the appeal and, setting aside the order of the District Judge, direct him to decide the application after making an inquiry as contemplated by the law.

The parties should be examined and issues settled and then they should be allowed to adduce their evidence.

Appeal accepted; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1219 OF 1909.

January 25, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Miller.

ULAGAPPA CHETTIAR—PLAINTIFF—APPELLANT

versus

PERIA KARUPPAN CHETTY *alias* VELLACHAMY CHETTY AND OTHERS—RESPONDENTS.

Oaths Act (X of 1873)—*Failure to take oath—Practice.*

A fact which was to have been proved by oath cannot be taken to have been proved simply because a party resiles from an agreement to take oath.

If a party resiles from his agreement to take oath or be bound by the oath, a decree cannot be passed against him forthwith. The only course open to the Court in such a case is to proceed with the trial of the suit in the ordinary way drawing such inference as might be proper from the conduct of the defaulting party and mulcting him in costs as may be considered appropriate.

Umayyamai v. *Muttiah Nadar*, 17 M. L. J. 99, distinguished.

Thoyi Ammal v. *Subbaroya Mudali*, 22 M. 234 and *Majan* v. *Pattukutti*, 31 M. 1; 17 M. L. J. 545; 3 M. L. T. 98, referred to.

Second appeal against the decree of the Additional Subordinate Judge's Court of Madura, in Appeal Suit No. 414 of 1908, presented against that of the Court of the District Munsif of Sivaganga, in Original Suit No. 652 of 1906.

Mr. *L. A. Govindaraghava Iyer*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—In the present case, the onus of proof is on the 1st defendant, not on the plaintiff; and this distinguishes the present case from that relied on by the Subordinate Judge, *Umayammai* v. *Muttiah Nadar* (1). The oath has not in fact been taken by the defendant, and consequently the defendant's contention as to interest which was to have been proved conclusively by the defendant's oath has not been proved. Neither the Oaths Act nor any of the decisions referred to in the argument, *Thoyi Ammal* v. *Subbaroya Mudali* (2), *Majan* v. *Pattukutti* (3), are authority for holding that in such circumstances that fact which was to have been proved by the oath must be

(1) 17 M. L. J. 99 at p. 100.
(2) 22 M. 234.
(3) 31 M. 1; 17 M. L. J. 545; 3 M. L. T. 98.

taken to have been duly proved. No doubt a party ought not without good reason to be allowed to resile from his agreement, but if he does resile, the law does not provide that a decree may forthwith be given against him. Apparently, the only course open to the Court in the present case was to proceed with the trial of the suit in the ordinary way drawing such inference as might be proper from the conduct of the defaulting party and mulcting him in costs that should be considered appropriate. We set aside the decree of the lower Appellate Court and remand the suit to the Court of first instance, for the trial of the 2nd issue, the only matter now in dispute and for disposal according to law. The plaintiff must pay all costs hitherto incurred in all the Courts whatever the result.

Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

February 21, 1912.

Present:—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

PARBATI—DEFENDANT—APPELLANT

versus

Sayid MUHAMMAD MUZAFFAR ALI KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law— Shia *sect*—*Widow, childless*—*Dower*—*Immoveable property left by husband*—*Adverse possession*—*Estoppel*--*Mortgagor and mortgagee.*

The right to dower of a *Shia* Muhammadan widow, does not confer upon her a saleable estate in her husband's immoveable property.

A., a member of a joint Hindu family, ceased to be joint in food and joint in business, with *B.* and *C.*, the other members,but no partition of the family property was then made. After that he received a present of a considerable sum of money from his grandmother, with which he carried on the business of a money-lender on his own account, and out of his separate self-acquired property, he purchased some property in 1853-54 from a childless *Shia* Muhammadan widow, which was in 1846 mortgaged to *B.* and *C.* by her husband. The heirs of the husband sued, in 1903, for possession of the property, the representatives of the mortgagees upon the allegation that the mortgage had been discharged by the usufruct:

Held, that the defendants possessed a title by adverse possession and the suit of the plaintiffs must fail.

Appeal from the judgment and decree of the Allahabad High Court reported as 29 A. 640, dated June 13th, 1907, which partly affirmed and partly reversed a decree of the Sub-Judge of Saharanpore, dated July 14th, 1904, by which the suit had been dismissed.

FACTS.—That suit was brought on September 1, 1903, for the redemption of a two-thirds share in *Mauza* Lohari, which two-thirds share had been mortgaged by the plaintiffs' predecessor-in-title, Mehdi Ali, on the 22nd July 1846. Mehdi Ali was also the owner of the remaining one-third share, which, however, was not included in the mortgage.

The plaint alleged that the mortgage was to Sita Ram and Sheo Lal, then represented by the defendants thereto. It was a possessory mortgage for Rs. 4,000 for two years, and the mortgagees at the date of suit were still in possession. The plaint alleged that the mortgage-money with interest had been paid up from the profits of the property. The relief prayed was for possession by redemption, and a sum of Rs. 5,500 on account of mesne profits for the last three years, and for future mesne profits and interest from the date of suit.

The defendants were the widows of Baldeo Sahai, who was the son of the said Sheo Lal and grandson of the said Sita Ram, and formed with them, at the date of the mortgage, a Hindu joint family. They denied that the mortgage was still subsisting, and that the plaintiffs had any equity to redeem. They alleged that the widows of Mehdi Ali, as admitted by his other heirs, became the owners of his entire estate, "in lieu of the debt due to them." They relied upon two transactions of purchase one dated May 27, 1853, by their deceased husband Baldeo Sahai of a 10 *biswas* or half share of the said *Mauza* Lohari from Ashrafunnissa one of the widows of Mehdi Ali, and the other dated March 20, 1854, by their predecessor-in-title, Sheo Lal, of the remaining 10 *biswas* share thereof, at an auction-sale in execution of decrees against the said Ashrafunnissa and Umdu Begam, the second widow of the said Mehdi Ali and his daughters. They contended that under the purchase of May 1853, Baldeo became the owner to the extent of the said 10 *biswas*

share, or at least to the extent of his vendor's interest, that the mortgage-money had been paid off out of the usufruct of the property, and that he had been in proprietary and adverse possession of the 10 *biswas* share for more than 12 years. They also contended that the auction-sale of March 20, 1854, of the remaining 10 *biswas* was "upheld and confirmed, in spite of an objection taken by the then defendant's judgment-debtors, and the auction-purchaser's name had all along been entered in the revenue papers."

The plaintiffs filed a reply to the defendant's written statement on the 8th February 1904, in which they contended that the mortgage still subsisted and that they were still entitled to redeem, the statutory period of 60 years not having elapsed. With regard to the auction-sale of March 20th, 1854, they admitted that decrees were passed, and that a 10 *biswas* share in *Mauza* Lohari along with shares in some other villages were advertised for sale. But the "fact is that the share in *Mauza* Nizampur was sold in execution of the aforesaid decrees, and that amount due under these decrees was paid off and the sale of *Mauza* Lohari was stopped." With regard to the transaction of May 27, 1853, they denied that Ashrafunnissa had any title to convey, and also that Baldeo Sahai had gained title by adverse possession. As a member of the joint family, he was one of the mortgagees and could not set up adverse possession against his mortgagor.

Eleven issues were settled, but, so far as now material, they related to the title of Ashrafunnissa at the date of the conveyance of May 27, 1853, and the effect of Baldeo Sahai's possession thereunder, and also to the question of Sheo Lal's alleged purchase at the auction-sale of March 20, 1854. They are summarized in the judgment of the High Court as follows:—

(1) Had Ashrafunnissa a daughter living when her husband Mehdi Ali died?

(2) If not, what is the effect of the transfer of the 27th May 1853, by her to Baldeo Sahai?

(3) As to the remaining 10 *biswas*, were they actually sold and purchased by Sheo Lal or not?

Upon the first point, the Courts below differed, the Subordinate Judge finding upon the evidence:—"I am inclined to think tha Ashrafunnissa had a daughter and that she was alive at the death of Mehdi Alt with the result that she was owner of 9/32 share in the village on her behalf, and through her daughter and transfer of the remainder 7/32 was without any right." The High Court, on the other hand, found "that the evidence will not support the finding that Mehdi Ali had a daughter by Ashrafunnissa, who survived him," with the result that under *Shia* law Ashrafunnissa did "not inherit any immoveable property from her husband."

Assuming that Ashrafunnissa had no title by inheritance from Mehdi Ali, the Subordinate Judge found "that Baldeo Sahai's name was recorded in the revenue papers through the sale-deed. His name must have been recorded in place of Ashrafunnissa as owner." He added: "Baldeo Sahai himself was sole and separate purchaser of 10 *biswas*. In respect of this portion, he did not stand in the shoes of his father, Sheo Lal. Entry of his name in revenue papers through his purchase was commencement of his possession. It was completed in 1853 by removal of his father's name from the share as its mortgagee. His possession amounted to redemption by usufruct. As through his purchase he stood in shoes of the mortgagor, in respect of a moiety of Lohari, his possession in respect of it was adverse to the original owner."

On the third point, the Subordinate Judge found "that the evidence on the record satisfies us that Sheo Lal had purchased 10 *biswas* Lohari on the 20th March 1854."

His judgment accordingly concluded: "Sheo Lal became full owner of a moiety of Lohari through his purchase of 1854. It was made for discharge of Mehdi Ali's debts. The sale is binding on his heirs. From what has been said above, it follows that Baldeo Sahai through his purchase and continued adverse possession had become full owner of the moiety he had purchased, and that he had inherited the other moiety from his father on his death in 1870. The plaintiffs have no right left in Lohari to claim its redemption." In the High Court the defendants took up definitely the position that it was immaterial whether Ashrafunnissa had a daughter or not: "that as she was in possession of half of Lohari in lieu of her dower, she could in the right convey a good title by the sale.

deed of May 27, 1853." The High Court, however, pointed out that possession had all along remained with the mortgagees, and that the widow never obtained it, and that if she had obtained possession, her right to hold it was neither heritable nor transferable, and was restricted in its enjoyment to herself personally.

With regard to Baldeo Sahai's title by adverse possession, the finding of the High Court was that he had never ceased to be mortgagee, and could not by any act of his own render his possession adverse to the mortgagor during the continuance of the mortgage. The first Court had found that from 1848, the date of an alleged disagreement with his father, Baldeo Sahai had lived separately and carried on his business separately, but that there had been no partition. The High Court found that "the separation between father and son was merely one of convenience, and that the family remained to all intents and purposes a joint family," and that Baldeo Sahai has not abandoned his rights in the ancestral property, and with them his rights as one of the mortgagees of Lohari.

With regard to the auction-sale of March 20, 1854, the High Court said of the evidence relating to it: "We agree with the lower Court that it proves that the remaining 10 *biswas* of Lohari were actually sold and purchased by Sheo Lal at the auction-sale of March 20, 1854, and that he has been in possession ever since." As a matter of law it decided: "We think we ought to presume that *Musammat* Umda was appointed by the Court to act in those suits as guardian of her minor children; and we also think that the power to appoint a guardian *ad litem* is inherent to every Court of Civil Jurisdiction. The sale proceedings were a continuation of the suits which had been brought and the decrees which had been obtained against *Musammat* Umda in her own right and as guardian of her infant daughters." For a report of the judgment of the High Court, see *Muzaffar Ali Khan* v. *Parbati* (1).

Against the decree of the High Court, both the plaintiffs and the defendants appealed to His Majesty in Council. The two appeals were consolidated by an order in Council.

Sir Robert Finlay, *K.C.* and Mr. *B. Dube*, for the Defendants:—Ashrafunnissa had a daughter, who survived Mehdi Ali, and on the death of the daughter the widow succeeded to her share. And although the share to which she succeeded was according to law less than one-half, she was treated by the other heirs of Mehdi Ali to have succeeded to one-half. Her title passed to Baldeo Sahai on May 27, 1853, when 10 *biswas* of Lohari were sold to him by Ashrafunnissa. Baldeo Sahai remained in possession of that share for more than 12 years before the institution of the suit, and even if Ashrafunnissa had no title, which she could convey, it is submitted that Baldeo Sahai's title is perfected by adverse possession as against the plaintiffs. It is, however, contended that Baldeo was a member of a joint Hindu family, which held possession as mortgagees and that Baldeo Sahai cannot set up a title by adverse possession. But, as the Subordinate Judge has found, Baldeo lived separate from his father, and carried on money-lending business with the money supplied by his maternal grandmother; at the time of the purchase he had separate property, from which the purchase was made, and Baldeo Sahai acquired this 10 *biswas* as his own. He did not come into possession as mortgagee and his possession is adverse. As regards the other 10 *biswas*, it is submitted that the lower Courts are right in dismissing the suit in that respect.

Mr. *De Gruyther*, *K. C.*, and Mr. *H. Cowell*, for the Plaintiffs:—The question is what title passed by the sale-deed of May 27, 1853? The deed recited that Ashrafunnissa remained the heir of half of the estate of the deceased in lieu of the dower-debt. The law is, that if a widow has possession of the property, she is entitled to retain it as against the heirs of her deceased husband until her dower-debt is paid by them or discharged from the profits of the property. But if she is not in possession, she has no right to claim it. Here Ashrafunnissa never had possession and she had no title to possession even against Medhi's heirs. The defendants rely upon this deed, but Ashrafunnissa therein claims nothing as heir, and, as a matter of law, she has no title as heir, even if she claimed as such. It is, therefore, submitted that the defendants acquired no title under that deed of conveyance as Ashrafunnissa had no title, which she could convey; next, had

(1) 29 A. 640; A. W. N. (1907) 221; 4 A. L. J. 52.1

she any other title? She would have a title, if she had a daughter who survived her deceased husband. But it is submitted that she had no such daughter. In the deed of May 27, 1853, she sets up no title either as her daughter's heir or as the heir of Mehdi Ali. Even if she had a daughter, she would be entitled to the daughter's share only, which is not one-half in this case. Reference was made to the Indian Evidence Act (I of 1872), section 32.

The next question is whether Baldeo Sahai was joint with his father on May 27, 1853. The presumption is that he was joint unless the defendants prove that he was separate. The burden of proof is on the defendants, who have failed to discharge it, as found by the High Court. Baldeo Sahai's possession, therefore, must be that of the mortgagees, and could not be adverse to the plaintiffs, who claim through the mortgagor. As regards the remaining 10 *biswas* sold on March 20, 1854, at an auction-sale in execution of a decree, the purchaser, under such circumstances, acquires the right, interest and title of the judgment debtor. These 10 *biswas* are alleged to be sold as Umda's 10 *biswas*. But she was not entitled to the whole of 10 *biswas*. She could not convey the shares of her daughters. Again, no sale certificate is produced and the evidence on record does not make it clear what was sold. There is evidence to show that Nizampur was advertised for sale at the same time and that Lohari was exempted from the sale. It is submitted that the decrees were satisfied from the proceeds of the sale of Nizampur. Reference was made to *Simbhunath Pande* v. *Golap Singh* (2).

Sir *Robert Finlay*, *K. C.*, in reply: No claim to redeem was made until the institution of the present suit, although the daughters attained the age of majority long ago. The youngest became a major about 1870. The plaintiffs say that the mortgage is paid off, but the Subordinate Judge found as a fact that it was paid off long ago in 1863. Beyond all doubt Baldeo Sahai was the purchaser and took possession as such.

JUDGMENT.

SIR JOHN EDGE.—These are consolidated appeals from a decree of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 13th June 1907 which partly affirmed and partly reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th July 1904, by which the suit had been dismissed.

The suit was brought on the 1st September 1903 to obtain proprietary possession of 13 *biswas*, 6 *biswansis*, 3 *tanwansis*, $6\frac{1}{2}$ *kachwansis* and a fraction of the 20 *biswas* of *Mauza* Lohari. The plaintiffs' case briefly was that one Mehdi Ali, whose representatives-in-title they alleged themselves to be, had in 1846 mortgaged the shares in *Mauza* Lohari, possesssion of which they claimed, to Sita Ram and his son Sheo Lal; that the mortgage-debt had been discharged by the usufruct; and that the defendants were the representatives of the mortgagees and still held possession under no other title; and the plaintiffs claimed a decree for proprietary possession and for mesne profits. The case of the defendants was that they held possession not under the mortgage of 1846, but under a private sale of the 27th of May 1853, of 10 *biswas* of *Mauza* Lohari, and under an auction-sale of the 20th March 1854 of the remaining 10 *biswas* of *Mauza* Lohari, which sales they alleged were made in order to discharge debts which had been contracted by Mehdi Ali. In effect, the defendants' case was that by reason of the sales of 1853 and 1854, the equity of redemption in the shares which were mortgaged in 1846 passed to those through whom they claimed title. It was also contended on behalf of the defendants that they were not precluded from setting up a title by adverse possession by the fact that possession of the shares in suit had been originally obtained under the mortgage of 1846.

The facts as found by the Board are briefly as follows:—

On the 22nd July 1846, Mehdi Ali, who owned the whole 20 *biswas* of *Mauza* Lohari, borrowed Rs. 4,000 from Sita Ram and his son Sheo Lal, and executed in their favour a mortgage for the term of two years of the shares which are the subject of this suit. The mortgage was usufructuary and the mortgagees were put in possession under it. Incidentally it may be mentioned that the Subordinate Judge found as a fact that the mortgage-debt had been discharged by the usufruct before 1863. If it were necessary

(1) 14 I. A. 77; 14 C. 572.

in this appeal to decide that issue, their Lordships would probably not be prepared to dissent from that finding of the Subordinate Judge.

Mehdi Ali, who was a *Shia* Muhammadan, died on the 9th January 1852, and left surviving him two widows, Ashrafunnissa and Umda Begum, and certainly three daughters, who had been born to him by Umda Begum. Through one of those daughters, Askari, who subsequently married and left issue, the plaintiffs claim title. It has been contended on behalf of the defendants that Mehdi Ali also left surviving him a daughter born to him by Ashrafunnissa. On behalf of the plaintiffs, it has been contended that Mehdi Ali left surviving him no daughter by Ashrafunnissa, and that Ashrafunnissa was a childless widow. In the view which their Lordships take of this case, it is immaterial whether Mehdi Ali left, or did not leave, a daughter surviving him by Ashrafunnissa. It may, however, be mentioned that after Mehdi Ali's death, for some reason which the evidence does not explain, 10 *biswas* of *Mouza* Lohari were treated as the share of Ashrafunnissa, and the remaining 10 *biswas* were treated as the share of Umda Begam and her three daughters.

Mehdi Ali died heavily in debt, and after his death in 1852, suits to recovor debts which were due by him were brought by his creditors against Ashrafunnisa, Umda Begum, and her three daughters, as the representatives of Mehdi Ali, and money-decrees were obtained in those suits. One of those suits was brought by Sheo Lal on the 8th July 1852, on a bond payable on demand to recover with interest Rs. 2,000 which Sheo Lal had lent to Mehdi Ali on the 29th May 1849. In that suit Sheo Lal obtained a decree for Rs. 2,783-5-6, principal and interest, against Ashrafunnissa, Umda Begum, and the three daughters of Umda Begm, all of whom were sued as the heirs of Mehdi Ali. Under that decree the 20 *biswas* of *Mouza* Lohari were attached. On the 5th of May 1853, a sale proclamation was made fixing the 20th of June 1853 as the date for the auction-sale of the 20 *biswas* in execution of the money-decree. On the 19th of May 1853, Sheo Lal, through his Pleader, applied to the Court to remove the attachment in order to enable the defendants in that suit to pay the decree money by a private sale of the estate of Mehdi Ali deceased. On that application, the Court removed the attachment. On the 27th May 1853, Inayet Husain, acting under a power-of-attorney, which had been executed for that purpose by Ashrafunnissa and had been duly registered, executed on her behalf a sale-deed of 10 *biswas* of *Mouza* Lohari in favour of Baldeo Sahai, son of Sheo Lal, the consideration being Rs. 7,500. In that sale-deed it was stated that two-thirds of three *suls* of the 20 *biswas* of *Mouza* Lohari had been from the 22nd of January 1846 in the exclusive possession of Sita Ram and Sheo Lal under the mortgage for Rs. 4,000 of 1846 from Mehdi Ali to them and it was stated that Mehdi Ali had died, and had left a considerable amount of debt unpaid, that Ashrafunnissa had remained the heir of half the estate of Mehdi Ali in lieu of her dower-debt; and in order to satisfy the decrees held by, and the debts due, to Sheo Lal she made an absolute sale of the 10 *biswas* share to Baldeo Sahai. It was by the sale-deed agreed that Rs. 2,000 of the purchase-money should be left with Baldeo Sahai, and that he should have power to pay the Rs. 2,000 to the mortgagee and to redeem the subject of the sale. In the sale-deed the 10 *biswas* were described as Ashrafunnissa's share. After that sale the 10 *biswas* were entered in the revenue papers as Baldeo Sahai's share by private sale. Baldeo Sahai obtained possession of the 10 *biswas* share and held possession of the share until he died in 1895, when the defendants as his representatives obtained possession.

It has been contended on behalf of the plaintiffs, *first*, that Ashrafunnissa had no title to the 10 *biswas* share in *Mouza* Lohari, and, consequently, had no title which she was capable of passing by the sale-deed, and, *secondly*, that Baldeo Sahai was a member with his father Sheo Lal of a joint Hindu family, and that the family held possession as mortgagees and could not set up a claim of adverse possession against the representatives-in-title of Mehdi Ali, the mortgagee of 1846.

It has not been suggested that Ashrafunnissa had any interest in *Mouza* Lohari which she could sell other than such interest, if any, in the immoveable property of Mehdi Ali as she obtained under the *Shia* law as his widow. Her right to dower did not confer

upon her a saleable estate in *Mouza* Lohari If she had not borne to Mehdi Ali a daughter who survived him, Ashrafunnissa as his widow took no title to any share in *Mouza* Lohari. If, on the other hand, as the defendants have contended, Ashrafunnissa had borne to Mehdi Ali a daughter who survived him for a few months, Ashrafunnissa's share as his widow, and the share of his daughter, which on that contention came to her on the daughter's death, did not together amount to a 10 *biswas* share in the *Mouza*. If Ashrafunnissa had any other title in 1853 to the 10 *biswas* share which she purported to sell to Baldeo Sahai, it has not been shown what it was or how she had obtained it. But it is not necessary to consider what title, if any, Ashrafunnissa had to the 10 *biswas* share, as by the sale-deed of the 27th May 1853 Ashrafunnissa sold to Baldeo Sahai such interests, if any, as she had in the 10 *biswas* of *Mouza* Lohari, and Baldeo Sahai got possession of the 10 *biswas*, and in course of time obtained a title by adverse possession to the whole 10 *biswas* or any portion of that share which Ashraf-un-nissa may not have been empowered to sell to him, and that title became indefeasable unless he or the defendants who claim under him were precluded from setting up a title of adverse possession.

The High Court found as a fact that Baldeo Sahai was in 1846, and continued to be, a member of the joint Hindu family, of which his father Sheo Lal had been a member, and on that finding of fact decided that Baldeo Sahai's possession and the possession of the defendants as his representatives had always been that of mortgagees, and consequently that Baldeo Sahai and those who claim under him were precluded from setting up any title of adverse possession to any portion of the share which was mortgaged in 1846 to Sita Ram and Sheo Lal. Their Lordships are unable to agree with the findings of fact of the High Court upon which that decision was based. At the date of the mortgage of 1846, Baldeo Sahai was undoubtedly a member of the joint Hindu family, of which Sita Ram and Sheo Lal were members, and that family was governed by the law of the Benares School of the *Mitakshara*. Their Lordships, however, find on evidence, which they consider is unimpeachable, that in 1847 or 1848, owing to disputes in the family, Baldeo Sahai ceased to be joint in food and joint in business with Sheo Lal, but no partition of the family property was then made, and thenceforward during their lives Baldeo Sahai and Sheo Lal had been separate in food and in business. Their Lordships also find that when Sheo Lal and Baldeo Sahai ceased to be joint in food and in business, Baldeo Sahai received a present of a considerable sum of money from his grandmother, with which he carried on the business of a money-lender on his own account, and that out of his separate self-acquired property he found the purchase-money of Rs. 7,500 of the sale-deed of the 27th of May 1853. The oral evidence showing a separation is in their Lordships' opinion confirmed by the terms of that deed. Ashrafunnissa purported to sell the 10 *biswas* to Baldeo Sahai as a person who was not a mortgagee under the mortgage of 1846. So far as the 10 *biswas* which Ashrafunnissa purported to sell to Baldeo Sahai on the 27th of May 1853, their Lordships find that a title at least of adverse possession has been established and that the defendants are not precluded from setting up that defence.

Their Lordships concur with the finding of the Subordinate Judge and the finding of the High Court that the remaining 10 *biswas* share in *Mauza* Lohari was sold to Sheo Lal on the 20th of March 1854 at an auction-sale held in execution of a decree for money which had been obtained by a creditor of Mehdi Ali, in a suit brought against Umda Begum and her three daughters as the heirs and representatives of Mehdi Ali, and Sheo Lal obtained possession and held it until he died, when his interest passed to his son Baldeo Sahai as his heir.

The plaintiffs failed to establish any title by way of redemption or otherwise to any interest in *Mouza* Lohari, and their suit was rightly dismissed by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal of the representatives-in-title of Baldeo Sahai be allowed with costs and the decree of the High Court be varied by dismissing the Appeal to that Court with costs, and that the appeal of Saiyid Muzaffar Ali Khan and other plain-

tiffs to His Majesty in Council be dismissed with costs.

Appeal allowed and cross-appeal dismissed.

Solicitors for the Defendants: Messrs. *Barrow, Rogers Nevil.*

Solicitors for the Plaintiffs: Messrs. *Ranken Ford, Ford & Chester.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 36 OF 1910.

February 8, 1912.

Present:—Mr. Justice Sundara Aiyar.

G. NARAYANA IYER—PLAINTIFF—PETITIONER

versus

S. VENKATARAMA AIYAR—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Lower Court refusing costs to the successful party on insufficient grounds--High Court can interfere in revision.

Ordinarily, costs should follow the event, and when the lower Court does not act on this rule, it ought to give a sufficient reason for not doing so. Where the reason given by a Subordinate Judge for disallowing the costs of a successful plaintiff is unsatisfactory, the High Court can interfere under section 25 of Act IX of 1887.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Subordinate Judge's Court of Tanjore, in S. C. S. No. 1637 of 1909 dated 30th September 1909.

Mr. *V. Purushotham Aiyar*, for the Petitioner.

Mr. *S. Srinivasa Aiyar*, for the Respondent.

JUDGMENT.—I am of opinion in this case that the lower Court ought to have awarded costs to the plaintiff. The defendant received notice of the suit on the 2nd; the suit was filed on the 5th August 1909. It is not clear that the plaintiff filed his suit too early. But, apart from this fact, the defendant made payment of the amount more than four weeks after the suit was instituted; and then it was only on being arrested that he made the payment.

It is contended for the respondents that costs were at the discretion of the lower Court and that I ought not to intrefere in revision. But in this case the lower Court has given a specific reason for disallowing costs, and that reason is unsatisfactory. Ordinarly, costs should follow the event and, when the lower Court does not act on this rule, it ought to give a sufficient reason. The reason given in this case is quite insufficient.

I, therefore, modify the decree of the lower Court by awarding to the plaintiff his costs in the lower Court. The petitioner will also have his costs in this Court.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 130 OF 1911.

January 17, 1912.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

MOHAMMAD AMIR MIRZA BEG—DEFENDANT—APPELLANT

versus

Babu KEDAR NATH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Stamp Act (II of 1899), s. 12—Adhesive stamp, cancellation of--Adhesive stamp, lines drawn on, effect of—Execution of document admitted or proved—Consideration—Burden of proof.

Where an adhesive stamp on a pro-note or a receipt was cancelled by drawing lines across it in different directions, each line extending more or less beyond the edges of the stamp on to the paper on which the document was written: *Held*, that cancellation had been effected in a sufficiently effectual manner.

The question whether the requirements of law about the cancellation of stamps have or have not been sufficiently complied with is to be determined upon an examination of the document concerned in each particular case.

Piran Ditta v. *Mangal Singh*, 108 P. R. 1908, approved.

When a document is admitted in evidence, and its execution is either admitted by the defendant or proved against him and the receipt of consideration is acknowledged therein, the burden would lie upon the defendant to prove the want of consideration.

Mr. *H. C. Dutt*, for the Appellant.

Pandit *Gokaran Nath Misra*, Babu *Ishri Prasad* and Pandit *Tara Shankar*, for the Respondents.

JUDGMENT.—This was a suit for recovery of principal and interest on a pro-note for Rs. 21,000, dated March 14th, 1909. The plaintiffs are Kedar Nath, a Pleader of this Court, and his son Gauri Nath, who keeps a shop for the sale of gold and silver lace, embroidered cloths and the like in the city of Lucknow. The defendant, Mohammad Amir Mirza Beg, is a gentleman of the Sitapur district, and nephew of Mirza Muhammad Ali

Beg, the late *Talukdar* of Aurangabad. In his written statement, he admitted execution of the pro-note which is the basis of the suit, but in effect pleaded partial failure of consideration and also that his execution was obtained by fraud or misrepresentation. He said that when the plaintiffs came to him on March 14th, 1909, they claimed a sum of Rs. 8,000 as due from him personally on the balance of a current account between the parties, and a further sum of Rs. 7,500 as due from his late uncle, Mirza Mohammad Ali Beg, who had died in the course of the previous month of October. They also promised to supply him with Rs. 4,000 in cash and undertook that Babu Kedar Nath, plaintiff No. 1, would render him services in his professional capacity in connection with a dispute which was anticipated as to the succession to the aforesaid uncle's estate, for which a sum of Rs. 2,000 was set down as his remuneration and included in the consideration for the pro-note in suit. The total of the items here set forth comes to Rs. 21,500, and the written statement nowhere explains what arrangement is alleged to have been arrived at regarding the odd Rs. 500. It may be noted also that the defendant nowhere pleads that the representations made by the plaintiffs in respect of the debt of Rs. 8,000 were in fact false, while as regards the debt of Rs. 7,500 he implies that it was a genuine and valid debt, inasmuch as he pleads that it has since been paid off. As regards execution of the pro-note in suit, the defendant pleads that he signed it believing it to be a mere memorandum of account and that it was not stamped at the time. There is also a general plea to the effect that the pro-note, the basis of the suit, is not admissible in evidence because it is not properly stamped; and this plea has been pressed upon us in the form of an argument that the adhesive stamp of the value of one anna affixed to the pro-note in suit, as also the similar stamp affixed to the receipt of the same date, have not been duly cancelled as required by section 12 of the Indian Stamp Act. It will be convenient to dispose of this last point at once. The stamp on each of the documents in question has been cancelled by having three lines drawn across it in different directions, each of the said lines extending more or less beyond the edges of the stamp on to the paper on which the documents are written. The contention before us is that the words "or in any other effectual manner" occurring at the end of clause (3) of section 12 of the Indian Stamp Act (II of 1899) should be regarded as so far governed by the words which immediately precede them as to necessitate some sort of writing being employed in order to effect a proper cancellation. There seems some authority for this view in *Virabhadrapa* bin *Adirashapa* v. *Bhimaji Balaji Saraff* (1) and in an older case of the same Court [*S. A. Rilli* v. *Caramalli Fazal* (2)]. It seems to us that the law requires no more than that an adhesive stamp should be cancelled in such a manner as effectually to prevent its being used again for a similar purpose, and that whether this requirement has or has not been sufficiently met is a question to be determined upon examination of the document concerned in each particular case. If the Legislature had intended that the signature or date or some portion of the same must necessarily appear upon the stamp in order to effect its cancellation, it would have said so in plain terms. There is authority for the proposition that an adhesive stamp may be sufficiently cancelled by the drawing of lines across it in *Piran Ditta* v. *Mangal Singh* (3); and the Postal Regulations introduced at the time when postage stamps were first made available for use as receipt stamps suggest that the Government of India felt no difficulty about regarding a stamp which has had lines drawn across it as having been used and cancelled in accordance with law. It is difficult to see how any one, without destroying an adhesive stamp altogether, can so "cancel" it as to make it absolutely impossible for an expert forger to remove it from the document to which it has been affixed and make use of it elsewhere; the most that can be done is to deface the stamp in such a manner as to make this operation difficult and likely to be detected, and this would seem to be the cancellation required by law. In the case now before us, we think the adhesive stamps on the documents in question have been cancelled in a sufficiently effectual manner. Moreover the said documents were undoubtedly admitted in evidence by the learned District Judge, although he has not seen fit to set forth in explicit terms his reasons for deciding in favour of the plaintiffs the issue framed by

(1) 28 B. 432; 6 Bom. L. R. 436.
(2) 14 B. 102.
(3) 108 P. R. 1908.

him on the question of stamp law, and the plaintiffs-respondents are entitled to the benefit of section 36 of the Indian Stamp Act.

These documents being once admitted in evidence, and their execution by the defendant being admitted or proved, it becomes clear that the plaintiffs are suing upon an instrument in writing duly executed, and that the receipt of consideration for the same has been acknowledged in writing by the defendant; the burden of proof would, therefore, be upon the defendant to produce at least some *prima facie* evidence in support of the allegations put forward in his written statement. As a matter of fact, when the case came on for hearing, the proceedings began by the plaintiff Kedar Nath's going into the witness-box. He deposed that both the pro-note of 14th March 1909 and the receipt of the same date were written in full in his presence by the defendant himself, that they were stamped at the time and the stamps cancelled by lines drawn across them. It may be noted in passing that each of the documents in question contains a recital that it has been duly stamped. As regards consideration the plaintiff denied the allegations contained in the defendant's written statement. He admitted that Mohammad Ali Beg, the former *Talukdar* of Aurangabad, had an account with plaintiff No. 2's shop and that this account had since been duly settled by the gentleman who has succeeded to the actual possession of the estate. He gave details regarding the payment of the consideration, and produced for the inspection of the Court a ledger which contained separate accounts in the name of Mohammad Ali Beg, the late *Talukdar*, and of the defendant, Mohammad Amir Mirza Beg. According to this ledger-account and to the evidence of the plaintiff, transactions between the defendant and the plaintiffs commenced in the month of January 1904; between that date and the 4th of August, 1905, there were a series of purchases of gold lace, embroidered waist coats and the like, together with two small cash advances; interest at 1 per cent. per mensem was charged upon the debt and a pro-note was taken as security on the 25th of October, 1906. Later on, that is to say, on July 6th, 1908, a pro-note for Rs. 19,500 was taken as covering the entire debt up to the date; this pro-note according to the plaintiff, fell due on the 14th of March, 1909, and on that date it was found that a sum of Rs. 20,304-12 was due in respect of the same. The plaintiff remitted the odd Rs. 304-12 and made a further advance in cash of Rs. 1,000 and took the pro-note for Rs. 21,000, which is now in suit. It so happened, however, that a sum of Rs. 250 was due at the time from the defendant to the plaintiff Kedar Nath for his professional services in a certain case, and this sum the defendant at once paid out of the cash advance of Rs. 1,000 made to him on March 14th, 1909. It may be conceded that the ledger-account produced by the plaintiff in the course of his examination was not regularly proved or put in evidence under the provisions of section 34 of the Indian Evidence Act (I of 1872); but it was, at any rate, put forward by the plaintiff for the information of the Court as setting forth the precise details of the consideration upon which the pro-note in suit was based, and in particular as embodying the plaintiffs' answer to the allegation contained in the defendant's written statement that a portion of that consideration was due on account of debts incurred by the late *Talukdar* Mohummad Ali Beg.

The defendant had an opportunity of examining this ledger and of cross-examining the plaintiff in respect of the same, as well as on his evidence generally. We find that no attempt was made to do this, not a single question being put to the plaintiff by way of cross-examination. As the case stood at this point, there can be no doubt that the burden of proof in respect of the issues for trial was on the defendant: we do not know whether it was on the plaintiffs' own initiative, or in consequence of some expression of opinion let fall by the learned District Judge, that the plaintiffs closed their case at this point and the defendant was called upon to produce his evidence. He did not go into the witness-box himself, but contented himself with calling five witnesses. One of these said nothing relevant; another [D. W. No. 5] is the general attorney of the defendant, and another [D. W. No. 1] is a connection of his by marriage. This evidence has been unfavourably criticised and entirely rejected by the learned District Judge. We have been taken through it in detail and we are clearly of opinion that the District Judge was right. What the witnesses seek to prove is that at the time of the execution of the pro-note in suit its consideration was stated to be a sum of

Rs. 8,000 due on a standing account from the defendant himself, Rs.7,500 or Rs. 7,000 due on a similar account from the late Mirza Mohammad Ali Beg, a promise on the part of the plaintiffs to advance a further sum of Rs. 4,000 in cash, and an agreement that Babu Kedar Nath (plaintiff No. 1) would render professional services in connection with mutation cases, either pending or about to be instituted, for which he should receive remuneration amounting to Rs. 2,000. The statements of the witness are in places vague; they contradict one another on important points, for instance, as to whether the debt due from Mohammad Ali Beg was Rs. 7,500 or Rs. 7,000 and as to whether a receipt was or was not executed at the same time as the pro-note in suit; finally, the defendant's agent Bashir Ahmad (D. W. No. 5) put an entirely new colour upon the case by deposing that the reason why the pro-note in suit was left unstamped was that the transaction was incomplete and that it was understood that a stamp would not be affixed until a further cash advance of Rs. 4,000 was made by the plaintiffs as agreed. The witness made no attempt to explain why under these circumstances, the pro-note itself should contain a recital that it had been duly stamped, or why this document as well as the receipt should have been made over to the plaintiffs. The lower Court, having thus held the evidence for the defendant to be entirely worthless, proceeded to find the principal issues in the case in favour of the plaintiffs and to decree their suit in full. The pleas taken before this Court are that, under the circumstances of the case, there was a burden laid upon the plaintiffs to prove actual payment of consideration, and that they have failed to do this and have not produced the best available evidence. In the main the case for the appellant appears to rest upon the allegation that the plaintiff Babu Kedar Nath stood in a fiduciary relation towards the defendant, inasmuch as he was acting as his legal adviser, and that the Court was, therefore, bound to scrutinize the whole transaction carefully to put the plaintiff to strict proof and to satisfy itself that the execution of the document in suit had not been brought about by undue influence within the meaning of section 16 of the Indian Conrtact Act (IX of 1872). Now there was nothing in the defendant's written statement which can be regarded as setting up any plea of undue influence, nor did the defendant himself come into the witness-box and depose to the existence of any circumstances from which the Court could infer that Babu Kedar Nath was in a position to dominate the will of the defendant, or that he had, as a matter of fact, taken advantage of any existing circumstances so as to obtain an unfair advantage. Moreover, we have rejected the evidence for the defendant, and we find it impossible to infer merely from Babu Kedar Nath's admission that a sum of Rs. 250 was paid to him on March 14th 1909, for professional services rendered in a particular case, that there existed on that date any fiduciary relation between the parties, much less that the execution of the pro-note in suit was in any way brought about in consequence of the existence of such relationship. It has been proved beyond question that Gauri Nath, plaintiff No. 2, carries on a business in Lucknow city, that there had been dealings between him and the defendant, and that on the 14th of March, 1909, a sum amounting to at least Rs. 8,000 was due to him from the defendant upon current account. On that date the two plaintiffs visited the defendant at Aurangabad in order to lay their claims before him and to obtain a settlement of accounts. It is admitted that after discussing his position with the plaintiffs, the defendant proceeded to execute the pro-note in suit by which he binds himself to pay a sum of Rs. 21,000 as money due from him "on account of the purchase of goods, etc., on past and present transactions" (*babat hisab kitab kharid ashiae waghaira sabiq o hal*), and further to execute a receipt by which he formally admitted the consideration for the pro-note to have been paid in full. We are asked to hold that these facts, if uncontradicted by any other evidence upon which the Court can rely, are not sufficient to establish the plaintiffs' claim, and that a burden lay upon the plaintiffs of proving item by item the previous transactions in respect of goods supplied or cash advanced, which formed the consideration for the pro-note in suit, and we are asked to do this entirely on the strength of the fact that Babu Kedar Nath, plaintiff No. 1, is a Pleader and that on the 14th of March, 1909, he received from the defendant a sum of Rs. 250 as remuneration for professional services. Moreover, we are asked to do this in face of the fact that Babu Kedar Nath

went into the witnees-box and laid before the Court a full statement regarding the details of the consideration as claimed by him, that he was not cross-examined upon this statement and that the defendant did not go into the witness-box to contradict him or to explain how he was induced to execute the documents in suit if he had not in fact received full consideration for the same. We are unable under the circumstances to accede to the appellant's contention or to hold that the plaintiffs were under an obligation formally to put in evidence, under section 34 of the Indian Evidence Act, the complete accounts of Gauri Nath's shop.

This appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed with costs.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1095 OF 1910.

December 29, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

NARAYANA KUTTI GOUNDAN—PLAINTIFF—APPELLANT

versus

PECHIAMMAL *alias* MAHALI AMMAL AND OTHERS—DEFENDANTS NOS. 1 AND 2 AND 2ND PLAINTIFF—RESPONDENTS.

Subrogation—English and Indian Law—Reversioner—Transfer of Property Act (IV of 1882), ss. 58, 91—Person interested in the property—Contract Act (IX of 1872), s. 69—Charge under a mortgage executed by daughters during the life-times of widows—Registration—Lien.

A person, who pays off a mortgage-debt on the properties of a deceased male owner, cannot claim to be subrogated to the rights either of the daughters or of the original mortgagee whose debt he discharges. The scope of the rule of subrogation in India is much narrower than in England or America.

Butler v. *Rice*, (1910) 2 Ch. 277; 79 L. J. Ch. 652; 101 L. T. 94, discussed.

Gurdeo Singh v. *Chandrika Singh*, 5 C. L. J. 611; 1 Ind. Cas. 193; 46 C. 193 and *Jagatdhar Narain Prasad* v. *Brown*, 33 C. 1133; 4 C. L. J. 121; 10 C. W. N. 1010, disapproved.

Khushal Sadashiv v. *Punamchand*, 22 B. 164, distinguished.

Mere payment of a mortgage-debt by a stranger would not entitle him to the mortgagee's rights by subrogation.

Ram Tuhul Sing v. *Bisveswar Lal Sahu*, 2 I. A. 131; 15 B. L. R. 208; 23 W. R. 305, referred to.

A reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose. But when a suit is instituted by the mortgagee for sale, a reversioner has sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow. In the latter case, the reversioner is entitled under section 69 of the Contract Act to be reimbursed by the widow in respect of the money which the latter was bound by law to pay. The scope of section 69 of the Contract Act and of sections 85 and 91 of the Transfer of Property Act is not co-extensive. The daughters of a deceased mortgagor, therefore, have sufficient interest in the land to entitle them to discharge the mortgage-debt when the property is brought to sale in execution of the mortgage-decree against the mortgagor's widow. By so discharging, they obtain a charge over the land which they are entitled to assign or charge in favour of a third person who has enabled them to discharge the mortgage-debt.

Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. In India, the scope of the rule is narrower still. A mere agreement, either with the creditor holding a mortgage or with the debtor owing it, cannot give a person, lending money to discharge the mortgage, a lien over the property. An agreement with the creditor or the debtor may entitle him to sue him for the execution of a mortgage-deed, or a deed of assignment of the mortgage, as the case may be: but mortgages for a sum of Rs. 100 and upwards can be created only by registered instruments and a mere agreement to mortgage is insufficient to create a lien.

Second appeal against the decree of the District Court of Coimbatore, in Appeal Suit No. 153 of 1909, presented against the decree of the Court of the District Munsif of Udamalpet, in Original Suit No. 187 of 1908.

Mr. *K. Srinivasa Iyengar*, for the Aappellant.

The *Advocate General*, for 1st Respondent.

JUDGMENT.

SUNDARA AIYAR, J.—The facts necessary for the disposal of this second appeal may be very briefly stated. One Venkatachella Mudali hypothecated certain land to one Muthu Goundan in 1893 and died in 1904, leaving behind him two widows, the 1st and 2nd defendants in this suit, and five daughters, defendants Nos. 3 to 7. Muthu Goundan obtained a decree on his mortgage-bond against the widows and certain purchasers from them. The property was directed to be sold in execution of the decree and while the sale was actually going on, Narayana Kutti Goundan, one of the plaintiffs in this suit, paid the amount of the decree into Court. Four of the daughters executed a mortgage-bond

in favour of the two plaintiffs here for the amount which the bond alleges was received from them for discharging the amount required for paying up the decree amount due to Muthu Goundan. The property mortgaged under the instrument was the same as that which had been mortgaged to Muthu Goundan. The plaintiffs' suit is to recover the amount due under their mortgage-bond by sale of the mortgaged property and personally from the defendants Nos. 3 to 6, the executants of the bond. The District Munsif was of opinion that the daughters as reversioners, having only a *spes successionis*, had no such interest in the mortgaged property as would entitle them to redeem Muthu Goundan, and that the plaintiffs obtained no legally enforceable right under the mortgage to them as against the mortgaged property. He, therefore, refused to pass a decree for the sale of the land, but gave the plaintiffs a personal decree against the defendants Nos. 3 to 6. On appeal, the District Judge confirmed the Munsif's decree holding that, though the defendants Nos. 3 to 6 must be held to have some interest in the land and might be entitled to a charge on the land against the 1st and 2nd defendants, the plaintiffs who lent money to the daughters could not be held to have obtained any valid right under their mortgage. The 1st plaintiff, Narayana Kutti Goundan, has appealed to this Court from the decree of the District Judge.

It is clear from the facts of the case that the plaintiffs lent moneys to the four daughters on the security of such interest as they would obtain in the land by redeeming Muthu Goundan's mortgage. If the daughters obtained a valid charge on the land against the widows, the defendants Nos. 1 and 2, by redeeming the mortgage, there is no reason for holding that they could not create the mortgage in question in the plaintiffs' favour charging their right.

The plaintiffs, then, would stand in the position of sub-mortgagees with respect to the defendants Nos. 1 and 2 and would be entitled to sue both their mortgagors, the daughters, and the defendants Nos. 1 and 2, to enforce their mortgage by the sale of the 1st and 2nd defendants' rights in the land. It was not suggested in the Courts below that the plaintiff lent the money merely on the personal security of the executants of the mortgage-deed. The question for decision in this second appeal, therefore, is whether the daughters, who executed it, obtained any charge over the land by discharging the amount due to Muthu Goundan. It is contended for the appellant, *first*, that they would stand in the shoes of Muthu Goundan by subrogation merely by discharging his debt, and, *secondly*, that they were persons entitled to redeem Muthu Goundan's mortgage under section 91 of the Transfer of Property Act and by redeeming him became entitled to his right as against the 1st and 2nd defendants. The first of these two arguments was put on a broader ground than the second, it being contended that, whether a reversioner under the Hindu Law is a person entitled to redeem under section 91 of the Transfer of Property Act or not, the right of subrogation was wider, and that, the daughters having discharged a burden on Venkatachellam's estate in the hands of the 1st and 2nd defendants, the land in their possession became liable for the amount paid by them. In support of this argument, the judgment of Warrington, J., in *Butler* v. *Rice* (1) was relied on. In that case, one Mrs. Rice was the owner of a house in Bristol and of property in Cardiff, which were together subject to a charge in favour of a bank to secure £450 and interest, and the title-deeds of both the properties were deposited with the bank. Mr. Rice asked the plaintiff Butler to lend him £450 for the purpose of paying off the mortgage. Mr. Butler agreed to lend the amount upon a legal mortgage for £300 of the Bristol house and a guarantee of £150 by Mr. and Mrs. Rice's Solicitor, who was to hold the title-deeds for him in the meantime. The money was paid and the deeds of the Bristol property which were recovered from the bank passed into the custody of the Solicitor. Mrs. Rice did not know

(1) (1910) 2 Ch. 277; 79 L. J. Ch. 652; 101 L. T. 94.

of the transaction and subsequently refused to execute a mortgage in favour of the plaintiff. Butler instituted an action against Mr. and Mrs. Rice and the Solicitor for a declaration that he was entitled to a charge on the Bristol property for £450 and interest. Warrington, J., took the question for determination to be whether in the circumstances of the case, Mrs. Rice was entitled to hold the Bristol property discharged from the debt of £ 450, not one penny of which, said the learned Judge, she had paid off herself, or whether the person who paid was entitled to treat the bank's charge as still on foot in his favour. The learned Judge observes:—"In the first place, I find from the facts I have stated that it was not the intention of the plaintiff, nor indeed is it possible to suppose that any sensible man would have such an intention, to discharge the property from the debt. There are only two questions which have to be dealt with in order to arrive at the further conclusion that in equity the debt is still kept alive. The *first* is this: is it material that the owner of the property, the mortgagor, has not requested the person who paid the money to make the payment and, *secondly*, is the plaintiff's right affected by the further intention that, when the transaction was fully carried out, his position should be secured by a legal mortgage for £300 and a guarantee of £150? On the first question, it should be observed that this is not a case in which a person seeks to create a charge in his own favour. Here, there was an existing charge, and the only question is whether it had been paid off or kept alive. On such a question as that, it appears to me that the concurrence of the mortgagor is immaterial. Her position is not affected. The only alteration in her position is that instead of owing the money to *A*. she will in future owe it to *B*." Again he says:—"Then, does the fact that the plaintiff intended, if the transaction was carried out, to have a legal mortgage on the Manor Road property only and a guarantee for the remaining £150, prevent the application of the doctrine? Plainly not. His meaning was that he should have a further security; but that is no evidence that he intended in the meantime to give up such security as a transfer of the deeds to him would give him. The evidence which he gives, which I find to be true, as to what he said at the second interview supports this, namely, that the deeds were to be taken by the Solicitor and held by him for the plaintiff. Such security as that gave would be superseded by the better security to be given afterwards." It may be noted that it was not contended that her husband had any right to act on behalf of Mrs. Rice or that the Solicitor was entitled to enter into any agreement on her behalf. In these circumstances, it appears to me that the judgment of the learned Judge went very far and is not supported by any previous dicision of the English Courts. The learned Judge appears to hold that, though the plaintiff had no previous interest in the property to sustain his action in paying off a previous mortgage and claiming a charge for the amount paid by him, he was entitled to stand in the shoes of the bank whose charge he discharged. He observes that as there was *an existing charge* in favour of the bank, the concurrence of the mortgagor is immaterial. The learned Judge, no doubt, refers to the agreement between Butler and Mr. Rice and the Solicitor that the deeds were to be taken by the Solicitor and held by him for Butler, but it is difficult to see that this would have any bearing on the question if Mr. Rice and the Solicitor had no right to act for Mrs. Rice. The decision seems almost to go the length of holding that even a volunteer, who pays off an existing mortgage, would be entitled to a charge on the mortgaged property for the amount he paid. The decision is not based on any agreement between Butler and the debtor that the former should have the rights of the latter. The learned Judge says that the judgment in *Patten* v. *Bond* (2) and the decision in particular of Romer, J., in *Chetwynd* v. *Allen* (3), are consistent with the view expressed by him, "for in the case before him, as in this, the material payment was made without the knowledge and without any communication with the person who was the real owner of the mortgaged property, and, notwithstanding that, Romer, J., held that the charge was still on foot." In *Patten* v. *Bond* (2), the money was lent at the request of trustees for the purpose of preserving the trust estate. In such cases, a right of subrogation is, undoutedly, recognised in the English Law. In *Chetwynd* v. *Allen* (3), the

(2) (1889) 60 L. T. 583; 37 W. R. 373.

(3) (1899) 1 Ch. 353; 68 L. J. Ch. 160; 47 W. R. 200; 80 L. T. 110.

person who claimed the right of subrogation paid the money at the request of the trustee for the owner of the property, who was the trustee's wife, in order to discharge a mortgage executed on her property with her consent. He was, therefore, entitled to bind her interest by an agreement which he entered into for discharging that mortgage. The case is, therefore, not similar to *Butler* v. *Rice* (1). On the other hand, the dicision in *In re Wrexham, Mold and Connah's Quay Railway Company* (4), appears to be against the view maintained by Warrington, J. There a Railway Company, which had issued debenture stocks and whose power of borrowing was exhausted, borrowed money from their bankers to pay a half year's interest on the stocks, the bankers paying the interest warrants of the stock-holders when presented to them. Soon after this, a judgment-creditor of the Company presented a petition under the Railway Companies Act, 1867, and a Receiver was appointed under the petition. The Receiver had in his hands sufficient money to pay the next half year's interest due to some of the stock-holders. The bank claimed priority in respect of their advances over all interest payable in respect of the debenture stock; this claim was negatived by Romer, J., and by the Court of Appeals. Rigby, L. J., observes:—"The claim is rested on a supposed subrogation and right to stand in the place of, and with the right to the securities and priorities of, the creditors who have been paid off, and this is the only claim with which I propose to deal. I do not think that any right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers has ever been allowed, or can be justified in principle." Lindley, M. R., and Vaughan Williams, L. J., took the same view. It may be observed that the bank's rights against the Company as a simple creditor apart from any question of priority was not denied as the money, though borrowed by the Company in excess of their powers, was used for discharging claims lawfully binding on the bank.

The principle governing the right of subrogation in cases where it is claimed by a person who, without any previous interest in the property, discharges a mortgage on it, is expressed in Jones on Mortgages thus: "Under the equitable principle of subrogation, one who pays a mortgage-debt under an agreement for an assignment or for a new mortgage for his own protection or for the benefit of another, acquires a right to the security held by the other." The learned author quotes a passage from a recent Georgia case which may be cited here: "It has been said that subrogation was a 'benevolent' doctrine and equity would apply it in any case in which justice required it; and under sanction of this elastic expression, cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be, and we, therefore, hold that a subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay or where he had some interest to protect, or where he advanced the money *under an agreement, express or implied, made either with the debtor or creditor*, that he would be subrogated to the rights and remedies of the creditor." The rule is stated in similar terms by Sheldon in his book on Subrogation. It has been said that "whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor, he is entitled to such substitution. But the doctrine generally adopted, and that of these very cases when limited to the point actually decided, is that a conventional subrogation can result only from a direct agreement, express or implied, made with either the creditor or debtor, and it is not sufficient that a person paying the debt of another should have merely an understanding on his part that he is to be subrogated to the rights of the creditor, though if the agreement have been made, a formal assignment will not be necessary." The English cases do not carry the principle further.

In India, the scope of the rule appears to me to be narrower still. A mere agreement either with the creditor holding a mortgage or with the debtor owing it, cannot give a person lending money to discharge the mortgage a lien over the property—see section 54 of the Transfer of Property Act. An agreement with the creditor or the debtor

(4) (1898) 2 Ch. 663; (1899) 1 Ch. 440; 68 L. J. Ch. 270, 47 W. R. 464; 80 L. T. 130; 15 T. L. R. 122; 6 Manson 218.

may entitle him to sue him for the execution of a mortgage-deed, or a deed of assignment of the mortgage as the case may be, but mortgages for a sum of Rs. 100 and upwards can be created only by registered instruments and a mere agreement to mortgage is insufficient to create a lien. In England and in America, it may be that the principles of equity would enable the Courts to treat an agreement for a mortgage as giving the lender an equitable interest in the property agreed to be mortgaged. But equitable interests are not recognised in this country as distinct from legal interests, though many principles of law are borrowed from the principles of English Equity Jurisprudence. In this country, equitable mortgages by deposit of title-deeds are recognised only in a special class of cases referred to in section 59 of the Transfer of Property Act when the mortgages are made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. In *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehary Singh* (5), the rule of subrogation is stated and it seems to be assumed that a payment made under agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, would be sufficient to entitle the lender to the benefit of subrogation—see pages 631 and 632. In *Jagatdhar Narain Prasad* v. *A. M. Brown* (6), it was held that an agreement to give a mortgage would be enough to create a charge by way of subrogation, though the decision of the case itself does not seem to have required the enunciation of the principle. It appears to me that the important distinction between the English and Indian Law pointed out above was overlooked in these cases. No doubt a person having an agreement may sue for the specific performance of the agreement to execute or assign a mortgage, and in suits for the execution of a mortgage-deed, the Courts have sometimes passed not only a decree for specific performance but for sale also following on the execution of the conveyance. But this does not justify the view that the agreement itself can be treated as creating a charge. In the American Cyclopedia of Law and Procedure, Vol. XXVII, the true principle applicable in England and America is stated by H. C. Black, the auther of the Article on Mortgages. He says:—"An agreement by which a stranger undertakes to advance the redemption money and pay it for the mortgagor's benefit, to hold the premises as security for his reimbursement, and to release or re-convey to the mortgagor on being re-paid, is valid and enforcible; it is not within the Statute of Frauds and may be made the basis for a decree for specific performance." The principle is also recognised in *Khushal Sadasiv* v. *Punamchand* (7), where the transaction took place in the town of Bombay and the lender who paid off the prior mortgage could, therefore, claim an equitable mortgage. These are the two kinds of cases which must be distinguished from the class under notice. No conveyance, of course, would be required in cases where a person who, having a previous interest in the property, pays off a prior mortgage or where the owner of the equity of redemption paying off a mortgage claims priority over a subsequent incumbrancer. So also in cases where one claiming under a void or voidable conveyance or *bona fide* believing himself to have a title to the property discharges an encumbrance on it and claims a charge as against the owner. The principle contended for by the appellant that the mere payment of a mortgage-debt by a stranger would entitle him to the mortgagee's rights by subrogation has always been negatived in India. See *Ram Tuhul Singh* v. *Biseswar Lall Sahu* (8). It is impossible to argue that it is open to any meddler to claim a lien by discharging a mortgage with which he has no concern. I must, therefore, overrule the contention that the plaintiff can claim to be subrogated to the rights either of the daughters or of Muthu Goundan by the mere fact that he discharged the mortgage of the latter.

The next question for consideration is whether the daughters were entitled to redeem Muthu Goundan under section 91 of the Transfer of Property Act and could by doing so claim a charge which they could transfer to the plaintiffs. Section 91 provides that any person having any interest in or a charge upon the mortgaged property and any person having any interest in or charge upon

(5) 5 C. L. J. 611; 1 Ind. Cas. 913; 36 C. 193.
(6) 33 C. 1133; 4 C. L. J. 121; 10 C. W. N. 1010.
(7) 22 B. 164.
(8) 21. A. 131; 15 B. L. R. 208; 23 W. R. 305.

the right to redeem the property may institute a suit for redemption. Section 85 lays down that all persons having an interest in the property comprised in the mortgage must be joined as parties to any suit under this Chapter relating to such mortgage. The word "interest" must be taken to be used in the same sense in both the sections. Can it be held that a reversioner under the Hindu Law is a person having an interest within the meaning of these sections? I cannot hold that in a suit by the mortgagee for sale or foreclosure, such a reversioner is a necessary party. Indeed, it is doubtful whether he can be held to be a proper party at all. It follows that a reversioner cannot be held to be entitled to institute a suit under section 91. In *Ram Chandar* v. *Kallu* (9), Stanley C. J., and Banerji, J., held that the reversionary heirs of the deceased husband of a Hindu widow in possession of his property as such could not maintain a suit for redemption. Although the holder of a mere easement and a remainder-man have been held entitled to redeem in England [see Seton on Judgments and Orders, 6th Edition, page 1935; *Pearce* v. *Morris* (10)]. I am on the whole inclined to hold that a reversioner can not voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose. But does it necessarily follow that when a suit is instituted by a mortgagee for sale, the reversioner has not got a sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow? I do not think I am bound to hold that his rights stand on the same footing when he claims of his own accord to redeem and when he tries to save the property for the estate upon the mortgagee attempting to sell it. The right of a person interested in the payment of money which another is bound by law to pay and who, therefore, pays it to be re-imbursed by the other is recognised in section 69 of the Indian Contract Act. There is no reason for holding that only those who have an interest in a mortgaged property within the meaning of sections 85 and 91 of the Transfer of Property Act can be held to be interested in the payment of the money due on a mortgage created by the last male owner. It has been held by the Courts in India that a reversioner is entitled to resist a claim for Probate of a Will alleged to have been made by the last male owner by reason of his interest in the estate. See *Brindaban Chandra Shaha* v. *Sureswar Shaha Paramanick* (11), *Puttanna* alias *Keshava Bhatta* v. *Ramakrishna Sastri* (12). As observed by Mookerjee, J., in the former case, "although a reversioner under the Hindu Law has no present interest in the property left by deceased, yet it is manifest that he is substantially interested in the protection or devolution of the estate. It is well settled that a reversioner can sue to restrain waste. The reversioner can, if he makes out a proper case, obtain an order for the appointment of a Receiver. He can maintain a suit for declaration that an adoption by the female heir in possession is invalid. He can also sue for declaration that an alienation by the female heir in possession will not be operative beyond her life time. This has now been placed beyond the possibility of dispute by the provisions of section 42 of the Specific Relief Act, illustrations (*e*) and (*f*) to which section show that such declaratory suits may be maintained. Besides, it is manifest that such a declaratory suit is maintainable by a remote reversioner, who would take an absolute interest in the absence of the immediate reversionary heir who has only qualified rights in the estate; and, also, when the nearest reversioner has precluded himself from maintaining a declaratory action by his conduct or by omission to sue within the statutory period, a remote reversioner is entitled to maintain the suit." In Civil Revision Petitions Nos. 343 and 344 of 1908, it has been held by this Court that a reversioner paying arrears of Government revenue in order to save the estate from sale is entitled to recover the same from the widow in possession. I am of opinion that the daughters had sufficient interest in the land to entitle them to discharge Muthu Goundan's debt when the property was brought to sale and

(9) 30 A. 497; A. W. N. (1908) 225; 5 A. L. J. 631.
(10) 5 Ch. 227; 39 L. J. Ch. 342; 22 L. T. 190; 19 W. R. 196.
(11) 10 C. L. J. 263; 3 Ind. Cas. 178.
(12) 30 M. 195; 17 M. L. J. 374.

that by doing so they obtained a charge over the land which they were entitled to assign or charge in favour of the plaintiff. I must, therefore, hold that the plaintiff obtained a valid charge for the amount paid by him to discharge Muthu Goundan's mortgage. The widows cannot contend that they have been put to any disadvantage by the redemption of Muthu Goundan's mortgage by the daughters. The amount due to the plaintiff was disputed by the 1st defendant in her written statement. The case does not appear to have been tried on the merits. We, therefore, reverse the decrees of the Courts below and remand the suit to the Court of first instance for disposal on the merits. The costs up to date will abide the result.

SPENCER, J.—I agree with my learned brother in thinking that the defendants Nos. 3 to 7 as reversioners were persons interested within the meaning of section 69 of the Indian Contract Act in the payment of money which the widows, the defendants Nos. 1 and 2, were bound to pay to Muthu Goundan. By discharging the debt for which the property of the defendants Nos. 1 and 2 was on the point of being sold, I think that they were equitably entitled to have a charge on the property. This being so, I am further of opinion that the assignment or sub-mortgage by the defendants Nos. 3 to 7 to the plaintiff of their lien by the deed of July 3rd, 1909, was in law a valid transaction. The result will be as above stated.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 87 OF 1911.

November 9, 1911.

Present:—Mr. Evans, J. C.

NANHE—DEFENDANT—APPLICANT

versus

Saiyad TASADDUQ HUSAIN—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 2(9), O. VIII, r. 10—Judgment, Court's power to pronounce, when written statement not filed—Revision—Material irregularity.

A defendant did not file his written statement on the date on which he was ordered to file it, nor on the date fixed for hearing. The Munsif thereupon decreed the claim of plaintiff under Order VIII, rule 10, Civil Procedure Code, without going into the merits of the case or without stating the grounds of his order decreeing the claim:—

Held, that the Munsif's order was not a judgment, but merely an order decreeing the plaintiff's claim, it was held that the Munsif acted with material irregularity and his decision was set aside.

Appeal against the order of the District Judge, Lucknow, dated 11th April 1911, upholding that of the Additional Munsif, Lucknow, dated 21st February 1911.

Babu *Salig Ram*, for the Applicant.

Babu *Ishwari Prasad*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the District Judge of Lucknow, upholding a decision of the Additional Munsif of Lucknow.

The facts of the case are that a suit was instituted against the applicant and a summons was served on him on the 5th February 1911. On the 10th February 1911, the date fixed for filing of the written statement, none was filed. The case came up for hearing on the 21st February 1911. The learned Munsif said that the defendant was ordered to file his written statement on the 10th February, but he did not file it on that date nor did he bring it on the later date. He decreed the claim with costs under Order VIII, rule 10, of the Code of Civil Procedure.

It is urged on behalf of the applicant that the Munsif acted with material irregularity because under Order VIII, rule 10, he was only empowered to pronounce judgment against the defendant and in this case there is no judgment, but merely an order decreeing the plaintiff's claim. A judgment is defined in section 2 (9) of the Code as the statement given by the Judge of the grounds of a decree or order. Therefore, the law contemplates that the Court should go into the case and pronounce a decision upon the facts so far as they are before it. If the learned Munsif had examined the plaintiff and considered the documents produced before him and written a decision stating that he believed the plaintiff's evidence that would have been a judgment within the meaning of Order VIII, rule 10, but I cannot hold that the order of the Munsif in this case was a judgment. I am, therefore, of opinion, that there was a material irregularity. The learned Pleader for the respondent refers to the case of *Kristamma Naidu* v. *Chapa Naidu* (1), where

(1) 17 M. 410.

it was said that material irregularity within the meaning of section 622 of the old Code of Civil Procedure, means "a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from some rule of law or procedure," and he contends that there is no departure from any rule of law or procedure in this case. I must assume that the learned Munsif knew what the meaning of a judgment is. A judgment certainly means some kind of decision upon the merits, but there is none in this case.

I allow the application and, setting aside the order of the Court below, remand the case, through the lower Appellate Court, to the Court of first instance for decision on the merits. Costs will abide the result.

Application allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1519 OF 1910.
AND CIVIL MISCELLANEOUS PETITON No. 2053 OF 1911.
January 16, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

IN S. A. No. 1519 OF 1910.

KOMMENENI CHINNA VEERAYYA
PLAINTIFF—APPELLANT
versus
KOMMENENI LAKSHMINARASAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

IN C. M. P. No. 2053 OF 1911.

KOMMENENI SUBBAYYA AND ANOTHER—LEGAL REPRESENTATIVES—PETITIONERS
versus
KOMMENENI VENKATASUBBIAH—RESPONDENT.

Abatement—Survival of suit—Suit by reversioner—Declaration of invalidity of alienation.

Where a suit is really one for a declaration that a deed of relinquishment is invalid as against the reversionary interest of the plaintiff, it abates on the death of the plaintiff and the cause of action does not survive to the next reversioner.

Sakyahani Ingle Rao Sahib v. *Bhawani Bozi Saib*, 27 M. 588, followed.

Muthusamy Mudaliar v. *Masilamani*, 33 M. 342, 7 M. L. T. 17; 20 M. L. J. 49; 5 Ind. Cas. 42, explained.

Chiruvolu Punnamma v. *Chiruvolu Perraju*, 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307; *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshuar Baksh Singh*, 33 I. A. 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 635; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727, referred to.

Second appeal against the decree of the Temporary Subordinate Judge's Court of Guntur in A. S. No. 154 of 1906, presented against that of the Court of the District Munsif of Guntur in Original Suit No. 54 of 1905.

Mr. *P. Nagabhushanam*, for the Appellant.

Mr. *L. A. Govindaraghava Iyer*, for the Respondent.

JUDGMENT.—The prayer in the plaint, according to its terms, is for a declaration that the 3rd defendant is not the *Illatom* son of the 1st defendants' father-in-law, as well as for a declaration that the 1st defendant's deed of relinquishment in favour of the 3rd defendant cannot affect the plaintiff's rights as reversioner. The 3rd defendant raised various legal objections to the maintainability of the suit for a declaration that the 3rd defendant was not the *Illatom* son of the 1st defendant's father-in-law. To overcome these objections, the plaintiff contended that his suit was really only one to declare the deed of relinquishment invalid as against his reversionary rights. This contention was upheld and the suit was allowed to go on as one relating merely to the validity of the relinquishment. We cannot, therefore, now regard it as one relating to the 3rd defendant's rights as an *Illatom* son. This Court decided that a suit by a reversioner for a declaration that a deed of alienation or other instrument executed by a widow will not affect his reversionary rights, abates on the death of the plaintiff and that the cause of action does not survive to the next reversioner; *Sakyahani Ingle Rao Sahib* v. *Bhavani Boyi Sahib* (1). In *Muthusawmy Mudaliar* v. *Masilamani* (2), the cause of action was held to survive but that was on the ground that the plaintiff in the suit asked for a declaration on behalf of himself and other reversioners. We are bound by *Sakyahani Ingle Rao Sahib* v. *Bahavani Bozi Sahib* (1), which was not overruled by *Chiruvolu Punnamma* v. *Chiruvolu Perraju* (3). The Privy Council has held, in *Mahamed Umar Khan* v. *Mahomel Niaz-ul-din Khan* (4), that Article 118 of the Limitation Act is

(1) 27 M. 588.
(2) 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49; 5 Ind. Cas. 42.
(3) 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307.
(4) 11 M. L. T. 76; 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 39 C. 418; 13 Ind. Cas. 344.

not applicable to suits for possession [see *Muhammad Umar Khan* v. *Muhammad Niaz-ud-Din Khan* (5) which refers to and explains *Thakur Tirbhuvan Bahadur Singh* v. *Raja Rameswar Baksh Singh* (6)]. The right of the present petitioners, who wish to prosecute the 2nd appeal as legal representatives of the original plaintiff, to recover the property on the death of the 1st defendant will not, therefore, be affected by their not being admitted as plaintiff's representatives, and we must reject their application to be permitted to continue the appeal. The order of the admission Court, passed on 26th October 1911 on the application is set aside.

The second appeal abates. We make no order as to the costs of the Civil Miscellaneous Petition. The respondents will be entitled to their costs of the second appeal out of the estate of the deceased plaintiff.

Decree set aside.

(5) 13 Ind. Cas. 344; 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 39 C. 418.

(6) 33 I. A. 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 495; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 485 OF 1910.

January 31, 1912.

Present:—Mr. Lindsay, A. J. C., and Mr. Rafique, A. J. C.

DEBI SAHAI AND OTHERS—DEFENDANTS

versus

GAURI SHANKAR SAHAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition suit—Civil Procedure Code (Act V of 1908), O. II, r. 2—Subsequent suit for a share in the property not included in the general suit for partition, maintainability of—Property held by the members of a family jointly with a stranger cannot be included in general suit for partition.

Although as a general rule, a partition suit should embrace all the joint family property, there is an exception in favour of property held jointly with strangers to the family who have no interest in the family partition, and, therefore, cannot be made parties to the general suit for partition.

Where in a previous suit for partition of the joint ancestral property between the plaintiffs and defendants, Nos. 1 to 4, certain shares held in the Paper Mills Company were not included in the suit and it was found that these shares had been inherited from a collateral relation of the parties by the plaintiffs and defendants Nos. 1 to 4 jointly with defendants Nos. 5 to 8, who were collateral relatives of the plaintiffs and defendants Nos. 1 to 4:

Held, that Order II, rule 2 of the Code of Civil Procedure was no bar to a subsequent suit by the plaintiffs for their share in this property.

Appeal against the decree of the District Judge, Lucknow, dated 23rd August 1910, reversing that of the Additional Munsif, Lucknow, dated 17th June, 1910.

Mr. *A. P. Sen* and Babu *Bisheshar Nath*, for the Appellants.

Babu *Basudev Lal*, for Respondents Nos. 1 and 2.

JUDGMENT.—The subject-matter of the suit out of which this appeal has arisen consists of five shares held in the Upper India Paper Mills Company, Limited, Lucknow. The suit was brought by four plaintiffs Gauri Shankar, Hari Shankar, Shankar Narayan and one *Musammat* Jasodha, the widow of Shankar Sahai, who was a brother of the three plaintiffs already mentioned. The first three plaintiffs and the husband of the plaintiff No. 4 were brothers of one Lachmi Narayan who died in the year 1905. The first four defendants in the suit are the sons of this Lachmi Narayan and they are the appellants in this Court. Four other defendants were also joined *pro forma* as having an interest in the shares in question. These defendants (Nos. 5 to 8) are collateral relations of the plaintiffs and of the other defendants. The shares about which this dispute has arisen seem to have been acquired originally by one Bakht Bahadur, the father's uncle's son of the plaintiffs, and the grandfather's uncle's son of the defendants Nos. 1 to 4. He died many years ago and was succeeded by his widow *Musammat* Mamola into whose name the shares were transferred. Mamola died in 1895 and the estate of her deceased husband then descended upon his collateral relations. Up till the year 1898, no steps appear to have been taken to obtain a transfer of these shares in the Company's register, but in September of that year Lachmi Narayan made an application in the Court of the Subordinate Judge, Lucknow, for the grant of a succession certificate to enable him to collect the dividends on the shares and to have them transferred to his name. In his application for the certificate, Lachmi Narayan set out the various persons of his own family as also the various collateral relatives whom he described as being entitled to an interest in the shares

in question. The result of the application was that a certificate was granted to Lachmi Narayan who got the shares transferred in his own name. The legal position of Lachmi Narayan in respect of this application and of the order which was made upon it has been defined in the course of previous litigation between these parties and it may be taken now that the grant of the certificate to Lachmi Narayan was not a grant to him in his own right, but merely as representing his own interest and the interest of all others who were entitled to a share in the property. To use the language of the learned Judge of this Court, who decided the previous case in which the question of Lachmi Narayan's status arose, he was nothing more than a trustee and administrator in respect of the five shares now in dispute. Lachmi Narayan, as has already been said, died in the year 1905 and it appears that after his decease the shares were transferred to the names of the four sons, the defendants Nos. 1 to 4, who appear to have set up a claim to hold the shares in their own right. It is necessary now to refer to some previous litigation between the parties. The five shares in question formed the subject-matter of a suit which was filed in the year 1907 in the Court of the Munsif of Lucknow, in which certain collateral relations who are represented in the present suit by defendants Nos. 5 to 8 were plaintiffs. The present plaintiffs and the defendants Nos. 1 to 4 were the defendants in that suit. The claim was for a declaration of interest in the shares and for recovery of Rs. 25 on account of dividends which were alleged to have been improperly withheld by the sons of Lachmi Narayan. This suit was dismissed in the Munsif's Court on the 12th December 1907. An appeal was preferred to the Court of the District Judge which was decided on the 30th November 1908. The District Judge reversed the decree of the Munsif and declared the plaintiffs to be entitled to one quarter interest in the five shares in question. This decision of the District Judge was affirmed by a judgment of this Court which was passed in June 1909. We have next to refer to a second suit which was lodged in the Court of the Subordinate Judge of Lucknow on the 24th August 1908, and which was finally disposed of in appeal by this Court in April 1910. This was a suit filed for partition by the four plaintiffs who figure as plaintiffs in the case we are now dealing with. The defendants in that case were the present defendants Nos. 1 to 4. What was claimed in this suit was a division of the joint ancestral property which had descended from one Parsidh Rai, the father of the plaintiffs and the grandfather of the defendants Nos. 1 to 4. The result of this suit was that the joint family property was divided between the parties.

We come now to the present suit which was instituted on the 30th November 1909. According to the plaint, the case of the plaintiffs is that they are entitled to a moiety of these five shares. There was also a claim for Rs. 92-8 on account of dividends which have been wrongfully retained by defendants Nos. 1 to 4. In the plaint it was stated that Lachmi Narayan, after he had obtained the succession certificate in respect of these shares, did distribute a share of the dividends to the plaintiffs during his life-time but that after his death his sons, defendants Nos. 1 to 4, had refused to pay anything on this account. The suit was resisted by the defendants Nos. 1 to 4 whose case on the merits was to the effect that the shares in dispute had been the exclusive property of Lachmi Narayan in which the plaintiffs could claim no interest whatsoever. It was also stated that Lachmi Narayan and after him the defendants Nos. 1 to 4 had always treated these shares as their own property and had been in adverse possession of them. Further, a technical plea was raised in bar of the suit. It was contended that the suit was barred under the provisions of Order II, rule 2 of the Code of Civil Procedure, 1908, (corresponding to section 43 of the old Code), according to which every suit must include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; and which lays down that where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted. Thus, it is said that if the plaintiffs considered they were entitled to an interest in these shares, it was their duty to include the property in the suit which they brought for partition in the

year 1908 when they asked for a division of the family joint property. A reply to this plea which was made by the plaintiffs was that the present claim could not have been put forward in the former suit because certain persons, that is to say, defendants Nos. 5 to 8, who were not and could not have been parties to the partition suit of 1908 were necessary parties in the present case. So far as the plea raised by the defendants to the effect that the property was the exclusive property of Lachmi Narayan was concerned, it was rejected by the Court of first instance and by the Court below. The Munsif, however, was of opinion that Order II, rule 2 was a bar to the suit. In appeal, his decision was reversed by the learned District Judge who held that the causes of action in the two suits were different and that really in the suit we are now considering the defendants Nos. 1 to 4 were being sued as administrators *de son tort* and that this being so under Order II, rule 5, the present claim could not have been included in the previous suit. This decision of the District Judge is attacked here on four grounds which really give rise to one plea only, namely, that the suit was barred under Order II, rule 2. The case as it has been argued before us is not precisely the case which is disclosed in the memorandum of appeal. Mr. Sen who argued the case for the appellants says that the suit was barred because the shares in question constituted joint property which was liable to partition and a claim in respect of it, therefore, should have been made in the previous suit. It is argued that although the shares descended to the joint family of which Lachmi Narayan was the head from a collateral relative and was thus, what is called in the parlance of the Hindu Law, an obstructed heritage, it nevertheless came to the joint family as joint family property liable to partition at the instance of any member of the family. Mr. Sen further argued that even if the property did not descend in joint tenancy but in tenancy-in-common, it had nevertheless been treated as joint property by the members of the family and ought, therefore, to have been included in the property partition of which was sought in 1908. It will be seen that this plea is altogether at variance with the position taken up by the defendants in the written statement in which they asserted that the shares were exclusively the property of Lachmi Narayan. It was nowhere admitted in the plaint that the property was joint family property in the strict sense of the term. In fact, the case of the plaintiffs seems to have been that this property was property in which each member of the family had a separate share, a fact which was recognized by Lachmi Narayan in the course of his administration of the estate by his handing over to them their share of the dividends. It was not proved that any such dividends had ever, as a matter of fact, been paid by Lachmi Narayan to any of the plaintiffs. However, the point we have to decide is a point which the defendants appellants did raise in the Courts below, namely, that the suit was barred by Order II, rule 2 and in order to ascertain whether any such bar exists, the real question which we have to decide is whether or not the property now in suit was properly liable to partition in the suit previously filed by the plaintiffs against the first four defendants. It appears, from such documentary evidence as we have on the record relating to this previous partition suit, that what the plaintiffs were claiming in that suit was nothing more nor less than their share of the joint ancestral property which had descended from their father Parsidh Rai. It is quite clear that the shares which we have now to deal with never at any time formed part of Parsidh Rai's estate. Now, no doubt, it is a general rule of law that every partition suit must embrace all the joint family property. At the same time, it is well recognized that there are certian exceptions to this general rule to which a reference will be found in paragraph 493, Mayne's Hindu Law (7th Edition). According to Mr. Mayne, every suit for partition should embrace all the joint family property unless (1) different portions of it lie in different jurisdictions in which case suits may be brought in the different Courts to which the property is subject; or (2) some portion of it is at the time incapable of partition as for instance from being in the possession of a mortgagee; or (3) is from its nature impartible as a *zemindari* governed by the law of primogeniture; or again (4) is held jointly with strangers to the family who have no

interest in the family partition and, therefore, cannot be made parties to the general suit for partition. This last exception is declared in the case of *Purushottam* v. *Atmaram Janardan* (1) and on behalf of the respondents in this case it is claimed that this ruling supplies the law which ought to be applied to the present case. The facts of that case may be briefly stated as follows:—

The plaintiffs and the first six defendants were members of the *Parashare* family and as such they were joint owners of certain *vritti* called *Parashare vritti*. They also owned jointly with another family the *Kandve* family a certain other *vritti* called the *Kandve Parashare vritti*. In 1881, the plaintiffs as members of the *Parashare* family sued the first six defendants who were also of the same family for partition of the *Parashare vritti* and other joint family property. They obtained a decree and recovered the share. A second suit was brought by these same plaintiffs against the other members of their family and also against the members of the *Khandve* family for partition of the *Khandve Parashare vritti*. The first six defendanes raised the plea which has been raised in the present suit, namely, that the claim was barred under section 43 of the (old) Code of Civil Procedure. The first Court disallowed this contention and gave the plaintiffs a decree. On appeal the decree was reversed by the District Judge, who held that section 43 did apply to the case. The decision of the District Judge was in turn reversed by their Lordships of the Bombay High Court who held that section 43 of the (old) Code of Civil Procedure was no bar to the suit. In his judgment Parsons J. says that section 43 applies only to claims arising out of the same cause of action and he pointed out that it could not be said that the claim of the plaintiffs to obtain their share of property owned jointly by themselves and *B.* was founded on the same cause of action as their claim to obtain their share of property owned jointly by them, and *B.* and *C.* He goes on to say at page 599 of the report that "Joint family property is the property owned by one family (*familia*) jointly amongst its own members . . . . Property which is held jointly by several families is not the joint family property of each of those families so that it would be compulsory upon each of them in suing its own member for a partition of their family property to include it in that suit or else not be allowed afterwards to sue for its share therein." Ranade, J., concurred in this judgment. He pointed out that the old suit was confined to the division of the property jointly owned by the *Parashare* family whereas the suit then before him related to the division of a *vritti* which was jointly owned by both the families of the *Parashares* and *Khandves*, the latter being entire strangers to the *Parashare* in respect of family relationship.

So it seems to us in the present case that, for the reasons laid down in the judgment just cited, it cannot be held that the present suit was barred by Order II, rule 2 of the Code of Civil Procedure. There is no question whatever that when succession opened to the estate consisting of these five shares after the death of *Musammat* Mamola in 1895, the persons who were entitled to these shares were not all members of the joint family of which Lachmi Narayan was at that time the head. It was admitted and it is beyond dispute that various collateral relations who were separate altogether from Lachmi Narayan and the members of his family were also entitled as heirs of Mamola's deceased husband Bakht Bahadur. It seems correct, therefore, to say that these shares were jointly owned by two separate families just as the *vritti* in the Bombay case was jointly owned by the two families of *Parashares* and *Khandves*. As we have stated before, what the plaintiffs sought in the previous partition suit was a division of the joint family property which has descended to the family from Parsidh Rai. That was a suit which the plaintiffs as sons of Parsidh Rai were entitled to bring and we think it clear that it was not possible for them to include in the property then sought to be divided property which had formed no part of Pardsidh Rai's estate and which only descended many years after Parsidh Rai had died. This latter property was in no sense the exclusive property of the joint family presided over by Lachmi Narayan and we do not see how any division of it could properly have been made without joining in it the collateral relatives who as a result of the previous litigation

(1) 23 B. 597.

must be taken to have held a share in it all along. These collateral relatives had no interest whatever in the joint ancestral property which had come down from Parsidh Rai and they could not, therefore, properly have been parties to the previous partition suit. For these reasons, therefore, we think it is clear that the plea of a bar under Order II, rule 2 is misconceived and was rightly rejected by the learned District Judge, although we do not desire to express any opinion as to the correctness of the ground upon which he decided the point. It has been urged on behalf of the appellants by Mr. Sen that although it is admitted that the collaterals have an interest in these shares, nevertheless the interest in them which was owned by the joint family of which Lachmi Narayan is the head was, *qua* that joint family property, which ought to have been brought into partition. We do not think that this contention is a sound one, because at the time when the previous partition suit was brought, the right of these collaterals was still in dispute. We have already mentioned that when the collaterals came forward in 1907, claiming an interest in these shares, their claim was resisted by the present defendants Nos. 1 to 4 upon the ground that the shares belonged exclusively to them; and this plea having been accepted by the Court of first instance the suit of the collaterals had been dismissed. That case was still pending in appeal when the present plaintiffs brought their suit for partition in 1903 and for this reason, we think it may well be said that the partition suit could not properly have embraced any claim in respect of the shares regarding which litigation was still going on and in which persons, who were entirely separate from the family of the plaintiffs and defendants Nos. 1 to 4, were claiming an interest. We do not consider it necessary for the purposes of this appeal to decide the question of law which was argued before us, namely, as to whether property which has come down to a joint family as obstructed heritage descends to them as property held in joint tenancy or in tenancy-in-common. All we are concerned to say is, that in our opinion whether or not the property now in question came down in joint tenancy or in tenancy-in-common, it could not have properly been included in the suit for partition which the plaintiffs brought against the first four defendants in the year 1908.

We, therefore, hold that Order II, rule 2 was no bar to the present suit and we direct that this appeal be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 44 OF 1911.

February 2, 1912.

Present:—Mr. Justice Sundara Aiyar.

GUDLAVELLARU VENKATARATNAM —DEFENDANT—PETITIONER

versus

VELLATHAMBI VENKATARATNAM— PLAINTIFF—RESPONDENT.

Contribution, suit for—Undissolved partnership—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41.

A suit for contribution will lie on the Small Cause side even where the debt in respect of which the decree was obtained was one relating to a partnership trade carried on between plaintiff and defendant jointly. To sustain a plea that the suit will not lie on the Small Cause side and that plaintiff's remedy was by asking for a dissolution of the partnership and the taking of its account, the defendant should allege and prove that the partnership is undissolved and continuing. In the case of a dissolved partnership, a suit for contribution is maintainable by a partner who has paid the whole of the debt.

Sadhu Narayana Iyengar v. *Ramaswami Iyengar*, 32 M. 203; 4 M. L. T. 475, 3 Ind. Cas. 486, followed.

In such a case, it would be open to the defendant to show that nothing was really due to the plaintiff according to the accounts of the partnership as they stood.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Kristna at Ellore, dated 29th September 1910 in Small Cause Suit No. 422 of 1910.

Mr. *T. Prakasam*, for the Petitioner.

Mr. *V. Venkataratnam*, for the Respondent.

JUDGMENT.—The suit in this case was for contribution. The plaintiff alleged that a decree for money was passed against him and the defendant jointly, that in execution the whole of the amount was levied from him and that the defendant is, therefore, liable to pay him half of the amount. The defendant set up the contention that the debt for which the former decree was passed related to a partnership trade conducted by the plaintiff and

the defendant jointly, that the plaintiff was, therefore, not entitled to recover the amount without an account being taken of the partnership transaction and that the suit was, therefore, not maintainable on the Small Cause side. The defendant did not say definitely in his written statement whether the partnership was a continuing one or not. As far as I am able to make out, his plea seems to have been that the partnership itself was dissolved, but that the account of the partnership had not been taken. If his case were that the debt sued for was only one item in a continuing partnership business, then probably he would be entitled to say that a suit is not maintainable for it separately, and that the plaintiff's remedy would be to ask for a dissolution of the partnership and the taking of its account. In the case of a dissolved partnership, this Court has held, in *Sadhu Narayana Iyengar* v. *Ramaswami Iyengar* (1), that a suit is maintainable for contribution by a partner who has paid the whole of a debt. No doubt, as pointed out in that case, it would be open to the defendant to show that nothing was really due to the plaintiff according to the accounts of the partnership as they stand. The decision in *Sadhu Narayana Iyengar* v. *Ramaswami Iyengar* (1), seems to me, if I may say so, to be in accordance with the current of recent decisions.

In this case, the defendant's Pleader seems to have taken the view that, if his client was entitled to show that the plaintiff should not have a decree because the partnership accounts would show that he could not claim the amount sued for then, the plaintiff would be bound to sue for an account of the partnership transactions, and he not being entitled to do so in a Small Cause Court, the suit for contribution would not lie in a Small Cause Court. This is apparently the reason why the written statement states that, as the plaintiff himself had received a larger portion of the debt collected from him in the former suit, the suit is not entertainable by the Small Cause Court.

Now, assuming that the suit for contribution would lie at all, my attention is not drawn to any Article in the Provincial Small Cause Courts Act, which would prevent a Small Cause Court from trying it. Article 41 which was relied on for the petitioner does not cover this case, and no other Article is relied on. On account of the view taken by the defendant's Pleader, no attempt seems to have been made to prove at the trial that on the merits the plaintiff was not entitled to a decree. It is not stated that the lower Court refused to receive any evidence that was offered. I have very little doubt that the Pleader was not content to take up the position that if the defendant would be entitled to show that on the merits the plaintiff should not have a decree, then the plaintiff would have no right to have the suit tried by a Small Cause Court. It was for the defendant in this case to allege that the debt collected from the plaintiff was only an item in an undissolved partnership. The plaintiff said nothing about a partnership, his allegation being that there having been a joint decree against him and the defendant and the amount of the decree having been collected from him solely, he was entitled to contribution against the defendant. This allegation is *prima facie* sound legally. The defendant has to disprove it by stating facts which would put the plaintiff out of Court, for this purpose. According to the dicision in *Sadhu Narayana* v. *Ramaswami Iyengar* (1), which is binding on me, the defendant would have to allege that the debt in question was a transaction in an undissolved partnership. If the partnership was dissolved, the defendant failed to allege and to prove that the plaintiff was not entitled to recover in the suit on the mertis. In this view, I must dismiss the petition.

Petition dismissed.

(1) 32 M, 203; 4 M. L. T. 475; 3 Ind. Cas. 486.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 21, 1912.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Raja DURGA PRASHAD SINGH—PLAINTIFF—APPELLANT

versus

BROJO NATH BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

*Digwari tenure—Nature and character of tenure—Title to mineral rights—*Zemindar *presumed to possess such rights—Suit by* zemindar *for declaration of right—Party—Government, whether necessary party.*

DURGA PRASHAD SINGH *v.* BROJO NATH BOSE.

A Digwari tenure is similar to a Ghatwali tenure. It was originally granted in consideration of the performance of military service, to which Police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government and is liable to dismissal by it for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

Where a *zemindar* does not part with his mineral rights to the Digwar, it must be presumed that those rights remain in the *zemindar*.

Kumar Hari Narayan Singh v. *Sriram Chakravarty*, 6 Ind. Cas. 785: 11 C. L. J. 653; 37 C. 723; 14 C. W. N. 746; 37 I. A. 136; 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; (1910) M. W. N. 309, followed.

The Government is not a necessary or a proper party to a suit brought by a *zemindar* against the Digwar for a declaration of his mineral rights, as the Government does not claim them under permanently settled estates.

Appeal from the judgment of the High Court at Calcutta, dated March 18, 1907, and reported as 34 C. 753; 12 C. W. N. 193, reversing that of the Sub-Judge of Manbhum, dated June 14, 1904.

Sir *R. Finlay*, *K. C.* Messrs. *Ross* and *Parekh*, for the Appellant.

Messrs. *L. De Gruyther*, *K. C.* and *Dunne*, for the Respondents.

JUDGMEMT.

LORD MACNAGHTEN.—The suit out of which the present appeal arises was brought by the *zemindar* of Pergunnah Jharia, a permanently settled estate, in order to establish his right to the minerals underlying *mouzah* Tasra and *mouzah* Rohrabund. The two *mouzahs* are within his *zemindari*. They are both held by the Digwar of Tasra on digwari tenure at a fixed rent of Rs. 64 per annum payable to the *zemindar*.

Digwari tenure is similar to Ghatwali tenure. It was granted originally in consideration of the performance of military service, to which Police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government and liable to be dismissed by the Government for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

In 1892, the Digwar of Tasra granted a perpeptual lease of the coal mines underlying the two villages. The lease became vested in the Tasra Coal Company, Limited. The Company took possession and raised and sold a large quantity of coal.

The *zemindar* asked for a declaration of right, an account and an injunction.

The Subordinate Judge of Manbhum gave judgment in favour of the *zemindar*. On appeal to the Calcutta High Court, that judgment was reversed and the suit was dismissed with costs.

The case was argued at considerable length in both the Courts below and fully discussed before this Board.

Two points, and two points only, were seriously argued. It was contended (1) that the Government ought to have been made a party to the suit, and that in the absence of the Government, the suit was defective and ought to be dismissed, and (2) that the Digwar had a proprietary right in the underground minerals.

The High Court decided both points in favour of the defendants.

In their Lordships' opinion, the Government is not a necessary or a proper party to this suit. Apparently, the Government does not claim the minerals under permanently settled estates. However that may be, the Government has never claimed the minerals under the two *mouzahs* or either of them, or put forward any claim inconsistent with the rights now asserted by the *zemindar*. The rights of the Government, whatever they are, will not be prejudiced or affected by the result of a suit to which it is not a party.

The second point seems equally clear. The two *mouzahs* are within the plaintiff's *zemindari*. Both the Courts below have so held. The Permanent Settlement was made with the *zemindar* of Jharia. No separate Settlement was made with the Digwar of Tasra, if there was a Digwar of Tasra at the date of the Permanent Settlemant, which seems more than doubtful. No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the Permanent Settlement if the lands were then held on Digwari tenure. Nor is there the slightest evidence tending to show or to suggest that the *zemindar* ever parted with his mineral rights to the Digwar. Mineral rights were vested in the Ghatwals of Pergunnah Sarhat in the north-western part of the Birbhum *zemindari*, but those Ghatwals paid their rent direct to the Government, and in other respects, they were in a very peculiar position. They were dealt with by Regulation XXIX of 1814. They obtained the right to lease the minerals by the Act V of 1859. With every respect to the learned

Judges of the High Court, no inference can be drawn from the circumstances of their case that the Digwars in Manbhum had similar rights or powers.

The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Sriram Chukrabutty* v. *Kumar Hari Narain Sinha* (1), which was afterwards reversed by this Board in *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (2). There certain persons, called Goswamis or Gossains, priests of a Hindu idol, to which a certain village had been assigned on a permanent *debutter* tenure at a small annual rent, granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this tribunal that it must be presumed that the mineral rights remained in the *zemindar* in the absence of proof that he had parted with them.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, and the decision of the High Court reversed, with costs, and the decree of the learned Subordinate Judge restored.

The respondents will pay the costs of this appeal.

Appeal allowed with costs.

Solicitor for the Appellant : Mr. *Edward Dalgado.*

Solicitors for the Respondents : Messrs. *Burton, Yeates* and *Hart.*

(1) 10 C. W. N. 425; 33 C. 54; 3 C. L. J. 59.

(2) 37 I. A. 136; 14 C. W. N. 746; 11 C. L. J. 563; 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 6 Ind. Cas. 785; 20 M. L. J. 569; 37 C. 723; (1910) M. W. N. 309.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1089 OF 1910.

January 3, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

NARNA BALAYYA—DEFENDANT—APPELLANT

versus

RUDRAVARAM VENKATAPPA AND OTHERS—PLAINTIFFS AND 1ST DEFENDANT—RESPONDENTS.

Mortgage—Decree for sale by subsequent mortgagee—Prior mortgagee's suit for declaration that sale must be subject to his right—Jurisdiction—Valuation of suit—Specific Relief Act (I of 1877), *s.* 42, *proviso.*

Where a mortgagee sued for a mere declaration that the mortgaged property should be sold under a decree for sale obtained by a subsequent mortgagee, subject to his own prior mortgage for Rs. 3,300: *Held*, that the Munsif's Court had no jurisdiction in the case.

Since a prior mortgagee can institute a suit for sale against a subsequent mortgagee, the suit for a mere declaration by the prior mortgagee would be opposed to the proviso to section 42 of the Specific Relief Act.

Second appeal against the decree of the District Court of Guntur, in Appeal Suit No. 171 of 1908, presented against that of the Court of the District Munsif of Ongole, in Original Suit No. 46 of 1907.

Mr. *T. Prakasam*, for the Appellant.

Mr. *P. Subramaniam*, for the Respondent.

JUDGMENT.—In this case the 2nd defendant, who had a mortgage of certain properties from the 1st defendant, instituted a suit on his mortgage and obtained a decree for sale. The plaintiff claiming to be a prior mortgagee entitled to a sum of Rs. 3,300 objected to the sale. The District Munsif, in whose Court proceedings in execution of the 2nd defendant's mortgage were going on, directed that notice should be given to intending bidders of the plaintiff's claim of a prior mortgage. No sale had yet been held. The plaintiff's suit is for a declaration that the 2nd defendant's sale should be subject to his mortgage for Rs. 3,300.

Two legal objections were raised by the 2nd defendant to the suit. The first objection is that the suit was beyond the jurisdiction of the District Munsif's Court as the amount claimed by the plaintiff as due to him on his mortgage, was more than Rs 2,500. This contention ought, in our opinion, to have been upheld. The District Judge considers that the matter in dispute in the suit should not be taken to be of a higher value than the amount for which the 2nd defendant obtained a mortgage decree, which was Rs. 264. It is difficult to understand how this view can be supported. If the plaintiff succeeds in his suit, he would establish a claim to the extent of Rs. 3,300 as against the 2nd defendant or rather against the mortgaged property over which the 2nd defendant has also a mortgage and if he fails in his suit, he would lose as against the 2nd defendant the right of enforcing a claim for Rs. 3,300. This case is not similar to cases in which it has been held that if the property itself is not worth the amount of the lien, the value

of the suit may be taken not to exceed the market-value of the property. We must hold that the suit ought not to have been instituted in the Munsif's Court.

The second objection raised was that the plaintiff was not entitled to institute a suit for a mere declaration as against the 2nd defendant.

Now, it is undoubted law that a prior mortgagee may institute a suit for sale against a subsequent mortgagee.

The plaintiff, therefore, was entitled to seek consequential relief against the 2nd defendant in the shape of a decree for sale.

The proviso to section 42 of the Specific Relief Act must, therefore, be held to bar the present suit.

The result is, that the decrees of the lower Courts must be reversed and the suit dismissed with costs throughout.

Appeal dismissed.

PRIVY COUNCIL.

ON APPEAL FROM THE MADRAS HIGH COURT.

February 21, 1912.

Present:—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

VASUDEVA MUDALIAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

SADAGOPA MUDALIAR—PLAINTIFF—RESPONDENT.

Procedure—Case remitted by Privy Council to High Court—Case pending in Court of Appeal—Limitation Act (IX of 1908), *s.* 31.

The Subordinate Judge held that to a suit upon a simple mortgage, the twelve years' rule of limitation, under Article 132 of the Limitation Act of 1877, would apply. The High Court, on appeal, held, that the sixty years' rule of limitation was applicable under Article 147. On appeal the Privy Council, on July 22, 1907, restored the former decision and remanded the case to the High Court for disposal. While the case was pending in the High Court the Limitation Act of 1908 was passed on August 7, 1908, which enacted that "no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable:"

Held, that this legislation applied to this suit, as the former judgment of the Privy Council did not end the suit which was remitted for inquiry upon allegations of fact, and when the new Limitation Act was passed, the suit was pending.

Appeal from the judgment of the Madras High Court, dated December 16, 1908.

Mr. *L. DeGruyther*, *K. C.* and Mr. *Kuffin*, for the Appellant.

Sir *R. Finlay*, *K. C.* and Mr. *Brown*, for the Respondent.

JUDGMENT.

LORD SHAW.—This is an appeal against the judgment of the High Court of Judicature at Madras, dated the 16th December 1908.

On the 23rd September 1899, a suit was brought in the Court of the Subordinate Judge of Negapatam, founded upon a certain mortgage of date the 22nd September 1883, and with the object of recovering the mortgage-debt by sale of the mortgaged property.

That Judge held that part of the claim was of a nature to which, under Article 132 of the 2nd Schedule of the Indian Limitation Act of 1877, the twelve years' rule of limitation would apply. The High Court on appeal, held, on the other hand, that the article applicable was Article 147, the sixty years' rule of limitation.

On appeal to this Board, the latter decision was reversed and the former restored. This occurred on the 22nd July 1907. The order itself by His Majesty in Council was dated the 12th August 1907.

It appears that the question is one upon which there has been much diversity of opinion in India, and conflicting decisions in the High Courts of Madras, Bombay, and Allahabad were referred to in this connection.

In view of the argument presented in this appeal, it is necessary to cite the exact terms of the former decision. They are these:—

"Their Lordships will humbly advise His Majesty that it should be declared that Article 132 is the Article which provides the rule of limitation applicable to this case, and that the case should be remitted to the High Court to be disposed of in accordance with this declaration." [*Vasudeva Mudliar* v. *K. S. Srinivasa Pillai* (1)].

A remit took place accordingly.

The reason for a remit is obvious. While the defendant had pleaded the limitation,

(1) 11 C. W. N. 1005; 17 M. L. J. 444; 4 A. L. J. 625; 6 C. L. J. 379; 2 M.L.T. 333; 9 Bom. L. R. 1104; 30 M. 426.

the plaintiff had alleged payments of interest and settling of accounts which avoided the limitation, and a remit was required for the purpose of having, *inter alia*, inquiry and adjudication on these matters of fact.

So standing the suit in the Court of Appeal, the Indian Limitation Act of the 7th August 1908 was passed. Its 31st section is in these terms:—

"Notwithstandiug anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second Schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable.

"(2). Where in the aforesaid territories the claim of a mortgagee for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty-second day of July 1907 and before the passing of this Act, either in a Court of first instance or of appeal, on the ground that a twelve years' rule of limitation applied to such claim, the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act; and on such restoration, the provisions of sub-section (1) shall apply."

The question in the present appeal is simple, and in a word, whether this supervenient legislation applies to this suit. That it was meant so to apply is fairly obvious from the citation of the date the 22nd July 1907, which is in fact the date of delivery of the previous judgment of this Board. Whether it does in fact so apply depends, as was admitted by the learned Counsel for the appellants, solely on whether the suit was or was not a suit pending at the passing of the Act.

Their Lordships do not entertain any doubt that it was. The former judgment of the Board did not end the suit; did not finally determine it. It was remitted to the High Court of Madras for further procedure, and for inquiry upon allegations of fact; and at the date of the Statute that procedure was not concluded and the inquiry had not indeed been entered upon. The suit in fact was neither adjudged upon nor even ready for judgment. Their Lordships express their concurrence with the opinions of the learned Judges of the High Court, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellants: Mr. *Douglas Grant*

Solicitors for the Repondent: Messrs. *Chapman, Walker* and *Shephard.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1439 OF 1910.

March 4, 1912.

Present:—Sir Ralph Benson, Judge and Mr. Justice Miller.

ANNATHURI IYER—PLAINTIFF—APPELLANT

versus

T. RAMANUJA CHARIAR—DEFENDANT—RESPONDENT.

Admissibility—Evidence—Sale—Description of house and site—Oral evidence—Evidence Act (I of 1872), s. 92.

Where a sale-deed purported to convey an upstair house standing on a certain site, which was also described and conveyed, and the vendor had no upstair house on that site but had one on the opposite side of the same street and no other in that town or elsewhere:

Held, that parol evidence was admissible to show that the house intended to be conveyed was the latter upstair house.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 221 of 1908, presented against that of the Court of the District Munsif of Vellore in Original Suit No. 177 of 1907.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

Mr. *T. R. Ramachandra Iyer*, for the Respondent.

JUDGMENT.—Two questions have been argued.

First, it is contended that parol evidence was wrongly admitted to show that the upstair house described in Exhibit G (item 2) was the house in reference to which the present dispute has arisen. It is clear from Exhibit G that the intention was to convey an upstair house, and that house is described as included in, *i.e.*, standing on a certain site which is also described and conveyed. When the document is applied to the facts existing at the date of the sale, it is found that the vendor had no upstair house on that site, but had one on the opposite side of the same street and no other in that town or elsewhere. Evidence has been admitted to show that he intended to convey that house. We think the evidence was admissible and that the words in the document which indicated that the house sold stood upon the side described must be regarded as mere description to be omitted from consideration. The second contention is that the *Tamil* word ('*kalan*') in the covenant on which the plaintiff relies is to be interpeted as meaning any dispute about the title, and not, as the lower Courts have held, as referring to a defect in the title. On this point, we think we must accept the interpretation of the District Munsif from which the District Judge has not dissented.

This second appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1783 OF 1910.

March 6, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

PANATHIL PARKUM MANKOOTTIL CHATHKUTTY NAIR—PLAINTIFF—APPELLANT

versus

KALATH CHANDU KUTTI NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree, questions to be decided in—Representative of deceased judgment-debtor—Suit for declaration—Maintainability.

All questions arising between the judgment-creditor and the legal representative of the judgment-debtor must be decided in execution. A suit for a declaration that the suit properties belong to the plaintiff's judgment-debtor is not, therefore, maintainable where the execution petition has been dismissed on the ground that the defendant is not the legal representative of the deceased judgment-debtor. Such a suit can lie only if a declaration that the defendant is such legal representative has been prayed for.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 119 of 1909, presented against the decree of the Court of the District Munsif of Quilandy, in Original Suit No. 930 of 1907.

Mr. *T. Richmond*, for the Appellant.

Mr. *T. R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—This suit has been rightly dismissed by the lower Appellate Court. The appellant holds a decree against one Cheriyakkan Nair; and after his death he sought to execute it against the present 1st respondent alleging that the property was in possession of the present 1st respondent as the judgment-debtor's representative. The petition for execution was dismissed on the ground that the present 1st respondent was not the legal representative of the appellant's judgment-debtor. Then the appellant instituted the present suit and in it he asks for a declaration that the property belonged to his judgment debtor. He alleges that the 1st defendant is the legal representative of the judgment-debtor, but he does not ask for a declaration that the 1st defendant is the legal representative of Cheriyakkan Nair. It is settled law that any question arising between the judgment-creditor and the legal representative of the judgment-debtor must be decided in execution. If the plaintiff wanted to establish that the present 1st respondent is the legal representative of his judgment-debtor, he might maintain the suit. That is not, however, the scope of his suit and we, therefore, think that the suit has been rightly dismissed.

The second appeal is dismissed with costs.

Appeal dismissed.

SHASHI BHUSHAN LAHIRI *v.* RAJENDRA NATH JOARDAR.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 173 OF 1909.

May 17, 1912.

Present:—Mr. Justice Brett and Mr. Justice N. Chatterjea.

SHASHI BHUSHAN LAHIRI—DEFENDANT—APPELLANT

versus

RAJENDRA NATH JOARDAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Dayabhaga—Stridhan—*Succession—Half-sister's son—Daughter's son of great-grandson of great-grandfather of woman's husband—Probate—Citation, issue of, whether gives right to oppose grant of Probate.*

Under the *Dayabhaga* law, a woman's half-sister's son is entitled to succeed to her *stridhan* in preference to the daughter's son of the great-grandson of the great-grandfather of the woman's husband.

The mere fact that it was stated in an application for Probate that a certain party had applied for Letters of Administration to the estate of the testatrix, and that the Court had issued a citation upon him, would not entitle him to come in and oppose the grant of Probate, if it was found that he had no interest in the estate of the deceased.

Chhatu Kurmi v. *Raja Ram Tewari*, 3 Ind. Cas. 374; 11 C. L. J. 124 (F. B.), distinguished.

Appeal from the decree of the District Judge of Nadia, dated February 6th, 1909.

Mr. *B. K. Lahiri*, Counsel, Babus *Narendra Kumar Bose*, *Upendra Nath Bagchi* and *Hira Lal Sanyal*, for the Appellant.

Babus *Golap Chandra Sarkar* and *Satindra Proshad Ghose*, for the Respondents.

JUDGMENT.

N. CHATTERJEA, J.—This appeal arises out of an application for Probate of the Will of one Adya Sundari Debi, who bequeathed her properties to the three respondents who were her paternal relations and appointed them executors, one of them Charu Chander being related to her as her half-sister's son. The appellant, Shashi Bhushan Lahiri, was the daughter's son of the great grandson of the great-grandfather of Adya Sundari's husband, Ram Kanai Moitra. The appellant had applied for Letters of Administration to the estate left by Adya Sundari before the application for Probate of her Will was made by the respondents.

Therefore, in the proceedings on the application for Probate citation was issued upon the appellant and he put in a petition of objections contesting the genuineness and validity of the Will and also alleging that the estate belonged to Adya Sundari's husband which she had no power to dispose of by Will. The learned District Judge held that he was not entitled to oppose the grant of Probate and, after taking formal evidence of the execution of the Will, granted Probate to the respondents. Shashi Bhushan has appealed to this Court.

Before Shashi Bhushan can contest the Will, he must show that he has an interest in the estate of Adya Sundari. If the estate dealt with by the Will belonged to her husband, the grant of Probate of the Will executed by her cannot affect the rights of the heir of her husband, and the Court of Probate, of course, has no power to go into the question whether the estate belonged to Adya Sundari or her husband.

It has accordingly been contended on behalf of the appellant Shashi Bhushan, in this appeal, *first*, that assuming that the estate belonged to Adya Sundari over which she had a disposing power, the respondent Charu Chander, as the half-sister's son of the deceased, was not her heir in preference to him and, *secondly*, that citation having been issued upon him, the Court below is wrong in holding that he had no *locus standi* to oppose the grant of Probate.

The question, therefore, arises whether Charu Chandra, as the half-sister's son of the testator, is the heir to the *stridhan* of Adya Sundari. If he is, then the appellant, Shasi Bhushan, has no *locus standi* to contest the Will.

The parties are governed by the *Dayabhaga* School of Hindu law. The *Dayabhaga*, in dealing with the succession to the separate property of a childless woman, after enumerating certain heirs down to the husband, says as follows:—"On failure of heirs down to the husband, this rule is again provided which Vrihaspati thus delivers: 'The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother in-law and the wife of an elder brother are pronounced similar to mother. If they have no issue of their bodies nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property'." (See Dayabhaga, Chapter IV, Section III Verse 31).

The sister's son is expressly named as an heir in the above text of Vrihaspati and the

only question is whether a half-sister's son is included in the expression "sister's son." This question was raised in the case of *Dasharathi Kundu* v. *Bepin Behari Kundu* (1), and it was held in that case that "sister's son" includes a half-sister's son and that under the *Dayabhaga* a step-sister's son is entitled to succeed to a woman's *stridhan* in preference to her husband's elder brother. That is a direct authority against the appellant's contention. In that case the learned Judges, with reference to the translation of the expression "sister's son" in Vyavastha-Darpana, as own sister's son pointed out that the author probably used the words "own sister's son" as contra-distinguished from the woman's husband's sister's son, who is the next in order in the table of succession. In the case of *Bholanath Roy* v. *Rakhal Dass Mukerjee* (2), it was held that under the Bengal School of Hindu law, sons of sisters of the half blood are entitled to succeed equally with sons of sisters of the whole blood to the property of a deceased brother. That case, no doubt, related to the question of succession to a male owner but it is an authority for the proposition that the expression "sister's son" includes a half sister's son, and that there is no difference between the son of a sister of the whole blood and the son of a sister of half blood.

It is pointed out, however, on behalf of the appellant that the rival wife's son is expressly mentioned as a son in the Dayabhaga (Chapter IV, Section III, Verse 32) and that if it had been meant to include the son of a sister of the half blood in the expression "sister's son", it would have been expressly so stated. But no argument can be based upon this ground. The word "brother" in the well known text of Yajnavalkya relating to the succession of a male owner dying without male issue is applicable to a brother of the whole blood as well as to a brother of the half blood. The fact of being a male offspring of one common parent makes one a brother (see Srikrishna's Commentary on the Dayabhaga, Chapter XI, section 5 paragraphs 7-12). There is, no doubt, a distinction between brothers of the whole blood and those of the half blood, but the former confers a greater amount of spiritual benefit.

(1) 32 C. 261; 9 C. W. N. 119.
(2) 11 C. 69.

In the case of a sister's son, according to some authorities, (see Colebrook's Digest Book V, Chapter 8, section 1), there is no difference in the amount of spiritual benefit conferred by a full sister and a half sister respectively and therefore, they inherit together and although a different view is taken by some other authorities, the above view is "respected and followed" (see Shyama Charan Sarkar's Vyavastha Darpana, 2nd Edition p. 268). In the Dayakrama Sangraha, Chapter I, Section X, Verse 1, in dealing with the question of succession to a male owner, Srikrishna Tarkalankar says:—"According to Acharya Chudamani, the son of the proprietor's own sister and the son of his half sister have an equal right of inheritance." Srikrishna's recapitulation of the line of inheritance in which a different view is alleged to have been taken and the difference in the copies of the recapitulation, were disscused in the case of *Bholanath Roy* v. *Rakhal Dass* (2) cited above, and it was there held that Srikrishna's opinion was the same as that of Acharya Chudamani.

As already pointed out, it was held, in the case of *Dasharathi Kundu* v. *Bepin Behari Kundu* (1), that the half-sister's son is entitled to succeed in preference to the husband's elder brother. Even if the half sister's son does not stand in the same position as the full sister's son, he is entitled to succeed in preference to the appellant who is the daughter's son of the great-grandson of the great-great-grandfather of the deceased. The latter accordingly is not the heir of Adya Sundari and has no *locus standi* to oppose the grant of Probate. This disposes of the first contention.

The second contention also has no force. The mere fact that it was stated in the application for Probate that the appellant had applied for Letters of Administration to the estate of the testatrix, and that the Court had issued a citation upon him would not entitle him to come in and oppose the grant of Probate if it is found that he has no interest in the estate of the deceased. The case of *Ohhatu Kurmi* v. *Raja Ram Tewari* (3) relied on by the appellant has no application to the facts of the present case. There the relationship of the caveator with the testa-

(3) 11 C. L. J. 124; 3 Ind. Cas. 374.

trix was admitted, and the caveator would have succeeded if it had been proved that the testatrix was not a degraded woman. He wanted to cross-examine the witnesses for the petitioner for Probate to show that the deceased was not degraded ; his title to succeed depended upon the question whether the woman was degraded or not, he was a party to the proceeding and he had certainly a right to cross-examine the witnesses. In this present case, Charu Chunder, being the heir of Adya Sundari had she died intestate, the appellant had no interest in her estate and had no *locus standi* to contest the Will.

The appeal accordingly fails and is dismissed with costs three gold *mohurs*.

BRETT, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 39 OF 1911.

May 17, 1912.

Present:—Mr. Justice Tudball and Mr. Justice Chamier.

ASGHAR HUSSAIN—PLAINTIFF—APPELLANT

versus

PAL AHIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Occupancy-holding mortgaged as a fixed-rate tenure—No objection by the judgment-debtor tenant at the time of suit or sale by the mortgagor.

An occupancy-tenant mortgaged his holding to the *zemindar* describing the holding as a fixed-rate tenure. Subsequently in execution of a decree, obtained on the foot of this mortgage, the holding was sold and purchased by a stranger. No objection was raised either in the suit or in the execution proceeding that the holding was an occupancy-holding and not a fixed-rate tenure:

Held, that subsequently it did not lay in the mouth of the judgment-debtor tenant to say that it was an occupancy-holding and as such not transferable.

Letters Patent Appeal against the decision of Mr. Justice Richards, dated the 17th March 1911 in S. A. Nos. 330 of 1910. See 10 Ind. Cas. 145.

Dr. *Satish Chandra Banerji*, for the Appellant.

Mr. *Muhammad Ishaq Khan*, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal has arisen are as follows: The predecessors-in-title of the defendants-respondents were occupancy-tenants of a certain holding. On the 4th of June 1835, they mortgaged this holding *describing it as a fixed-rate* tenure in favoure of *the zemindar of the village*. A suit was brought to enforce the mortgage in December 1895 and on the 27th of July 1896, a decree for sale was passed. On the 23rd of August 1897, the property was sold *as a fixed-rate tenure* and was purchased by the plaintiff a stranger to that suit. The judgment-debtors objected to the *zemindar* being allowed to bid at the sale. On the 2nd of November 1897, a sale-certificate was granted to the plaintiff. From that date up to the 16th of October 1908, the plaintiff had been in possession of the holding paying rent to the *zemindar*. On the latter date, he was dispossessed by the defendants, who asserted that the land was their occupancy-tenure. Hence the present suit was brought by the plaintiffs to recover possession. The Court of first instance and the lower Appellate Court decreed the claim. On second appeal to this Court, the learned Judge, before whom the case came, dismissed the suit holding that as a right of occupancy could not be sold in execution of a decree, the plaintiff acquired no title to the holding and, therefore, he was not entitled to a decree in a suit for ejectment against the defendants. Two points are pressed before us. The *first* is that the judgment-debtors are estopped from saying that the tenure was an occupancy-tenure and not a fixed-rate tenure, and, *secondly*, even though no title passed to the plaintiff by the auction-sale, still on the 16th of October 1908, the defendants had no title themselves and, therefore, the plaintiff is entitled to a decree for possession against them on the strength of his possessory title. We think both these contentions are sound. It is clear that the defendants as well as the *zemindar* gave out that the tenure was a fixed-rate tenure, that is, one transferable in execution of a decree. The judgment-debtors in the mortgage-suit raised no objection whatsoever, either in the course of the suit or in execution proceedings, on the ground that the tenure was not transferable under law. The plaintiff, acting on the belief that the tenure was a fixed rate tenure as stated by the parties to the mortgage-deed and the mortgage-suit, purchased it. We think that it does not lie in the mouth

of the defendants to say now that the tenure was not a fixed-rate tenure. Furthermore, it is quite clear that for about eleven years the defendants had been out of possession. The plaintiff has held possession and has been accepted by the *zemindar* as a tenant and has paid rent for the holding. Any right which the defendants had as tenants disappeared long ago, and when on the 16th of October 1908, they dispossessed the plaintiff, the latter had at least a possessory title, while the defendant had no title whatsoever. On the basis of his possessory title alone the plaintiff would be entitled to a decree. We allow this appeal, set aside the judgment of the learned Judge of this Court and restore the decree of the lower Appellate Court. The plaintiff will have his costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 586 OF 1909.
May 3, 1912.
Present:—Mr. Justice Stephen and
Mr. Justice Richardson.
KONNORMAL OSWAL AND ANOTHER—
DEFENDANTS—APPELLANTS
versus
NAB.N CHANDRA DAS AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

Party—Auction-purchaser, whether necessary party—Application to set aside sale—Confirmation of sale—Transfer of Property Act (IV of 1882), s. 54—Delivery of possession, what is.

An auction-sale cannot be set aside after it has been confirmed in a proceeding to which the auction-purchaser is not a party.

Surendra Mohini Debi v. *Loharam Chattopadhaya*, 14 Ind. Cas. 67; 16 C. W. N. 570, distinguished.

Sharofan v. *Mahomed Habibuddin*, 10 Ind. Cas. 148; 13 C. L. J. 535; 15 C. W. N. 685, referred to.

The defendant purchased property worth less than Rs. 100 at an auction-sale in execution of a decree against the plaintiff. In 1898, he executed an unregistered document on plain paper in favour of the plaintiff in which he, the defendant, admitted that the property was the plaintiff's property and that he agreed to hold possession as a tenant for five years; it was also agreed afterwards to make the property over to the plaintiff, and that after the lapse of five years, the entire rights should vest in the plaintiff. In a suit by the plaintiff to recover possession:

Held, that, under section 54 of the Transfer of Property Act, the delivery of possession was an alternative to the execution and registration of a document which was an act formal in a high degree, that the document did not amount to a delivery of possession by the defendant to the plaintiff, and that the plaintiff did not acquire any title by means of the document.

Appeal from the decree of the Sub-Judge of Nowgong, dated December 14th, 1908, affirming that of the Munsif of that place, dated September 24th, 1907.

Babu *Girija Prosanna Roy Chowdhury*, for the Appellants.

Babu *Hem Chandra Mitra*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued to recover possession of certain lands. The lands were sold to the predecessor of the defendants at an execution sale following a money-decree on the 5th of January 1893. The sale was confirmed in March of the same year. An application was made by the judgment-debtor to set aside the sale. It failed in the first Court; but on appeal the sale was set aside by an order of the 14th June 1893. The auction-purchaser was no party to the appeal in which the sale was set aside. The first question, therefore, which arises is whether the title which vested in the auction-purchaser in consequence of the execution sale was ever taken away from him. The case of *Surendra Mohini Debi* v. *Loharam Chattopadhaya*, (1) is an authority for holding that the auction-purchaser was not a necessary party to those proceedings. The present case, however, is distinguished from that one by the fact that before the sale was set aside, it had been confirmed in favour of the auction-purchaser, a feature which is absent in the reported case. The effect of this confirmation seems to have been to complete a title in the auction-purchaser which was before inchoate and make absolute that right which was only provisional. This view is consistent with the decision in the case we have just mentioned. It is also borne out by the judgment of Mookerjee, J., in the case of *Bibi Sharofan* v. *Mahomed Habibuddin* (2). The title, then, having become absolute in the auction-purchaser on the confirmation of the sale, can it be said that he was deprived of it by proceedings to which he was no party? We know of no authority for saying that this can be so. There is a question in this case as to the respective dates of

(1) 16 C. W. N. 570; 14 Ind. Cas. 67.
(2) 10 Ind. Cas. 148; 13 C. L. J. 435; 15 C. W. N. 685.

the institution of the proceedings to set aside the execution sale, and the confirmation of the sale, and we do not know which of these occurences was the first, but we see no reason for treating the rights, which the auction-purchaser got by the execution-sale, as anything less than absolute. We, therefore, hold that the title vested in the auction-purchaser on the confirmation of the sale, and the subsequent proceedings in relation to the sale have not in any way diminished his rights.

We then come to the second point in the case, which is a document, dated the 15th of April 1898. In that document, the defendant admits that the premises are the properties of the plaintiff. He agrees to hold possession of them practically as a tenant for five years, and afterwards to make them over to the plaintiff. The rent, which will accrue in respect of these premises, is to go to satisfy a debt due from the plaintiff to him and defendant agreed that after the lapse of five years, "the entire rights to the said house and land should vest in the plaintiff." What effect are we to give to this document? It is clear that under the provisions of the Transfer of Property Act, it cannot be treated as a conveyance, because for one reason, it is not registered. Does it amount to a delivery of possession under section 54, the property being of less value than Rs. 100? We are of opinion that it does not.

It is argued that the defendant being in possession of the lands says, substantially, to the plaintiffs: "Henceforth I am your tenant," that thereupon he becomes his tenant and his possession becomes the possession of the plaintiff. We cannot hold that this is a delivery under the section in question. The delivery there is an alternative to the execution and registration of a document which is an act formal in a high degree. We consider that the delivery must at all events be something more formal than what is put forward in this case. We accordingly hold that the plaintiff has not made out his title either by reason of the setting aside of the execution sale or the execution of the document.

The result, therefore, is that this appeal is allowed, the judgment and decree of the lower Appellate Court are set aside and the suit is dismissed. The appellant is entitled to his costs in this Court and in the Courts below.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1277 OF 1910.

April 4, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

AIYAGARI NARAYANAMURTY—DEFENDANT—APPELLANT

versus

DHALIPALA VENKATARAMAYYA—RESPONDENT.

Civil Procedure Code (Act V of 1908). s. 11—Res judicata—Appellate Court not recording findings on some points—Vakil not arguing some points—Absence of finding on those points.

Where an Appellate Court, in the exercise of its discretion, omits to record findings on certain points raised in the case, on the ground that they were unnecessary for the decision of the case, its judgment does not, in respect of those points, operate as *res judicata.*

Sheosagar Singh v. *Sitaram Singh*, 24 C. 616; 24 I. A. 50; 1 C. W. N. 297, referred to.

Quære:—Whether, when an appellant in a Court of appeal does not argue against the findings on some of the points and confines his arguments to some particular issues, the decision of the Appellate Court, which goes against him, will be *res judicata* on the points not argued?

Second appeal against the decree of the Subordinate Judge of Ellore, dated 21st December 1909, in A. S. No. 150 of 1909, presented against the decree of the Additional District Munsif of Tanuku, in O. S No. 42 of 1908

FACTS.—The facts of the case are sufficiently clear from the following judgment of the lower Appellate Court:—

The suit out of which this appeal arose was instituted for recovery of possession of the suit lands with past and future mesne profits.

2. The suit property among others originally belonged to one Ramappa. She had two daughters, by name Gunnamma and Peramma. Their respective husbands were Kailasam and Lingayya. Ramappa sold her properties to her sons-in-law, the aforesaid Kailasam and Lingayya. In Original Suit No. 566 of 1880 on the file of the District

Munsif's Court of Tanuku, the two daughters sued for a declaration that the alienation by their mother in favour of their husbands was not valid and binding on them. Therein they prayed for immediate possession of the properties sold to the sons-in-law. They were unsuccessful both in the Original and Appellate Courts and the sale-deeds in favour of the two sons-in-law by Ramappa were found to be transactions binding on the two daughters.

3. While the sons-in-law were in enjoyment of the properties, the former (Kailasam) sold a portion to one Bapayya, who brought Original Suit No. 232 of 1892 on the file of the Tanuku District Munsif's Court against Kailasam's widow Gunnamma and his brother's son for recovery of the lands sold to him. In that suit a compromise was effected whereby it was agreed that Bapayya, the purchaser, should take 35 cents of the land sued for and that the remaining acre 1—25 cents, which now forms the subject-matter of this suit, should be enjoyed by Gunnamma in lieu of her maintenance till her death and that afterwards it should go to the plaintiff.

4. Subsequent to the compromise in the said suit, the 1st defendant herein became the purchaser of the very same properties from Gunnamma's sister, Peramma, who alleged to be the heiress of the deceased Gunnamma. Hence the suit out of which this appeal arose.

5. The District Munsif decreed the plaintiff's claim. Hence this appeal by the 1st defendant.

6. The first question arising for determination in this appeal is whether the *razinama* decree in Original Suit No. 232 of 1892 on the file of the Tanuku District Munsif's Court was true and whether the sale by Gunnamma's sister is sustainable or not. The *razinama* decree therein is marked Exhibit B in this suit. It clearly stated that on the death of Gunnamma the present plaintiff should obtain possession of the properties. According to the said *razinama* decree, Gunnamma had only right to enjoy the properties till her death on account of her maintenance. In such circumstances, Gunnamma's sister had no right to sell the properties to the 1st defendant herein.

7. The second point argued in this appeal was that Gunnamma inherited the properties from her father and, therefore, her mother Ramappa had no right to sell the properties to her sons-in-law Kailasam and Lingayya. I have already stated in para. 2 *supra* that the District Munsif of Tanuku and on appeal the District Judge of Rajahmundry held that the sales made by Ramappa in favour of her sons-in-law were true and *bona fide* and binding on the ground that they were effected in order to discharge the debts contracted by her husband and herself as well. When once it was found that the properties in question had become the properties of Kailasam and Lingayya, the 1st defendant is now estopped from saying that such alienations by her were not binding on Gunnamma.

8. That was a suit brought by the two daughters of Ramappa. In such a suit their right was found against. Hence that decree was binding on Gunnamma and, therefore, her sister had no right to sell the properties to the 1st defendant herein.

9. The third point argued in this appeal was that the arrangement made in Original Suit No. 232 of 1892 between Gunnamma and the present plaintiff was not binding on the 1st defendant's vendor. She was, no doubt, not a party to it. But I find that it is binding on her inasmuch as her predecessor-in-title was bound by it. Therein Gunnamma clearly stated that the property should go to the plaintiff herein after her death.

10. These are the only points argued in this appeal.

11. This appeal fails and is dismissed with costs."

Mr. *P. Narayanamurti*, for the Appellant.

Mr. *V. Ramesam*, for 1st Respondent.

JUDGMENT.—In this case, the judgment of the Subordinate Judge is based on the finding on the 2nd issue, *viz.*, whether defendants are estopped from asserting that their vendor got the suit property from her father under the decree in O. S. No. 566 of 1880 on this Court's file and whether it is a collusive decree. He finds that, as a matter of fact, the decree in that suit is *res judicata*. In coming to this conclusion, he proceeds on what is apparent-

ly a misreading of the judgment of the Appellate Court in that suit. He says that the Appellate Court in the above-mentioned suit decided: "that the sales made by Ramappa in favour of her sons-in-law were true and *bona fide* and binding on the ground that they were effected in order to discharge the debts contracted by her husband and herself as well." There is no such finding in the judgment of that Court. All that is found there is that the sales made in favour of the sons-in-law were genuine, and, having regard to the scope of the suit, that finding was enough to dispose of the case against the plaintiff in that suit. The only difficulty that arises in the appeal before us, is whether the question regarding the binding character of the sale-deed was raised in the previous suit before the Appellate Court or not. The Subordinate Judge, who heard the appeal in the suit of 1880, mentions two points, one of them being the question regarding the genuineness of the deed, as the points which he had to decide in that appeal, but does not say that those were the only points raised in the appeal. We are not prepared to hold that other points were not argued before him, including the question whether the sale-deed was binding or not. We need not, therefore, decide the somewhat difficult question of law whether, when an appellant has not argued against the findings on some of the points and confines his argument in the Appellate Court to some particular issues, the decision of the Appellate Court which goes against him will be *res judicata* on the points not argued. We cannot say that, in the present instance, the omission to decide the question of the *bona fides* and binding character of the sale-deed in favour of the son-in-law was due to the view which the appellant's Pleader in that case took of his client's case or to the fact that the Appellate Court thought that it was not necessary to go into questions other than the genuineness of the sale-deed. If the omission was, as is quite possible, owing to the discretion exercised by the Appellate Court in not going into any unnecessary question, then the decision in *Sheosagar Singh* v. *Sitaram Singh* (1) covers the case and the judgment is not *res judicata* on the points not decided. We, therefore, set aside the judgment of the lower Appellate Court and remand the case for disposal according to law on the other issues in the case on the evidence on record. The lower Appellate Court will also find on the question whether the sale-deed was made for purposes binding on the appellants in the previous case. On this issue, the parties will be permitted to adduce fresh evidence. Costs will abide the result.

Appeal allowed.

(1) 24 C. 616; 24 I. A. 50; 1 C. W. N. 297.

MADRAS HIGH COURT.

CIVIL APPEAL No. 169 OF 1908.

April 19, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

ANNAVARAPU NANCHARAMMA AND ANOTHER—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—RESPONDENTS.

Hypothecation—Instalments—"Due," meaning of—Failure of instalment—Right to claim whole debt.

An instalment hypothecation bond executed by the defendant to the plaintiff contained the following stipulation:—

"I agree that if I fail to pay the said balance of purchase-money with interest thereon .....according to the terms herein before contained, it shall be lawful for the said Collector on behalf of the Secretary of State to sell the said lands and apply the proceeds of such sale in or towards the payment and satisfaction in the first place of the expenses of such sale and then of the amount due or owing by me on account of the said balance of purchase-money, etc., etc.":

Held, that the word '*due*' in the said bond meant *payable*, and that the creditor could in default of any instalment claim only the overdue instalments and not the entire balance due on the bond.

Appeal against the decree of the District Court of Guntur, in O. S. No. 44 of 1905.

FACTS.—The facts of the case are clear from the following judgment of the lower Court:

In the auction held by the Collector of Kistna of certain Government lands in the Tenali Taluq on 29th and 30th April 1901, 1st defendant's husband (Annavarapu Pundareekakshudu) bought 171 acres and 73 cents in the village of Adavalduri and acres 44.45 cents in the village of Allaparru

for Rs. 8,918. Out of the sale amount 1st defendant's husband paid Rs. 1,466, and for the balance of Rs. 7,452, he executed to plaintiff the registered hypothecation bond sued on and, dated 10th June 1901 hypothecating the said 2 sets of land as also 3 acres, 14cents already belonging to him in Bapatla and stipulating for the payment of the money in 8 annual instalments payable on 1st February of each year commencing with 1st February 1902 with interest at 4 per cent. per annum and for plaintiff's power of sale and other terms in the event of default. First defendant's husband died on 25th July 1901.

Alleging payment of the 1st instalment only (on 5th February 1902) and the sale by plaintiff of the said 2 sets of land, after notice under the power reserved in the document, for Rs. 208 only and crediting the same and another item of Rs. 6, plaintiff sues to recover, by the sale of the said 3 acres 14 cents and from the assets of 1st defendant's husband the entire balance of Rs. 8,171-9-11, calculating interest at $6\frac{1}{4}$ per cent. per annum, the higher rate of interest provided for in the document in case of default, from the date of sale itself (30th April 1901)

The plaint was presented on 16th December 1905 with 1st defendant as the sole defendant.

The 1st defendant as sole defendant put in a written statement on 10th February 1906, denying that she came into possession of any assets of her husband.

She stated that her husband left a Will bequeathing his properties to certain legatees, with injunction to pay this debt and thus she has come into possession of certain properties which are not liable for plaintiff's claim and that plaintiff should implead the said legatees.

She further pleaded that the right to sue for instalments 5—8 had not accrued to plaintiff on date of suit, that there was no undertaking to pay the full amount in case of default of payment of any one instalment and that the higher rate of interest could be claimed at the most from date of default, and contended that the mortgaged properties (the said 2 sets of lands) were not properly sold after giving proper notice to proper persons, that the lands were in consequence sold for a very low price and that plaintiff was liable to this defendant in damages which should be ascertained herein and credited.

Upon 1st defendant's said plea, the legatees named by her were brought in as defendants Nos. 2—6.

Of these, 2nd defendant contends that the suit for a portion of the money is premature, that the sale as alleged by plaintiff is *ultra vires* and void for several reasons, that 1st defendant fraudulently got the lands purchased in her brother's name to defeat the claims of the other legatees, and committed other frauds in relation to the legacies, that plaintiff could get no relief against the legatees, in the absence of an adminstration suit and that this defendant is not a necessary party to the suit now.

Defendants Nos. 3 and 4 have put in similar written statements.

Fifth defendant denies any interest in himself.

Sixth defendant also disclaims interest as legatee and asserts the legality of the auction-purchase which he says he made for himself.

It appearing that 7th defendant was set up by 1st defendant as adopted son, plaintiff brought him on the record on 2nd December 1907. First defendant was appointed his guardian, but no written statement was put in on his behalf.

The following issues were framed by one of my predecessors on 22nd August 1906:—

(1) Whether the suit bond is true and supported by consideration ?

(2) Whether the right to recover the last 4 instalments of the bond accrued to plaintiff at the time of the institution of the suit ?

(3) Whether the re-sale held by the plaintiff was irregular and fraudulent ? If so, what damages have accrued in consequence thereof ?

(4) Whether plaintiff has no right in this suit to proceed against other than mortgaged properties to the prejudice of the legatees ?

(5) Whether the suit is bad for non-joinder of other legatees ?

(6) Whether 5th defendant and 6th

defendant are necessary parties to the suit ?

(7) What relief is plaintiff entitled to ?

First Issue :—The execution of the suit document, Exhibit A, by 1st defendant's husband is proved by the writer and attestor, plaintiff's 1st witness. Consideration is denied by no one. Nor would such a plea hold good, as the hypothecation was made for the unpaid purchase-money, Rs. 7,452. Having bought the lands, 1st defendant's husband hypothecated them and the plaint item (the land in Bapatla) for the debt. It is true that in para. 5 of 1st defendant's written statement there is a frivolous statement that there was no consideration as no regular sale-deed was executed. But this objection seems to have been properly given up and at any rate was not pressed before me. Plaintiff's very acceptance of the properties in mortgage, their being sold and purchased by 1st defendant's brother, 6th defendant, as 1st defendant's properties and part payment and other treatment by both parties leave no room for question in the case ; and I am not able to say more in the absence of further elicitation.

I find the issue in the affirmative.

Second Issue.—Omitting the details as to the instalments, the 4 per cent. rate of interest and the mortgaged properties, the material p rtion of Exhibit A is as follows:—"and I agree that if I fail to pay the said balance of purchase-money with interest thereon at the rate aforesaid or any part thereof respectively according to the terms therein before contained, it shall be lawful for the said Collector, on behalf of the Secretary of State, etc., to sell the said lands and the *ryotwari* rights therein and to apply the proceeds of such sale in or towards the payment and satisfaction, in the first place, of the expenses of such sale and then of the amount due or owing by me on acconnt of the said balance of the purchase-money with interest thereon at 6$\frac{1}{4}$ per cent. per annum ; or otherwise to recover from the said land or me or my representatives the balance then due in respect of the said balance of purchase money with interest thereon at such last mentioned rate."

Admittedly, the 2nd instalment due on 1st February 1903 was not paid, nor any subsequent instalment since. For payment of the amount of the second instalment, 1st defendant applied to the *Tahsildar* on 12th May 1903 (Exhibit G) for time till 1st February 1904. This was granted to her (see Exhibit G1, dated 25th May 1903). It was not paid accordingly and so, after notice Exhibit C to 1st defendant, the 2 sets of land were sold on 26th and 27th February 1904 and struck down in favour of 6th defendant whose bid, in all Rs. 208, was the highest (see Exhibit E and plaintiff's 2nd witness). The sale was confirmed by the Sub-Collector.

Then, for the balance of purchase-money, deducting the payments or credit as aforesaid, has the cause of action accrued or not ? Defendants Nos. 1 and 2 contend it has not.

As I construe Exhibit A, it seems to me that the first portion of the above extract in para. 7 does empower plaintiff to sue for the full amount when there has been default in payment of any part of the *balance of purchase-money* (for which Exhibit A was passed) as stipulated for.

I, therefore, find the issue in the affirmative.

Third issue.—The contention of defendants Nos. 1 and 2 is that the sale is *ultra vires* and void because,—

(1) the notice, Exhibit C, is not a notice satisfying the requirements of clause (1) of the proviso to section 69, Transfer of Property Act, and no notice satisfying those requirements was given on the expiration of the extended time granted till 1st February 1904 under Exhibit G1;

(2) the sale proceedings were irregular as they were conducted on the footing of an arrear of revenue and not for dues under a mortgage with power to sell;

(3) there was not sufficient publication and the sale amount was unduly low and thus enormous loss has accrued to the estate.

While I am inclined to think that there is some force in these objections, I am of opinion that under section 69 the point need not be determined in this suit as desired by defendants Nos. 1 and 2. The expression "any person damnified may have his remedy in damages" does not, in my opinion, necessarily cast on the Court the duty of ascertaining the damages and deducting the same from the amount of debt claimed.

Fourth issue.—There is the personal liability and it is not barred by limitation. Therefore, plaintiff is entitled to a decree under section 88, Transfer of Property Act, with liberty to apply for a decree under

section 90 [see *Damodar Sakarchand* v. *Vyanku Gangu Ram* (1).] Nothing more need be done now.

Fifth issue.—The legatees were set up by 1st defendant, and plaintiff, to avoid any possible defect, brought in all the persons named by 1st defendant in her list, dated 11th February 1906. Whether other legatees exist or not is not known. The Will itself is not produced and no legacy is proved. If there are legatees, plaintiff is interested in proving the debt even against them in order that there might be no impediment when he proceeds against the assets. But he has joined all those whose names were disclosed.

So, I find the issue in the negative.

Sixth issue.—Fifth defendant was given out by 1st defendant as one of the legatees.

Plaintiff had no other means of knowledge and he had to remove all defect of parties. If 5th defendant is not a legatee he has only to retire. If any costs are due to him, the same must be paid by 1st defendant and not by plaintiff.

Seventh issue.—Somehow no specific issue has been raised on plaintiff's right to claim the higher rate of interest as he has done. But the objection is shadowed forth in para. 4 of 1st defendant's written statement. The provision as to a higher rate of interest as from the date of the bond and not merely from date of default (here plaintiff has claimed it from date of the original obligation itself, *i.e.*, the date of sale) is ordinarily held to be penal and plaintiff is entitled only to reasonable compensation. But I do not regard the terms of Exhibit A as stipulating for payment of the enhanced rate from the date of sale or of the bond itself (in respect of the 2nd and subsequent instalments). In any view, $6\frac{1}{4}$ per cent. is a moderate rate of interest and here I allow it from 1st February 1904 on the amount then due. Prior to that date interest is allowed only at 4 per cent. per annum.

Subject to this deduction in interest, the rest of the amount sued for is decreed in terms of section 88, Transfer of Property Act, with costs thereon with interest, with liberty to apply under section 90. Defendants to bear their several costs.

(1) 9 Bom. L. R. 199; 31 B. 244.

The defendants appealed to the High Court.

Mr. K. *Balamakunda Aiyar*, for the Appellants.

Mr. *J. L. Rozario*, Government Pleader, for the 1st Respondent.

JUDGMENT.—The appeal relates only to one instalment of the debt due. The appellant's Vakil says it may be taken to mean the last or 8th instalment. On the construction of the document A, we are of opinion that the appellant's contention is well founded. There is no provision in the document that, in default of payment of any of the instalments, the whole debt shall become due. When default is committed, the creditor is entitled to sell the property and apply the proceeds of the sale to the balance of the debt due. We are of opinion that the word '*due*' in the context means *payable*. The whole debt was not due in this case at the same time. This is made clear by the next provision, that, if the sale does not realize what is due to the creditor, the debtor's other properties might be proceeded against for the balance *then* due. We must, therefore, allow the appeal and modify the decree of the lower Court by dismissing the suit so far as it relates to the last instalment with proportionate costs thereon both here and in the lower Court. The plaintiff will have his costs in the lower Court on the remainder of the claim. The appellant will not have any costs in this Court on the portion of the appeal relating to costs.

Appeal allowed: Decree varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 167 OF 1911.

May 1, 1912.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

KUTTUVA N. LETCHUMANA BAGAVATHAR—APPELLANT

versus

THOPPAI L. VENKATRAMAIER—RESPONDENT.

Transfer of Property Act (IV of 1882), *s.* 54—*Trans-*

KUTTUVA LETCHUMANA BAGAVATHAR *v.* THOPPAI L. VENKATARAMIER.

fer of right to cut and appropriate plants—Registration.

A transfer of the right of cutting and appropriating "plants now standing or that may hereafter form" on certain land, is a transfer of an interest in immoveable property and, therefore, it can only be made by a registered instrument.

Seeni Chettiar v. *Santhanathan Chettiar*, 20 M. 58 (F. B.), followed.

Syad Ajam Sahib v. *Ananthanarayana Iyer*, 35 M. 95; 8 M. L. T. 437; 8 Ind. Cas. 668; 1 M. W. N. 766; 21 M. L. J. 202, distinguished.

Second appeal against the decree of the District Court of Madura, in A. S. No. 70 of 1910, presented against that of the District Munsif of Madura, in Civil Suit No. 375 of 1908.

FACTS.—The material facts appear from the following extracts from the Munsif's judgment:—

"This is a suit to recover Rs. 300 as damages and to obtain an injunction."

"The defendant and one Vasudeva Iyen had taken up from one A. L. A. R. Arunachalam Chettiyar the right of cutting and appropriating the leaves of certain plants within a specified area. The defendant and the said Vasudeva Aiyan have executed a document in respect thereof. But no document has been executed in their favour or by any one on behalf of the said Chettiyar."

"The case in the plaint shortly is that the defendant agreed to transfer and transferred to the plaintiff his interest in the transaction for a consideration of Rs. 40 and receiving the said Rs. 40 and another sum of Rs. 25, being one half of the amount left in deposit with the said Chettiyar by the defendant and the said Vasudeva Iyen under their agreement, consented that the plaintiff should execute a document as to the same in favour of the defendant, that, accordingly, the plaintiff executed such document and handed it to the defendant, that the defendant received the same but has subsequently not allowed the plaintiff to enjoy the profits of the transaction and appropriated to himself his share of the profits and that, therefore, the defendant is liable to pay to the plaintiff Rs. 300 assessed as the value of such damages and that an injunction should be granted restraining the defendant from interfering with the enjoyment by the plaintiff of the profits of the succeeding *faslis*. At the date of the suit the profits only of *Fasli* 1317 had been realised. The original document with the Chettiar by the defendant and Vasudeva Aiyan was for five years, that is, *Faslis* 1315 to 1319. The agreement with the plaintiff was only for *Faslis* 1317, 1318 and 1319. The plaint asks for damages as to the *Fasli* 1317 and injunction as to *Faslis* 1318 and 1319. It is also stated in the plaint that if it is found that the injunction cannot be granted for *Faslis* 1318 and 1319, damages at the same rate as to *Faslis* 1317 might be awarded."

"The pleas of the defendant are that there being no document executed by him, the plaintiff has acquired no title, that the suit is barred by limitation and that the suit is not cognizable in the original side. It is also pleaded that the suit is bad for non-joinder of the said Vasudeva Iyen. On the facts it is pleaded that the defendant agreed to transfer his rights to the plaintiff only on condition that the plaintiff procured the signature of the said Vasudeva Iyen in the document which was to be executed by the plaintiff and the plaintiff obtained for the defendant a share in a similar transaction held by the plaintiff's brother, that the plaintiff executed a document and tendered to the defendant the same but without the said attestation and without obtaining for the defendant a share in the transaction held by the brother, that thereupon the defendant refused to accept the document as proper and returned it to the plaintiff and that, therefore, the plaintiff has acquired no right whatever. It is also pleaded that the proper remedy for the plaintiff even upon the facts alleged in the plaint is to ask for joint possession or ejectment but not for damages and that, therefore, the suit is not maintainable. This is the plea in paragraph 6 of the written statement."

"It appears that the original transaction between the defendant and Vasudeva Iyen on the one hand and the Chettiyar on the other has been cancelled by the Chettiar's agent for the reason that the two first mentioned persons did not duly pay the amount payable under the document executed among them. It is also pleaded on behalf of the defendant that, therefore,

the plaintiff can have no cause of action under it."

"The written statement raised a vague and general plea of estoppel, but the plea, such as it was, was given up at the time of the issues as appears from the note of my predecessor."

"The issues (which have been settled by my predecessor on the 12th March 1909) are as follows:—

"1. Whether there is a valid lease in favour of the plaintiff?"

[The remaining issues not being material are omitted.]

On the 1st issue, the Munsif made the following observations:—

"1*st Issue*:—The pleadings proceed on the basis that both the transactions amounted to leases. But the essence of a lease is that the supposed lessee should have a right to exclusive occupation of the parcels supposed to be leased. In this case, however, the parties supposed to be lessees are entitled to only to cut and gather a particular crop on the premises. The owner is entitled to put the property to any use not inconsistent with such right of the supposed lessees. Really, what the defendant and Vasudeva Iyen obtained under the document is only a right of profit to enure for five years. It is also a right of exclusive profit because there is a provision in the document between the said Chettyar and them that the former shall not allow any other to gather the same leaves. However this may be, the right acquired by the two persons was nothing more extensive than a profit *a prendre*.

The question, therefore, is whether it can be considered that the two persons had not acquired that right, because no document has been executed by the Chettiar in their favour. This issue has evidently been raised with reference to the decision in [*Turaf Sahib* v. *Esuf Sahib* (1)], which relates to a lease. But there is no provision of law which enacts that an incorporeal right such as a profit could be created only by an instrument in writing. I am aware that section 54 of the Transfer of Property Act requires that a sale of intangible things must be made by registered instruments. But, so far as the transaction between the Chettyar on the one hand and the defendant and Vasudeva Iyen on the other is concerned, it was not a sale or other transfer of incorporeal right. It was the case of a creation *de novo* of the right. Section 54 of the Transfer of Property Act applies only when an intangible thing in *esse* is transferred to another. Indeed, in this very case, probably, the transaction between the defendant and the plaintiff might come under section 54 of the Transfer of Property Act. But, so far as the transaction between the Chettyar, on the one hand, and the defendant Vasudeva Iyen, on the other, is concerned, it is clear that section 54 of the Transfer of Property Act does not apply. It is also true that it is enacted in section 8 of the Easements Act that "an easement may be imposed by any one in the circumstances and to the extent in and to which he may transfer his interest in the heritage on which the liability is to be imposed." Under the definition in that Act, the word "easement" includes also a "profit." But this section relates not to the mode by which the easement or profit should be created, but to the extent of the right which an owner could possibly create; for example, if an owner is entitled to a certain property only for life, he could not impose a right of profit on it to enure beyond his own life-time. The object of the section is not to provide that such owner could impose such profit in a particular mode although it was intended to enure only during the life-time of the owner. It follows, therefore, from the above reasoning that it cannot be said that the defendant and Vasudeva Iyen did not acquire any right because no registered instrument was executed on behalf of the Chettyar. Section 17 of the Registration Act, it is hardly necessary to say, does not require a written instrument for any transaction. It only requires that, if a written instrument is executed as to particular transactions, it must be registered. The Registration Act strikes at documents and not transactions. The right to cut and carry the leaves, therefore, became vested in the defendant and the said Vasudeva Iyen by the oral transaction between the agent of the Chettyar and them and the nature and provisions of the transaction are well evidenced by the docu-

(1) 30 M. 322; 2 M. L. T. 270; 17 M. L. J. 395.

ment executed by them to the Chettiyar (copy Exhibit B).

But the plaintiff's right is somewhat on a different footing. If he has acquired any right, it could only be by a transfer and not by original creation. Section 54 of the Transfer of Property Act, therefore, applies; and it is provided in that section that the sale of an intangible thing can be made only by a registered instrument and the obvious principle enunciated in the said case of *Turof Sahib* v. *Esuf Sahib* (1) applies and in order that the plaintiff may acquire a valid title, the registered instrument must be an instrument executed by the transferor, that is, in this case the defendant. There being no such document, the plaintiff has acquired no title. On the 1st issue, I find that the transactions in favour of the defendant and Vasudeva Iyen are neither of them leases and that the plaintiff has acquired no title, as there has been no registered instrument executed by the defendant in his favour as required by section 54 of the Transfer of Property Act."

On appeal, the District Judge reversed the Munsif's finding by the following judgment:—

"The first point for consideration in connection with this appeal is whether what the plaintiff describes as the leases of the right of cutting and appropriating the leaves of certain plants on a certain tract of land are valid transfers of interest in property. I am unable to concur with the District Munsif's views expressed in paras. 21 and 22 of his judgment that the transaction by which the transfer of this right is said to have been effected by Subramania Iyer (as the agent of Arunachellam Chettiar) to the defendant and Vasudeva Iyen stands on a different footing from the transaction by which, it is alleged, a transfer was effected of defendant's interest to the plaintiff. The right was certainly one which existed and was enjoyed by Arunachellam Chettiar at the time when his agent purported to transfer it to the defendant and Vasudeva Iyen and I cannot understand what the District Munsif means by saying that the transfer was a creation *de novo* of a right. Arunachellam Chettiar had, as lessee of the village, all the rights of a lessee in the land on which the trees grew and *inter alia* the right to cut the leaves of the trees. It was one of this bundle of rights which his agent transferred to the defendant and Vasudeva Iyen and the right transferred was certainly an existing right or interest in property at the time of transfer. If the transfer by defendant of his share of the right thus acquired to the plaintiff can only be effected by a registered document executed by the transferor it seems to me clear that the transfer of Subramania Iyer to defendant and Vasudeva Iyen could only have been effected in the same way. In determining the effect of the two transactions in question, it is well to determine, *first*, what was as transferred according to the plaintiff's case. The right to cut the leaves on the plants, which were growing at the time when either transaction was entered into, was only an interest in growing crops which are moveable property and no registered document is necessary to effect the transfer of such an interest. Some crops such as cultivated cotton crops remain on the land for two years and a right to gather cotton during a period of two years from crops which are in existence at the time of the contract is certainly only an interest in moveable property. In the case of the shrubs whose leaves the defendant and Vasudeva Iyen obtained a right to cut for a period of five years, there is no evidence to show how many of these shrubs were growing when they entered into the contract with Arunachellam Chetty's agent but the terms of Exhibit B show that that right was to be exercised with respect to future growths as well as the existing shrubs. The right to cut the former was clearly a right in immoveable property as decided in the rulings in *Seeni Chettiar* v. *Santhanathan Chettiar* (2) and *Mammikkutti* v. *Puzhakkal Edom* (3). The original transfer of this right, therefore, by Arunachellam Chettiar's agent to defendant and Vasudeva Iyen could only have been effected by a registered document and the same holds good as regards the transfer by defendant to plaintiff.

2. The question is whether such a transfer can only be effected by registered document

(2) 20 M. 58.
(3) 29 M. 353 at p. 357.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

executed by the person in whom the right was vested at the time of the transfer. In the present case, there are the registered documents, Exhibit B and Exhibit A, which evidence the terms of the contract entered into (1) between Arunachellam Chettiar's agent and defendant and Vasudeva Iyen and (2) defendant and plaintiff, but both these documents are signed only by the transferees and were accepted by, though not signed by, the transferors. They are none the less valid contracts. They are not obnoxious to the Stamp or Registration law. They would certainly operate to convey the transfer of a mere license but more than that was contracted for, *viz.*, a grant of an interest in moveable and immoveable property. I am not prepared to hold that they are inoperative as transfers of such a grant on the strength of the ruling in *Turaf Sahib* v. *Esuf Sahib* (1) which deals with the four forms of transfer of property mentioned in the Transfer of Property Act and nothing more. It is settled law that there are other valid modes of transferring property besides those referred to in the Transfer of Property Act and I do not understand why it should be contended that no transfer can be effected unless the transferor signs the instrument evidencing the same. If an instrument evidences a contract by the terms of which the transferor is bound to do or abstain from certain acts and if the effect of his so doing or abstaining secures for the transferee the full enjoyment of an interest in the property which forms the subject-matter of the contract, I fail to see what further is necessary to effect the transfer of that interest or why the instrument should be held to be inoperative as to such transfer.

3. In the present case, I hold that the contracts evidenced by Exhibits B and A are binding on all the parties thereto. Under them, the transferors were bound by implication to abstain from obstructing the transferees from enjoying the right of cutting the leaves directly or indirectly and the transfer of the right, so far as the transferor and transferee are concerned, was thus fully effected in both cases by documents, which are not obnoxious to the provisions of either the Stamp or the Registration law.

4. It has to be observed, however, that, as held in *Mammikkutti* v. *Puzhakkal Edom* (3), such grants as those evidenced by Exhibit B and Exhibit A do not carry with them an implied covenant for title or quiet enjoyment (*vide* page 357 of the ruling).

It remains to be considered whether Exhibit A was given effect to as plaintiff contends. With regard to this point, I entirely differ from the District Munsif's finding on the facts. The contract between the plaintiff and the defendant has been reduced to writing in the original of Exhibit A and, when this is so, oral evidence is not admissible to alter or vary the terms of the contract as therein disclosed. The oral evidence adduced by the defendant has also, in my opinion, not been properly appreciated by the District Munsif for the new case, which defendant for the first time set up in cross-examination, to the effect that a a part of the corsideration for his agreement with the plaintiff was that he should get share in some other transaction in which plaintiff's brother was concerned, is not proved by any other evidence. Further, there is no mention in notice Exhibit F that one of the conditions of the agreement was that the plaintiff should obtain the consent of Vasudeva Iyen to the contract. The recitals in the receipt Exhibit C corroborate plaintiff's evidence that the defendant agreed to accept the original of Exhibit A as embodying the terms of the contract. If defendant refused to abide by the terms of the Exhibit A after that, he was guilty of a breach of the contract.

6. With regard to issue 8, the issue as it stands seem to me to be meaningless because it is admitted on both sides that the original agreement which Arunachellam Chettiar entered into with the defendant and Vasudeva Iyen was cancelled by Arunachellam Chettiar. It is in connection with this cancellation of the original agreement between Arunachellam Chettiar's agent and defendant and Vasudeva Iyen that the ruling in *Mammakkutti* v. *Puzhakkal Edom* (3) becomes important. Defendant's contract with plaintiff cannot be presumed to carry with it an implied covenant for title or quiet enjoyment. I hold, therefore, that plaintiff has no claim for damages against defendant after the date when the contract entered into by Aruna-

chellam Chetty's agent was revoked, *i.e.*, for *Faslis* 1318 and 1319.

7. The District Munsif assesses the damages for *Fasli* 1317 at Rs. 182 and there is no objection taken to this finding in the Appeal Memo. A further sum of Rs. 25 must be added to this sum on account of the deposit which plaintiff expected to get refunded at the end of the contract.

8. I grant the plaintiff a decree for damages for Rs. 182 *plus* Rs. 25=Rs. 207 and proportionate costs throughout. In other respects, the appeal is dismissed with costs."

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *K. N. Aiya*, for the Respondent.

The defendant appealed to the High Court, which passed the following

JUDGMENT.—This is a case of transfer by a joint sub-lessee of his interest in the sub-lease. The transfer is of the "*umari* plants now standing or that may hereafter form in the undermentioned villages," and was, therefore, a transfer of an interest in immoveable property according to the decision in *Seeni Chettiar* v. *Santhanathan Chettiar* (2). Therefore, it can only be made by a registered instrument executed by the transferor. The recent decision in *Syed Ajam Sahib* v. *Ananthanarayana Iyer* (4) does not apply as the document before us is not a lease, and we are not prepared to extend it. We allow the appeal and restore the decree of the District Munsif with costs here and in the lower Appellate Court.

Appeal allowed.

(4) 35 M. 95; 8 M. L. T. 437; 8 Ind. Cas. 668; 1 M. W. N. 766; 21 M. L. J. 202.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 783 OF 1911.

May 27, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

Musammat TAUFIQUNNISSA—DEFENDANT—APPELLANT

versus

Musammat TASKIN BANU—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 199 (1) (b)—Decision of Revenue Court—Res judicata.

Section 199 of the Agra Tenancy Act, 1901, is confined to questions of title to land.

Where a Revenue Court does not act under section 199 (1) (*b*) of the Agra Tenancy Act, its decision does not operate as *res judicata*.

Beni Pande v. *Raja Kausal Kishore*, 29 A. 160; 4 A. L. J. 53; A. W. N. (1907) 6, *Bihari* v. *Sheobalak*, 29 A 601; A. W. N. (1907) 189; 4 A. L. J. 545, referred to

Second appeal from the decision of the District Judge of Shahjahanpur, dated the 16th June 1911.

Dr. *Satish Chandra Banerji*, for the Appellant.

Mr. *Abdul Raoof*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the respondent for possession of a plot of land No. 817/2 and 20 trees standing on the plot. The first Court gave the respondent a decree for possession of the land but dismissed her claim to the trees. On appeal her claim to the trees also was allowed by the District Judge.

The facts are fully stated in the judgment of the lower Appellate Court. It will be sufficient to give a short summary of them here. Ahmad Hossein and Nuruddin owned land including No. 817, on which Ahmad Hossein planted a grove. Ahmad Hossein was succeeded by his daughter Tausifunnissa who in January 1895 sold part of her *zemindari* to Wahiduddin husband, of the respondent. The sale-deed stated expressly that groves were included. In September 1898, a partition was effected between Tausifunnissa and Wahiduddin by which No. 817 was allotted to the latter and Fakhruddin a son of Nuruddin already mentioned. In December 1899, Tausifunnissa transferred her property including No. 817 to Taufikunnissa the present appellant. In 1908, there was another partition at which the plot was subdivided and No. 817/2 was allotted to the *mahal* of the respondent and Shafi Ahmad the latter being appointed *lambardar*. All this time the appellant had remained in possession of the plot as a tenant. In 1909 Shafi Ahmad as *lambardar* sued her for possession of the trees. The Munsif, whose judgment is dated June 10th, 1909, dismissed that suit holding that the appellant was the owner of the trees. At about the same time Shafi Ahmad again as *lambardar* sued in the Revenue Court for the ejectment of the appellant. On August 3, 1899, an

Assistant Collector allowed the claim as far as the land was concerned but excepted the trees from the operation of his order saying that it had been decided by a competent Court that the trees belonged to the appellant. In 1910 there was a partition between Shafi Ahmad and the respondent at which No. 817/2 was allotted to the respondent. The present suit was instituted by the latter in September 1910. It originally embraced a claim to possession of the whole plot on the allegation that although the appellant had been ejected by the Revenue Court, she had re-entered on the land. We are concerned now with the claim to the trees only.

In the Courts below and here, the appellant has urged that her title to the trees is *res judicata* under the decision in the Civil Suit of 1909. The final decision in that case is that of the High Court and it is clear, as the learned District Judge has pointed out, that the High Court did not decide the question of the title to the trees. It confirmed the dismissal of the suit on the ground that whether the trees belonged to the appellant or not she could not be deprived of the enjoyment of them while she remained tenant of the land. In this Court it has been argued that question of title is *res judicata* under the decision of the Assistant Collector of August 3, 1909. We were referred to section 196 of the Tenancy Act and the decisions in *Beni Pande* v. *Raja Kausal Kishori* (1) and *Bihari* v. *Sheobalak*(2). In the first place, the Assistant Collector did not decide any question of title. He declined to do so saying that the question had already been decided by a competent Court. It is clear that he did not act under section 199 (1)(*b*). He relied upon the decisions of the Munsif and Subordinate Judge in the Suit of 1909 which, as already explained, were not confirmed in their entirety by the High Court. He relied also upon a decision of the Revenue Court but the learned Advocate for the appellant has been unable to show us what that decision was or when it was pronounced. Next the dispute before the Assistant Collector did not relate to land as defined in the Tenancy Act and section 199 is confined to questions of title to land. We must, therefore, hold that the question of the title to the trees is not *res judicata*.

It has not been suggested that the appellant has acquired title to the trees by long continued adverse possession. The appellant is, therefore, in no better position than was Tausifunnissa who transferred the plot to her. Ahmad Hossein, father of Tausifunnissa, held the land on which he planted the trees jointly with his co-sharer, Nuruddin. Tausifunnissa succeeded to his rights whatever they were. When at the partition between Tausifunnissa and Wahiduddin the plot was assigned to the latter the trees presumably went with the land and Wahiduddin became the owner of the trees. There is nothing to suggest that the trees did not pass to him except the fact that Tausifunnissa remained in possession of the plot It has been found, however, that Tausifunnissa and after her the appellant were tenants of the plot. In the Civil Suit of 1909 it seems to have been suggested that Tausifunnissa must be regarded as having been the owner of the trees because Wahiduddin witnessed the deed of gift of December 1899. This point has not been raised in the present case and cannot be taken up now. It is a fact that the appellant and Tausifunnissa before her have held possession of the trees for a large number of years but that may be explained on the ground that they were tenants of the plot. The appellant has failed to establish a title to the tree. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 29 A. 160; 4 A. L. J. 53; A. W. N. (1907) 6.
(2) 29 A. 601; A. W. N. (1907) 189; 4 A. L. J. 545.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 505 OF 1911.

May 23, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

RAM DAWAR RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHIRGU RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage by conditional sale—Foreclosure—Limitation Act (XV of 1877), *Sch. II, Arts.* 135, 144, 147—*Limitation Act (XIV of* 1859), *s.* 1, *cl.* 12—*Limitation Act (IX of* 1908), *s.* 30, *Sch. I, Art.* 135.

RAM DAWAR RAI *v.* BHIRGU RAI.

A mortgage by conditional sale was executed in 1830 with a provision that the mortgagee would be entitled to enter into possession of the property if the mortgage-debt was not paid on a certain date in 1850. The debt was not paid on that date. No application under Regulation VII of 1806 was made for foreclosure of the mortgaged property. On 11th of July 1910, the mortgagee brought a suit for foreclosure:

Held, that the suit was barred by limitation.

The cause of action arose on the mortgagor's failure to pay the mortgage-money on the due date in 1850 and the mortgagee's right to possession of the property mortgaged was extinguished under section 1, clause 12 of Act XIV of 1859 as soon as twelve years had elapsed from the due date and the subsequent creation of foreclosure suits could not revive the extinct right.

Section 31 of the Limitation Act, IX of 1908, had, therefore, no application and the suit was barred by Article 135 of the Limitation Act.

Srinath Das v. *Khetter Mohun Singh*, 16 C. 693 at p. 700; 16 I. A. 85, followed.

Second appeal from the decision of the District Judge of Ghazipur, dated the 16th February 1911.

Dr. *Satish Chandra Banerji*, for the Appellants.

Mr. *A. Kareem* (with him Mr. *Surendro Nath Sen*), for the Respondents.

JUDGMENT.—On *Sawan Sudi Ashtami* 1237 (28th July 1830), a mortgage by conditional sale was executed by Pabarn Rai and Chittra Bal Rai, predecessors in-title of the defendants Nos. 1, 2 and 3, in favour of Bachan Rai, predecessor-in-title of the plaintiffs, to secure a sum of Rs. 800. The deed contains a provision to the effect that the mortgagee shall be entitled to possession at the end of 1257 (18th of September 1850) on default of payment of the mortgage-debt on the due date. I may note here that due date in the judgment of the first Court is stated as the 4th of October, 1850 and in that of the lower Appellate Court as the 4th of April 1850.

No application for foreclosure was ever made under Regulation XVII of 1806, but on 11th of July 1910, a suit for foreclosure was instituted. Limitation was pleaded in defence. The Courts below accepted it and dismissed the suit.

The contention in second appeal is that the suit is not time-barred. The substance of the argument of the learned Vakil for the appellants is as follows:—

The mortgage by conditional sale in suit was executed when Regulation XVII of 1806 was in force. Section 8 of that Regulation allowed a mortgagee to apply for foreclosure on the expiration of the stipulated period or at any time subsequent before the sum lent is re-paid and fixed no time within which to apply. With regard to the language of the section, a Full Bench of this Court in *Buldeen* v. *Golab Koonwer* (1) held that there was no limitation for an application to foreclose under Regulation XVII of 1806. The Limitation Acts of 1859 and 1871 contain no express provisions for foreclosure suits nor was there anything in section 28 of Act XV of 1877 to extinguish the mortgagee's right to take foreclosure proceedings. Such being the case, the right to foreclose was in existence when Act XV of 1877 came into force and Article 147 of that Act gave to the mortgagee the right to sue for foreclosure 60 years from the date when the money secured by the conditional sale became due *i.e.*, the 18th of September 1850. The suit, therefore, which was brought on the 11th of July 1910 was, according to the provisions of section 31 of the present Limitation Act (IX of 1908), not barred by limitation.

Article 135 of Act XV of 1877 has no application to a foreclosure suit. In terms it applies to a suit for possession as a mortgagee and there is a radical distinction between possession as a mortgagee and possession as an owner.

The Calcutta High Court cases, in *Denonath Gangooly* v. *Nursing Proshad Dass* (2), *Ram Chunder Ghoasul* v. *Juggutmanmohiney Dobee* (3), *Modun Mohun Chowdhry* v. *Ashad Ally Beparee* (4) and *Shurnomoyee Dasi* v. *Srinath Das* (5), proceed on the assumption that when a mortgage by conditional sale contains a stipulation that on failure to pay on the due date the mortgagee is entitled to possession as an absolute owner and discard the provisions of section 8 of Regulation XVII of 1806. Strictly speaking, they have no bearing on the limitation applicable to a foreclosure suit. The Privy Council case in *Srinath Das* v. *Khetter Mohun Singh* (6) is based on the notion of an English mortgage in which the mortgagee

(1) N. W. P. H. C. 1867 (F. B.) 102.
(2) 14 B. L. R. 87; 22 W. R. 90.
(3) 4 C. 283; 3 C. L. R. 336.
(4) 10 C. 68; 13 C. L. R. 51.
(5) 12 C. 614.
(6) 16 C. 693 at p. 700; 16 I. A. 85.

becomes the absolute owner of the property mortgaged with a liability to re-convey on the happening of certain events.

The cases in *Murlidhar* v. *Kanchan Singh* (7) and *Karim Dad Khan* v. *Mustaqim Khan* (8) are in conflict with the Full Bench case in *Buideen* v. *Golab Koonwer* (1). That Full Bench case had not been overruled. The learned Vakil for the respondent urges that the rulings of the Calcutta and the Allahabad High Courts, which have been referred to by the learned Vakil for the appellants, expressly lay down that twelve years' limitation applies to the present case, that the Privy Council case in *Srinath Das* v. *Khetter Mohun Singh* (6) is conclusive on the point and that the cases in *Janki* v. *Musammat Jai Dei* (9) and *Moman* v. *Ishri Pershad* (10) are to the same effect.

Apart from the case law on the subject, there is much force in the contention of the learned Vakil for the appellants that there is no limitation for an application to foreclose under Regulation XVII of 1806 and that the present suit is not barred by time, but the rulings of this Court, the Calcutta High Court, of Oudh, of the Punjab and of the Privy Council are against him.

So far back as in *Denonath Gangooly* v. *Nursing Proshed Dass* (2), in a suit upon mortgage by conditional sale providing that the mortgage-debt should be paid on the 9th of July 1855 and that on default of payment the deed of conditional sale should become one of absolute sale and that the mortgagee should thereupon acquire the absolute proprietary right, it was held that the cause of action arose on the 9th of July 1855, when default was made in payment of the mortgage-debt and the suit not having been instituted within twelve years from that date, was barred by section 1 clause 12 Act XIV of 1859 and that no new cause of action arose by reason of the foreclosure proceedings on the expiry of the year of grace in August 1868.

Since the decision in the above case, the trend of authority in the Calcutta High Court has been in the same direction regarding suits on mortgages by conditional sale which contain a stipulation to the effect that on failure to pay on the due date the mortgagee will be entitled to possession. In *Ram Chunder Ghosaul* v. *Juggutmanmohiney Dobee* (3), it was held that the suit by a mortgagee under a conditional sale was barred by Act XIV of 1859 as being brought more than 12 years after the cause of action arose and that that Act not only barred the remedy but extinguished the right and that, therefore, the plaintiff could derive no advantage from the extended period of limitation given by Article 149 of Act IX of 1871 which repealed the Act of 1859.

Modun Mohun Chowdhry v. *Ashad Ally Beparee* (4) expressly draws a distinction between the conditional sales in which there is a stipulation that the mortgagee on default of payment of the mortgage debt is to take possession of the property and those in which there is no such stipulation and lays down that in the former case he has twelve years from the date of default and that in the latter the right of the mortgagee to take possession does not accrue until after the expiration of the year of grace.

Shurnomoyee Dasi v. *Srinath Das* (5) rules that a mortgage in the English form between Hindus in the *mofussil* outside Calcutta has always been treated by the Courts as a mortgage by conditional sale and that under Act XIV of 1859 a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default and was barred thereafter. This is an important case. It went up in appeal to the Privy Council and the decision of the High Court was upheld. See *Srinath Das* v. *Khettar Mohun Singh* (6). In *Girwar Singh Thakur* v. *Narain Singh* (11) the following important passage occurs:—"Under the Acts of 1859 and 1871, the law of limitation governing suits by mortgagees under *kutkobala* or bill of conditional sale was as follows:—Where a *kut-kobala* gave to the mortgagee the right to recover possession on default of payment, the period of limitation for a suit based upon this stipultion was 12 years, see *Brojonath Kundu Chowdhry* v. *Khelat Chandra Ghose* (12), Article 135 of the Act of 1871. In Courts not established by Royal Charter in the Presidency of Bengal, the period of limitation for a suit for possession of the mort-

(7) 11 A. 144.
(8) 26 A. 4.
(9) 9 O. C. 147.
(10) 35 P. R. 1899.

(11) 14 C. 730 at p. 736.
(12) 14 M. I. A. 144; 8 B. L. R. 104; 16 W. R. (P. C.) 33.

gaged property, upon the conditional sale becoming absolute under the provisions of Regulation XVII of 1806, was 12 years from the date when the sale became absolute, *Ghinaram Dobey* v. *Ram Monaruth Dobey* (13); *Madun Mohun Chowdhry* v. *Ashad Ally Beparee* (4). But in the cases where the right of the mortgagee has been extinguished by the law of limitation, the proceedings under Regulation XVII of 1806 did not give a fresh start. See *Madun Mohun Chowdhry* v. *Ashad Ally Beparee* (4). Now in the year 1877 when the present Act was passed, foreclosure suits were not known in the Courts not established by Royal Charter in the Bengal Presidency. In the year 1877, therefore, suits under *kut-kobalas* or conditional bills of sale for possession of the mortgaged property were not covered by Article 147. The period of limitation for such suits, which was 12 years under the Act of 1871, was consequently not altered by the new Act. *Srinath Das* v. *Khetter Mohun Singh* (6) is the most important case on the point. Their Lordships of the Privy Council in it remark:—"From this decree sixteen of the defendants appealed to the High Court. The Court was of opinion that the mortgagor's right to possession determined on the 17th of February 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th of February 1878; that with the right to possession was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They, therefore, concluded that the suit was barred by force of Article 135 and they dismissed it against all defendants except Huri Narain.....No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.....If Article 135 is the one applicable to the case, the 12 years there allowed ran out in the month of August 1878 at the latest. In order to succeed then, the plaintiff must show that Article 135 is wholly inapplicable to this case. To do so it is contended that Article 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by Article 147, that on the 1st July 1882 the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits, and provided 60 years as the limit for them.

"To this argument it is sufficient for the present case to answer that in the year 1878 when no suit for foreclosure could be brought, the right of Shama Sundari to possession was wholly extinguished, and the title of the purchasers under Huri Narain freed from mortgage. The subsequent creation of suits for foreclosure could not except by clear enactment revive the extinct right, and in effect the clear enactment is the other way for section 2 clause (*c*) of the Transfer of Property Act says that nothing therein shall affect 'any right or liability arising out of a legal relation' constituted before this Act comes into force, or any relief 'in respect of such right or liability.' Their Lordships consider that within the meaning of this section the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Huri Narain and Shama Sundari. It is, therefore, unnecessary to discuss what has been so much urged at the bar, *viz.*, the effect to be attributed to Article 147 a provision which appeared for the first time in the Act of 1877."

The ruling not only lays down that Article 135 applies to the present case but answers almost all the points urged by the learned Vakil for the appellants. *Janki* v. *Musammat Jai Dei* (9) was a suit on a mortgage by conditional sale, dated the 3rd May 1863, in which the stipulation was that in default of payment on the due date the mortgagee would be entitled to possession. Article 135 of the Limitation Act of 1877 was applied. Wells, A. J. C., had considerable doubts about the case but the rulings of the Calcutta High Court and especially the ruling of the Privy Council in *Srinath Das* v. *Khetter* v. *Mohun Singh* (6) made him hold that the suit was barred by limitation.

Regulation XVII of 1806 is still in force in the Punjab and in a suit on a conditional sale [*Moman* v. *Ishri Pershad* (10)], in which foreclosure proceedings were instituted more than 12 years after the determination of the mortgagor's right to possession, it was held that the suit, not having been brought within 12 years of the date fixed in the mortgage

(13) 7 C. L. R. 580; 6 C. 566 note.

for the payment of the mortgage money, was barred by limitation either under Article 135 or Article 144 of the Limitation Act of 1877. In *Nagar* v. *Saudagar* (14), it was held that there was no time limit for the foreclosure of a mortgage by conditional sale and that a mortgagee in possession was entitled to take out such proceedings at any time during the subsistence of his mortgage and the learned Judges who decided the latter case distinguished the former on the ground of possession. Our own Court in *Murlidhar* v. *Kanchan Singh* (7), although the case of *Buldeen* v. *Golab Koonwer* (1) was referred to by the learned Subordinate Judge in his judgment, held that in a suit for foreclosure upon a mortgage by conditional sale executed in 1846, the plaintiff's remedy was barred by reason of Act XIV of 1859 during the currency of that Act and that the time within which he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863. The learned Judges disregarded the distinction drawn by the Calcutta High Court in cases in which the mortgagee was entitled to possession in default of payment on the due date and the cases in which he was not. They said:—"It now appears that no proceedings were taken under that Regulation. But even if they had been taken, we should be prepared to hold that the cause of action was the original non-payment of the money on the due date and that the provisions in Regulation XVII of 1806, which was passed for the protection of the mortgagor, could not create a fresh cause of action.

In *Karimdad Khan* v. *Mustaqim Khan* (8), the view taken in *Murlidhar* v. *Kanchan Singh* (7) was accepted and the case of *Buldeen* v. *Golab Koonwer* (1) was sought to be distinguished on a ground which is difficult to follow.

We, however, are bound by the ruling of the Privy Council in *Srinath Das* v. *Khetter Mohun Singh* (6) and must hold that the cause of action in the case before us arose on the failure to pay the mortgage-money on the due date, *i.e.*, the 18th of September 1850, that the mortgagee's right to possession of the property mortgaged was extinguished under section 1, clause (12), Act XIV of 1859, as soon as twelve years had elapsed from the due date and that the subsequent creation of foreclosure suits could not revive the extinct right. Section 31 of the present Limitation Act (IX of 1908) has, therefore, no application and the suit is barred by Article 135 of the present Limitation Act, corresponding with Article 135 of the Limitation Act of 1877.

The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(14) 115 P. W. R. 1908; 57 P. R. 1908.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 501 OF 1910.

April 19, 1912.

Present:—Mr. Lindsay, J. C., and and Mr. Stuart, A. J. C.

Thakur JAGDEO BAKHSH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JWALA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Gift of mere proprietary rights or usufruct for maintenance—Restraint on alienation by donee, condition as to—Sale in invitum—*Voluntary transfer.*

The predecessor-in-title of the plaintiffs-appellants executed a deed in 1873 in favour of the ancestors of the defendants-respondents by which certain land was granted to them for their maintenance without any power to transfer.

The deed authorized the grantees to cultivate the land and to appropriate the usufruct thereof, but enjoined that if they wanted to transfer their rights, they must do so to the grantor or his descendants. It also provided that if the donee at any time died childless, the land was to revert to the donor or to his heirs:

Held, (1) that the deed was not a gift of full proprietary rights but only of usufruct of the land for the purposes of maintenance;

(2) that the deed not being a gift of proprietary rights, the conditions in restraint of alienation were valid, as they formed an essential portion of the grant itself;

(3) that the sale in execution of a decree based on the mortgage of the said lands could not be considered as a sale '*in invitum*', which could override the provisions of the deed of grant but must be treated as a voluntary transfer, the decree and sale being the necessery consequences of such transfer and as proceeding directly out of the same.

Appeal against an order of the District Judge of Sitapur, dated 31st August 1910, upholding that of the Sudordinate Judge Sitapur, dated 30th April 1910.

JAGDEO BAKHSH SINGH *v.* JWALA PRASHAD.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *H. C. Dutlt*, for the Respondents.

JUDGMENT.—The facts of this case are as follows. The village of Dakkhin Gaon was transferred on the 2nd of August 1873 by Jwala Singh and Gulzari Singh to Lalta Bakhsh Singh. It is stated that the said village had originally belonged to the ancestors of Lalta Bakhsh Singh, that they had assigned it to the ancestors of Gulzari Singh and Jwala Singh for their maintenance, that Gulzari Singh and Jwala Singh had borrowed certain money from Lalta Bakhsh Singh and had pledged in security to him the interests which had been assigned to them in the village giving him a deed of conditional sale, and that, the money not having been re-paid, Lalta Bakhsh Singh had foreclosed, and obtained possession of the village on the 2nd of August 1873. On 4th August 1873, Lalta Bakhsh Singh executed a deed in favour of Gulzari Singh and Jwala Singh by which he conveyed to them certain interests in 400 *kham bighas* in the same village on certain conditions. The representative in-interest of Gulzari Singh and Jwala Singh is now Kalka Singh, defendant-respondent No. 6, and the representatives-in-intereset of Lalta Bakhsh Singh, are now Jagdeo Bakhsh Singh, Maheshar Bakhsh Singh and Bindra Bakhsh Singh, plaintiffs-appellants. It appears that the defendant-respondent No. 6 executed a deed of mortgage of 6 *bighas* 17 *biswas* standard (*pucca*) in favour of defendants-respondents Nos. 1 to 5. This area is included in the 400 *bighas* in question. The latter sued on the basis of this mortgage-deed and obtained a decree in execution of which the 6 *bighas*, 17 *biswas* in question were put to sale under a proclamation of sale, dated 10th July 1909. The plaintiffs-appellants instituted a suit in the Court of the Subordinate Judge, Sitapur, on the allegation that Gulzari Singh and Jwala Singh and the defendant-respondent No. 6 had no transferable right in the land and asked for a declaration that the 6 *bighas* 17 *biswas* decreed to be sold were not liable to sale in execution of the decree in question. The learned Subordinate Judge dismissed the suit on the ground that the defendant respondent No. 6 was proprietor of the land in question with full power of alienation. The plaintiffs-appellants preferred an appeal to the Court of the District Judge, Sitapur. The learned District Judge dismissed the appeal on two grounds. His first ground was in the main one of agreement with the learned Subordinate Judge. His second ground was that, in any circumstances, the property had been transferred by a sale "*in invitum*", and that no restrictions in the original deed of 4th August 1873, could operate to save the 6 *bighas* and 17 *biswas* in question from sale. The plaintiffs-appellants have come before this Court in second appeal, and the appeal has been referred by an order of Mr. Evans, late Judicial Commissioner, to a Bench of two Judges for decision.

The main contest has naturally been as to the interpretation of the terms of the deed of 4th August 1873. We find that the ancestors of Lalta Bakhsh Singh had originally granted the village of Dakkhin Gaon to the ancestors of Gulzari Singh and Jwala Singh, who appear to have been their relatives, for their maintenance, that the latter persons had subsequently borrowed money from Lalta Bakhsh Singh and assigned in consideration thereof their rights as grantees by meaus of a deed of conditional sale, that Lalta Bakhsh Singh had foreclosed on this deed and obtained possession of the village on the 2nd of August 1873. On the 4th August 1873, he executed a deed in favour of Gulzari Singh and Jwala Singh.

The following is a translation of the deed:—

"I, Lalta Bakhsh son of Raghunath Singh, Talukdar of Riwan and Panseri, *mouza* Dakkhin Gaon, *Pargana* Munwan, Tahsil Mahmudabad, and of Bari District Sitapur. Whereas from ancient times the village Dakkhin Gaon, *Pargana* Munwan, Tahs Mahmudabad, was given for their mainten ance by my ancestors to those of Gulzar Singh and Jwala Singh, sons of Pitam Singh, who have been in possession and enjoyment thereof up to this time, and whereas on the 1st August 1868 it was mortgaged by a deed of conditional sale to me, the declarant, in lieu of Rs. 3,950 now on the present date foreclosure has been obtained on that deed for Rs. 6,000, the previous and the present consideration, and I, the declarant, have obtained absolute possession and occupation thereof and

whereas these persons are the descendants of the same stock as my family and there remains nothing now for their support, I, the declarant, of my own accord and free will, do hereby give to them 400 *bighas kham* land, numbered and bounded below, without any power to transfer the same to a stranger, for their maintenance from 1281 *F.* and empower them that they and their descendants should take possession thereof themselves having entered upon the said lands, should cultivate the same as they like, and should appropriate profits thereof having nothing to do with the rent or the village expenses thereof. Out of the aforesaid land the *rabi* land shall be irrigated from the tanks numbered below, in proportion to the entire village to the extent of 1/8th, *i.e.*, the donees shall irrigate 1/8th of the land from the water of the tanks and the rest by digging *kham* wells and shall have nothing to do with the fish, water-nuts and other *zemindari* dues of these tanks; and if per chance the donees or their descendants ever desire to transfer the said rights conveyed by gift, they shall not be competent to do so, *i.e.*, to mortgage, sell and give the same to any person other than me, the declarant, or my descendants. If at any time (God forbid) there remains no child begotten by the donee, then the said land shall revert to my and my descendants' ownership and none else shall have any claim thereto. Wherefore I have executed this deed of gift so that it may serve as an authority and be of use."

The learned Subordinate Judge and the learned District Judge considered that this document should be interpreted as a deed by which full proprietary rights were transferred by gift, with a condition super-added whereby the power of alienation was restrained, and whereby in the event of failure of issue of the donees the proprietary right reverted to the donor and his issue. The same view was pressed by the learned Counsel for the contesting respondents. We consider that this is not the correct interpretation to be placed on the terms of the deed. We read it to be a deed of gift, but not a deed of gift by which full proprietary rights were transferred, and take it to be a deed of gift, by which the right to the usufruct of certain fields for the purpose of maintenance was assigned subject to two limitations, one of which was that the assignee should have no power to alienate the right assigned, and the other of which was that in the event of the failure of the issue of the assignees, the right of usufruct should revert to the grantor and his issue. Interpreting the document as we do, it is immaterial to enter into most of the points raised in the lower Courts and in argument in this appeal. Had the deed, in our opinion, transferred full proprietary right, there could have been no doubt as to the fact that the restrictions on alienation would have been null and void on the principles of equity and policy which are now embodied in the provisions of Act IV of 1882, and which had legal authority in Oudh before that Act was passed. If the transfer had been of complete proprietary right, a condition to restrain alienation would have been repugnant to the nature of the transaction, and would, according to recognized and binding principles of equity, have been inherently void and of no effect. But on the interpretation which we place on this document, which interpretation is in effect that it transferred the usufruct only, there is nothing repugnant in the imposition of these conditions which form an essential portion of the grant itself. We do not find that the conditions contained in this deed are in any way opposed to the principles of the Hindu Law that binds the parties, or to any statutory enactment or to the general principles of equity and good conscience. In the circumstances we consider that these limitations are good and binding, and are, therefore, in accord with the contentions of the plaintiffs-appellants on this point.

We are unable to accept the view of the learned District Judge that the transfer in question, being of the nature of a transfer "*in invitum*", was a good transfer which must override any provisions contained in the deed of 4th August 1873. The learned Counsel for the contesting respondents has stated that he has been unable to support this portion of the learned District Judge's judgment, and the arguments for the plaintiffs-appellants have remained unimpeached. They are briefly that this was not a transfer "*in invitum*", but that the defendant-respondent No. 6 had made a voluntary transfer which he had no title to make, and that the subsequent decree, and sale were the necessary consequences of this voluntary transfer and could only be taken as

proceeding directly out of the same. With this view, we are in complete accord. We decree this appeal accordingly and direct that the contesting respondents shall pay their own costs in all Courts and those of the plaintiffs-appellants.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 124 OF 1911.

April 16, 1912.

Present:—Mr. Rafique, A. J. C.

Musammat SUBHADRÁ—DEFENDANT—APPELLANT

versus

TRIBHUAN DAT AND OTHERS—PLAINTIFFS RESPONDENTS.

Second appeal—Finding as to custom—Right to challenge—Custom, elements necessary to establish—Reversioners, right of, to sue for declaration—Daughter's son alive, effect of.

It is open to an appellant in second appeal to show that the evidence relied upon by the other side, even if believed and considered sufficient, does not, in law amount to the proof of an alleged custom.

Kakarla Abbayya v. *Raja Venkata Papayya Rao*, 29 M. 24; 16 M. L. J. 8; *Hashim Ali* v. *Abdul Rahman*, 23 A. 698; 3 A. L. J. 467; A. W. N. (1906) 187; *Paragi* v. *Baiju*, 4 O. C. 71, referred to.

A custom to be valid must be ancient, continuous, reasonable and definite and all these elements must be established by clear and unambiguous evidence.

Mussammat Parbati Kuar v. *Rani Chandrapal*, 8 O. C. 94, followed.

Where the evidence established the custom to be only 16 years old and where the instances proved were so few in number that they could not establish the continuity of the custom, it could not be held to have been established in law.

Where the custom as to the exclusion of daughters is not established and the reversioners sue to set aside a deed of gift executed by the widow, their suit is not maintainable in the presence of a daughter and especially a daughter's son.

Uda v. *Durgadin*, 5 O. C. 360, *Rajadei* v. *Umed Singh*, 9 A. L. J. 158; 34 A. 207; 13 Ind. Cas. 632, distinguished.

Anund Kuar v. *Court of Wards*, 8 I. A. 14; 6 C. 764; 8 C. L. R. 381, referred to.

Appeal against an order of the District Judge of Gonda, dated 24th January 1911, upholding that of the Munsif of Gonda, dated 2nd December 1910.

Babu *Basudeo Lal*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the reversioners of one Ramdas Pande for a declaration that a transfer made by the widow of the latter in favour of her daughter was not binding upon them.

It appears that Ramdas Pande was the last male owner of 8-annas share in *Mouza* Nibia Paraspur. He died some time in 1908, leaving a widow *Musammat* Bishra, two daughters, *Musammat* Subhadra and Parbhudei and a grandson Balak Ram, the son of *Musammat* Subhadra. Balak Ram is now 9 years old. *Musammat* Bishna executed a deed of gift on the 4th. of June 1910, in favour of her daughter *Musammat* Subhadra in respect of 4-annas out of the 8-anna share of Ramdas Pande in *Mouza* Nibia Paraspur.

The plaintiffs-respondents instituted a suit in the Court of the Munsif of Gonda on the 5th of July 1910 against *Musammat* Bishna and *Musammat* Subhadra on the allegation that they were the next reversioners of Ramdas, as under a custom obtaining in the family, daughters and daughter's sons were excluded from inheritance, and that the deed of the 4th of June 1910 had been made without any legal necessity, which they prayed should be declared null and void as against them.

The claim was resisted by the two ladies who denied the custom set up in the plaint and alleged that the deed of the 4th June 1910 was made for legal necessity. They further said that *Musammat* Bishna had inherited the property with unrestricted power of alienation and that the suit was not maintainable because Ramdas Pande's daughters and grandsons were alive. The status of the plaintiffs-respondents was also denied, but subsequently in the pleadings it was admitted that they were the remote reversioners.

The learned Munsif decreed the claim holding the custom set by the plaintiffs-respondents to have been proved. *Musammat* Subhadra alone preferred an appeal to the District Judge who affirmed the decree of the first Court. She has preferred a second appeal to this Court.

She attacks the decree against her on the ground that the custom alleged by the plaintiffs-respondents does not obtain in her family.

On behalf of the respondents, a preliminary objection is taken to the effect that the question of the proof of custom cannot be raised

in second appeal. It is said that as the lower Courts have come to the conclusion on the evidence on the record that the alleged custom is proved, it is not open to the appellant to dispute that finding. In support of this contention the case of *Paragi* v. *Baiju* (1) is referred to. The particular passage in that case upon which the learned Counsel for the respondents relies is this:—"It follows from what I have said above that the question whether a particular *wajib ul-arz* is a sufficient proof of a custom recorded in it, is a question not of law but one of fact as it is a question as to the weight or value to be attached to it. The District Judge held that the *wajib-ul-arz* in this case, if not rebutted, was conclusive proof of the custom. Here I think that he was wrong. But he has also looked at the *wajib-ul-arz* in another way, that is to say, in the way in which I think he should have looked at it, namely, to see what weight should be attached to it as proof of the custom, merely as a piece of evidence. Looking at it in that way, he was of opinion that the entry in it was sufficient proof of the custom, if the entry was not rebutted. Sitting as a Court of second appeal, I am not competent to consider whether the District Judge should or should not have attached as much value to the *wajib-ul-arz* as he has done, dealing with it on the assumption that it is not conclusive proof, even if not rebutted."

For the appellant, the reply is that the custom is a mixed question of fact and law and whenever it is in dispute, the Court can in a second appeal examine the evidence bearing on it both as to the credibility of the evidence and the weight to be attached to it. In support of his argument, the learned Counsel for the appellant refers to *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2) and *Hashim Ali* v. *Abdul Rahman* (3).

In the Madras case it was held that "although the provisions of section 584 of the Civil Procedure Code disallow a second appeal with reference to findings of fact, yet the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court, when it has to pronounce an opinion upon such question, to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements required to constitute a valid usage having the force of law but also the credibility of the evidence relied on and the weight due to it."

The Allahabad High Court takes a narrow view. It held in the case mentioned above that: "Where on a question as to the existence or non-existence of a particular custom, the Courts below have acted upon illegal evidence or on evidence which is legally insufficient to establish an alleged custom, the question is one of law, and can be entertained in a second appeal, but if there is legal evidence upon which the lower Courts have pronounced an opinion, the High Court will not in second appeal consider the weight to be attached to that evidence."

The case of *Paragi and others*(1), relied upon by the respondents, takes a still more limited view of the rule. I must, however, follow that case. The appellant is not entitled to argue that the evidence in support of the custom is insufficient or that it does not prove the custom. But it is open to her to show that the evidence relied upon by the respondents, even if believed and considered sufficient, does not in law amount to the proof of the alleged custom. I have, therefore, to see whether there is legal evidence in support of the custom set up in the plaint. It has been held in more cases than one that a custom to be valid must be ancient, continuous, reasonable and definite and that all these elements must be established by clear and unambiguous evidence. Vide *Musammat Parbati Kuar* v. *Rani Chandrapal Kuar* (4).

The respondents examined four witnesses, two of whom describe themselves as distant connections of Ramdas, deceased. The other two are *zemindars* of the village where the parties live. The witnesses give three instances in which it is said that the daughters' sons were excluded from inheritance by remoter reversioners. The oldest instance is said to have happened only 16 years ago. It is impossible to hold the ancient nature of the custom on the basis of an instance that is only 16 years old, not can it be said that three instances prove the continuity of the custom. I find that there is no legal evidence to prove two of the main elements of a valid custom, namely, its age and continuity. I hold that

(1) 4 O. C. 71.
(2) 29 M. 24; 16 M. L. J. 8.
(3) 28 A. 698; 3 A. L. J. 467; A. W. N. (1906) 187.

(4) 8 O. C. 94.

the custom set up by the respondents has not been proved. This finding would dispose of the appeal but for a contention for the respondents that in spite of their failure to establish the custom set up by them, they can, as the nearest presumptive heirs to the full ownership of the estate of Ramdas, maintain the suit. In support of their contention, they rely on the following cases:—*Uda* v. *Durgadin* (5); *Rajadei* v. *Umed Singh* (6).

In the first case, it appears that the plaintiffs were the brothers of a deceased Hindu whose widow had created a mortgage of a part of her husband's estate in favour of a third party. The plaintiffs sued the widow and the mortgagee for a declaration that the mortgage was made without legal necessity and was, therefore, void as against them after the death of the widow. The suit was resisted upon the ground among others that the deceased owner of the estate had also left a daughter who was alive and the plaintiffs not being the immediate reversioners could not maintain the suit. It was decided that the plaintiffs, as the nearest presumptive heirs, could maintain the suit without proving that the daughter of the deceased male owner had refused without sufficient cause to sue or had precluded herself by her own act or conduct from suing or had colluded with the widow or was concerned in the alienation.

In the Allahabad case, the facts were that one Nagina died leaving a widow, *Musammat* Waziri, and a daughter, Rajadei. *Musammat* Waziri made a gift of the property that came to her from her husband to her grandson Kan Singh, the son of Rajadei. The next male reversioners of Nagina brought a suit to set aside the alienation. One of the pleas in defence was that the suit was not maintainable. It was urged in defence that the existence of Rajadei and the fact that Kan Singh was at the date of the institution of the suit the next reversioner presumptively entitled to the full ownership of the property, were fatal to the maintenance of the suit. The Court disallowed the plea and held that the suit was maintainable.

I do not think that either of these cases helps the respondents. All that was laid down in the Oudh case was that a suit by a remote reversioner could be maintained when the immediate reversioner was a female entitled to a life-estate only. It seems to have been conceded in that case that had the daughter a son born to her prior to the institution of the suit of the presumptive heirs, their suit could not be maintained, as would appear from the following passage:—" It appears that since the appeal was presented, the daughter has given birth to a son. The appellant, therefore, contended that as daughter's son was a nearer reverisonary heir than the plaintiffs, they could not maintain the suit. But the plaintiffs had a right to sue when the suit commenced and that right cannot be taken away by the mere fact that since the commencement of the suit they have ceased to be the nearest male reversionary heirs." Vide *Uda* v. *Durgadin* (5).

In the Allahabad case, the reasons for holding that the suit by the presumptive heirs was maintainable seemed to be that such a suit could be brought because the daughter had a life estate only and the daughter's son had colluded with the widow in accepting the transfer from her. Mr. Chamier in support of the second reason quoted the following dictum of their Lordships of the Privy Council from the case of *Rani Anand Kunwer* v. *Court of Wards*(7): "If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumptive reversioners would be entitled to sue."

In the present case, the existence of *Musammat* Subhadra and Parbhudei may not be a bar, but the existence of Balak Ram, in my opinion, is a bar to the maintenance of the suit of the respondents. For he is admittedly the nearest reversionary heir and being a minor cannot be said to have refused without sufficient cause to institute the proceedings to challenge the gift of 4th of June 1910 or to have precluded himself by his own act or conduct from suing or to have colluded with *Musammat* Bishna or given his consent to the gift by the latter.

For these reasons, I accept the appeal and set aside the decree of the Court below

(5) 5 O. C. 360 at p. 365.
(6) 9 A. L. J. 158; 34 A. 207; 13 Ind. Cas. 632.
(7) 8 I. A. 14; 6 C. 764; 8 C. L. R. 381.

by dismissing the claim of the plaintiffs-respondents.

Costs of all the Courts are allowed to the appellants.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 8 OF 1912.

May 6, 1912.

Present:—Mr. Lindsay, J. C.

IMDAD ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat HABIBUNNISSA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Additional evidence, reasons for admission to be recorded—Especial reasons must exist—Separate proceedings, record of.

Before an Appellate Court admits additional evidence, it should record separately its reasons for the admission of such additional evidence: except for very especial reasons, further evidence should not be admitted in a Court of appeal. The fact that such evidence proves a very important point would not be a sufficient reason.

Appeal against an order of the District Judge, Fyzabad, dated 16th November 1911, reversing that of the Assistant Collector, Barabanki, dated 5th September 1911.

Pandit *Gokaran Nath Misra*, for the Appellants.

Babus *J. K. Banerji*, holding brief of Mr. *Aditya Prasad*, for the Respondent.

JUDGMENT.—This is a second appeal against the appellate judgment of the District Judge, Fyzabad. The case has arisen out of a suit for profits brought by one *Musammat* Habib-un-nissa against Imdad Ali and other defendants. The Court of first instance dismissed the suit. In appeal the learned District Judge reversed the lower Court's order and decreed the plaintiff's claim to the extent of Rs. 85 with proportionate costs. One of the grounds upon which the decree of the lower Appellate Court is attacked here is that the learned Judge acted illegally in receiving certain documentary evidence at the hearing of the appeal merely on the ground that such documentary evidence proved an important point. It is also argued that no fresh documentary evidence ought to have been received without allowing the opposite party some opportunity of rebutting it. It is admitted that, apart from what is stated in the judgment of the learned Judge, there is nothing on the proceedings to show why this additional evidence was admitted during the hearing of the appeal. In Order XLI, rule 27 of the Code of Civil Procedure, it is laid down that wherever additional evidence is allowed to be re-produced by an Appellate Court, the Court shall record the reasons for its admission. In the old Code of Civil Procedure, section 568, it was directed that in cases where additional evidence is admitted by an Appellate Court, the reasons for its admission should be recorded on the Court's proceedings. Order XLI, rule 27 (2), which corresponds to section 568 of the old Code, does not say in so many words that the record of the reasons for the admission of additional evidence should be made on the proceedings but taking into account the language of Order XLI, rule 29, it seems clear that the law contemplates that a record of the reasons and the circumstances in which additional evidence is allowed to be taken should appear on the Court's proceedings. It has been ruled in this Court, in Second Civil Appeal No. 303 of 1903, which was a ruling under the old Code of Civil Procedure, that the law is not complied with merely by the Judge stating in his judgment the reason for admitting additional evidence. This case was decided by Mr. Wells on the 30th June 1904 and in his judgment he pointed out that when section 568 directed that the reasons for the admission of evidence should be recorded on the Court's proceedings, it did not mean in the Court's judgment, which, as Mr. Wells pointed out, might be written weeks later. Mr. Wells referred to the judgment of their Lordships of the Privy Council in the case of *Sreeman Chunder Dey* v. *Gopal Chander Chuckerbutty* (1). It has been the practice of this Court to require that a separate record of reasons for the admission of additional evidence should always be kept in cases where such evidence is admitted and I see no reason for thinking that the state of the law has been altered since the introduction of the new Code of Civil Procedure. What ap-

(1) 11 M. I. A. 28 at p. 48; 7 W. R. 10.

pears in the present case is this, namely, that the appeal came up for hearing before the learned District Judge on the 13th November 1911. The judgment was written on the 16th November. An application was made at the hearing of the appeal on behalf of the appellant for the admission of certain documentary evidence which, it was stated, had been presented to the Court of first instance but had been refused. The application for the admission of this evidence was supported by an affidavit but, according to the language of the judgment, it would seem that this affidavit was not accepted by the District Judge. It cannot, therefore, be said that this documentary evidence which consists of certain decrees has been properly admitted under the terms of Order XLI, rule 27 (1) (*a*); nor does the reason recorded by the learned District Judge for the admission of the evidence appear to satisfy the requirements of rule 27 (1)(*b*). It is not a sufficient reason for admitting additional evidence that such evidence proves a very important point. It is the duty of the parties to produce all the evidence at their disposal in the Court of first instance and it is only for very exceptional reasons that any further evidence should be admitted in the Court of appeal. Another difficulty which presents itself in considering what was done in the Court is this, namely, that so far as appears from the record and from the decrees themselves, it is not apparent that they were admissible in evidence. It is pointed out that on the face of them the decrees do not appear to have been passed between the parties to this suit or their representatives; and further it seems to me reasonable to hold that if the appellant was allowed to put in this further evidence in the Court below, the opposite party was certainly entitled to ask the Judge to receive any evidence which they could produce to rebut it. Had the application for the reception of additional evidence been dealt with in a proper manner, the question of the admissibility of the documents in question would have been decided in a separate proceeding. At the present stage, I am not in a position to say whether or not these decrees were admissible in evidence. As the procedure in the Court below has been irregular, the only course which is open to me now is to set aside the judgment and the decree of the Court below and direct that the appeal be re-heard after considering in a separate proceeding the application of the appellant Habibunnissa for the reception of the additional evidence and anything which the respondents in appeal may have to urge by way of objection to the admission. If the respondents desire to produce any evidence in rebuttal of the additional evidence which Habibunnissa may be allowed to produce, their application must also be considered. The respondents will pay the appellants costs.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 685 OF 1911.

May 22, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Karamat Husain.

BIDHATA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM CHERI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pre-emption—Custom or contract—Proof.

A custom of pre-emption should, like any other custom, be proved by clear and sufficient evidence.

Second appeal from the decision of the District Judge of Banda, dated 29th June 1911.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The property sold is *zemindari*. The plaintiffs are owners of isolated plots. They are not co-sharers with the vendors in the sense that they share in the profits of the vendor's property, or the vendors in theirs nor are they jointly responsible for Government revenue. This being the case it lay upon the plaintiffs to prove not only that some custom of pre-emption existed in the village but also that there was a custom of pre-emption which gave the owner of an isolated plot a right of pre-emption in the case of the sale of a *zemindari* share. The only evidence adduced in support of the case of the plaintiffs was the *wajib-ul-arz* of 1842 and the *wajib-ul-arz*

of 1886 and also one case in which pre-emption was claimed, and which resulted in a compromise. It does not appear whether or not the plaintiff in the case was, like the plaintiffs in the case now before us, merely an owner of an isolated plot, or a co-sharer in the *zemindari*. If he was the latter, the case is really of no importance whatever. The case then really rests on the extracts from the two *wajib-ul-araiz*. The first is as follows:

"In this village, land is sub-divided. All have power to sell their property to a stranger with consent of *Shikmis*."

This is very obscure. In all probability the division of the land at that time was very different to what it is at present. But there is no reference whatever to the owner of isolated plots. The second extract is as follows:

"In case proper price is paid, first a cosharer in a *mahal* and then a co-sharer in the village will have the right of pre-emption."

This is very different from the first. It gives a right to a co-sharer in the village and it may be that this was merely an arrangement entered into by the parties which would terminate with the Settlement. However this may be, in our opinion, the evidence adduced by the plaintiff in support of the right which he alleged was altogether insufficient to establish his claim. A custom of pre-emption must like any other custom be proved by clear and sufficient evidence. We, therefore, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

Decree set aside.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 186 OF 1911.

May 17, 1912.

Present:—Mr. Justice Brett and Mr. Justice Sharfuddin.

PANCHORAM TEKADAR—JUDGMENT-DEBTOR—APPELLANT

versus

KINU HALDAR AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Jurisdiction—Decree for possession and mesne profits in Munsif's Court—Mesne profits more than Rs. 1,000 *but less than Rs.* 5,000*—Whether Munsif can award amount.*

A decree for recovery of possession of land was obtained in a Munsif's Court, and it was directed that the amount of mesne profits would be determined in the execution proceedings. The amount of mesne profits so ascertained was more than Rs. 1,000 but less than Rs. 5,000:

Held, that the Munsif's Court had jurisdiction to award the sum as mesne profits.

Rameshwar Mahton v. *Dilu Mahton*, 21 C. 550, applied.

Bhupendra Kumar Charkarbuty v. *Purna Chandra Bose*, 8 Ind. Cas. 34; 13 C. L. J. 132; 15 C. W. N. 506, distinguished.

Appeal from the order of the Sub-Judge of Khulna, dated January 6th 1911, affirming that of the Munsif of Khulna, dated December 20th, 1909.

Babu *Sarat Chandra Ghosh*, for the Appellant.

Babu *Jadu Nath Kanjilal*, for the Respondents.

JUDGMENT.—This is an appeal against an order passed by the lower Appellate Court confirming an order made by the Court of first instance in certain execution proceedings relating to mesne profits. It appears that the respondent in the present appeal obtained a decree against the present appellant for recovery of possession of a certain piece of land with mesne profits.

It is alleged that the plaintiff-respondent had been dispossessed on the 23rd *Chait* 1311 and mesne profits were claimed for the years 1312 to 1315. The suit was instituted on the 6th March 1907 in the Munsif's Court and a decree was obtained by the plaintiff for recovery of possession of the land in suit together with mesne profits from the date of dispossession up to the date of the restoration of possession and it was directed that the amount of mesne profits would be determined in the execution proceedings. The decree was appealed against but it was confirmed. The execution proceedings for the purpose of determining the amount of mesne profits then commenced and, as a result, it was determined that the plaintiff was entitled to recover mesne profits for 1312, 1313 and 1314 but was not entitled to any mesne profits for 1315 because during that year, he had himself taken away the crops on the land. The total amount of mesne profits so ascertained was Rs. 1,630-8 which sum included interest amounting to Rs. 294.

An appeal was preferred against the deci-

sion of the executing Court allowing mesne profits to the plaintiff to the extent of that sum and in support of it various points were taken which also had been argued before the Court of first instance. For the purposes of this appeal, the only point which it is necessary for us to consider is that urged on behalf of the judgment-debtor, the present appellant, namely, that the executing Court being a Munsif's Court was not entitled to award mesne profits of a higher amount than Rs. 1,000, that being the ordinary pecuniary jurisdiction of such Court. In support of that contention, reliance was placed on the case of *Golap Sundari Debi* v. *Indra Kumar Hazra* (1). Both the Court of first instance and the lower Appellate Courts held that, that case had no application whatever to the facts of the present case, that being a suit brought for accounts and this High Court having held in that case that it was the duty of the plaintiff to ascertain approximately before instituting the suit the amount which he claimed to be due on taking accounts so as to determine the Court in which the plaint should be filed. In that case, the sum which was found to be due by the Court exceeded Rs. 8,000. In the present case, both the lower Courts, relying on the decision of this Court in the case of *Rameshwar Mahton* v. *Dilu Mahton* (2), were of opinion that, under the provisions of section 211 of the old Code of Civil Procedure, which corresponds with Order XX, rule 12 of the new Code, the Munsif's Court had jurisdiction in execution of the decree to award as mesne profits the sum allowed in the present case.

The judgment-debtor has appealed to this Court and, in support of the appeal, the main contention which has been advanced is that the lower Courts erred in holding that the Munsif's Court as a Court of execution had power to award to the plaintiff a decree for mesne profits in excess of Rs. 1,000. In support of this contention, reliance is placed on the decision of this Court in the case of *Bhupendra Kumar Charkrabuty* v. *Purna Chandra Bose* (3). We have read through the judgment of this Court delivered in that case and, in our opinion, the facts of that case and the grounds which influenced the decision of the learned Judges in that case are very distinct from the facts of the present case. There the suit was to recover possession of land valued at Rs. 686-8 and mesne profits valued at Rs. 200 up to the date of the institution of the suit and mesne profits from the date of the institution of the suit up to the date of the recovery of possession to be ascertained in execution. The suit was decreed in favour of the plaintiff for recovery of possession of the land claimed and also for mesne profits claimed, the amount to be determined in execution proceedings. When execution proceedings were taken, the claim for mesne profits *pendente lite* was laid at over Rs. 60,000. It does not appear in that case that any mesne profits were, in fact, ascertained, but, on appeal to this Court, it was held that the Munsif had not jurisdiction to entertain the claim for mesne profits *pendente lite* for such a large amount The learned Judges in that case pointed out that there were two weighty and obvious reasons why the Munsif should not be allowed to exercise jurisdiction and why the rule laid down in the case of *Rameshwar Mahton* v. *Dilu Mahton* (2) could not possibly be extended to that case. The two reasons were, *first*, that the value of the claim for mesne profits *pendente lite* which the decree-holder invited the Court to investigate was much in excess of the value of a suit which the Munsif was generally competent and specially authorized to try and, *secondly*, that if the Munsif investigated the claim, there would be insuperable difficulty as to the forum of the appeal which could not be either the Court of the District Judge who could hear appeals only in suits of which the value did not exceed Rs. 5,000 or this Court because the Legislature never contemplated an appeal direct from the decision of the Munsif to the High Court. For these reasons, the learned Judges held that the Munsif could not entertain the application for investigation of mesne profits *pendente lite* as the claim was laid at over Rs. 30,000. In the present case, the claim was not laid at anything like that sum and, in fact, the amount was only ascertained in the course of the execution proceedings by a Commissioner specially appointed for that purpose. In the present case, the amount of mesne profits ascertained does not exceed Rs. 5,000 or, in fact, approach near that amount and no question as to the forum of appeal arises. Furthermore, this

(1) 13 C. W. N. 493; 1 Ind. Cas. 86; 9 C. L. J. 367; 5 M. L. T. 360.
(2) 21 C. 550.
(3) 8 Ind. Cas. 34; 13 C. L. J. 132; 15 C. W. N. 506.

is not an appeal, as the case in *Bhupendra Kumar Chakrabutly* v. *Purna Chandra Bose* (3) was, against an application to the Munsif to investigate the mesne profits, but is an appeal against an award of mesne profits made by the Munsif in execution of a decree which has become final and which investigation appears to have been conducted without any objection raised on behalf of the appellant. It was only after the amount of the mesne profits had been ascertained that the objection was taken that the Munsif had no jurisdiction to award mesne profits in excess of Rs. 1,000. In our opinion, therefore, the ruling on which the learned Pleader for the appellant relies has no application whatever to the facts of the present case. The principles laid down by this Court in the case of *Rameshwar Mahton* v. *Dilu Mahton* (2), which have been followed by the lower Court, appear to us, on the other hand, to be fully applicable. In that case, the learned Judges pointed out that the amount of mesne profits to be awarded up to the date of the delivery of possession, which the decree-holder would be entitled to recover, would be dependent not on his action but on the opposition which the judgment-debtor might be able to offer to the delivery of possession to him and it was considered that it was neither the intention of the law nor would it be right that the decree-holder should be deprived of his rightful profits or driven to a subsequent suit to recover the amount simply in consequence of the conduct of the judgment-debtor. The learned Judges also pointed out that, in most cases where a suit is brought for recovery of possession and mesne profits, the Court would not be in a position at the time of the institution of the suit to say whether it had or had not jurisdiction until the inquiry as to the amount of the mesne profits had been completed. No doubt, there is in this case an opinion expressed that where mesne profits are claimed prior to the institution of the suit, such profits and the value of the property in suit should not exceed the pecuniary jurisdiction of the Court trying the suit; but, in the present case, this question does not appear to have been raised in any of the lower Courts nor, in fact, was it raised at first when the appeal was argued and it was only as an after-thought that the learned Pleader for the appellant suggested that the mesne profits for 1312 and 1313 together with the value of the property in suit would exceed Rs. 1,000 We have not the materials before us in this appeal to enter into that question and decide it even if we were prepared to do so. Certainly, if that question had been raised in any of the lower Courts, it would have been open to the decree-holder to determine whether or not he would relinquish any part of his claim for mesne profits prior to the institution of the suit, so as to bring the claim for mesne profits and recovery of possession within the pecuniary jurisdiction of the Munsif. As the facts at present stand before us, it is not possible for us to say that the contention is correct that the mesne profits claimed prior to the institution of the suit with the value of the property exceed Rs. 1,000. If the judgment-debtor relied on the contention now advanced before us, it was his duty to have taken the objection in the Munsif's Court or in the Court of first appeal and not to advance it as a sort of last argument in this Court in second appeal. In our opinion, the reasons given by the learned Judges in the case of *Rameshwar Mahton* v. *Dilu Mahton* (2) apply fully to the facts of the present case and we are of opinion that it was with the object of allowing a plaintiff to recover the mesne profits claimed in a suit for recovery of possession of land after the institution of the suit, without being driven to a subsequent suti, that the provisions of section 211 of the old Code, which are now re-produced in rule 12 of Order XX of the new Code, were enacted. In our opinion, the view taken by the lower Courts is correct. The judgment and decree of the lower Appellate Court are, therefore, confirmed and the appeal is dismissed with costs, three gold *mohurs*.

Appeal dismissed.

SADHAN SARDAR *v.* LAKAN MANDAL.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEALS NOS. 1211 AND 1486 OF 1910.
January 9, 1912.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
SADHAN SARDAR AND ANOTHER—DEFENDANTS—APPELLANTS
versus
LAKAN MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Party—Necessary party—Person not made party to proceeding, not bound by order—Purchase of occupancy holding in execution—Permanent lease granted to plaintiff by purchaser—Reversal of sale without making plaintiff party—Whether plaintiff bound by order of reversal—Bengal Tenancy Act (VIII of 1885), *s.* 85 *cl.* (2)—*Lease in contravention of cl.* (2) *s.* 85—*Who is entitled to question validity of lease.*

An occupancy-holding was sold in execution of a money-decree against the defendant and the purchaser obtained possession and subsequently granted a permanent lease to the plaintiff. The sale was afterwards set aside but in the application for the reversal of the sale, the plaintiff was not made a party. The plaintiff brought this suit for recovery of possession, and the defendant pleaded that the sale, which was the basis of the plaintiff's claim, having been set aside, the plaintiff had no enforceable title as against the defendant:

Held, that, as the plaintiff was not made a party to the proceedings for the reversal of the sale, he was not bound by the order.

Menajuddi v. *Toam Mandal*, 15 Ind. Cas. 175, followed.

The true object of section 85 of the Bengal Tenancy Act, is to entitle the landlord of a *raiyat* to question the validity of a sub-lease granted in contravention thereof. Therefore, an under-*raiyat*, who holds under a permanent lease granted by a *raiyat*, can successfully maintain a suit for possession or defend his possession against the *raiyat* or his representatives-in-interest. It is not open to the *raiyat* in such a suit to question the validity of the sub-lease on the ground that it was granted in contravention of clause (2) of section 85 of the Bengal Tenancy Act.

Manik Borai v. *Bani Charan Mandul*, 10 Ind. Cas. 469; 13 C. L. J. 649 and *Arab Ali* v. *Rachimuddi*, 10 Ind. Cas. 562; 13 C. L. J. 656, relied upon.

Appeal from the decree of the Sub-Judge of Khulna, dated December 15th, 1909, affirming that of the Munsif of Satkhira, dated July 31st, 1908.

Babu *Trailokya Nath Chakravarti*, for the Appellants.

Babu *Sarat Chandra Roy Chowdhury*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in an action in ejectment. The subject-matter of the litigation is an occupancy-holding which was sold in execution of a money-decree on the 15th May 1893. The sale was duly confirmed and the purchaser obtained possession. He subsequently granted a permanent lease to the plaintiffs-respondents on the 15th April 1896. The case for the plaintiffs is that they also obtained possession but were later on evicted by the appellants. The defendants resist the claim on the ground that the sale, which is the foundation of the title of the plaintiffs, was reversed on the 25th August 1906 and that consequently the plaintiffs have no enforceable title as against them. This defence has been overruled by the Court below and, in our opinion, rightly. It is clear that as the purchaser alone was made a party to the proceedings for reversal of the sale after he had granted a permanent lease in favour of the respondents, they are not bound by the order which was made behind their back. It cannot be disputed, in view of the decision of this Court in the case of *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (1), that appropriate proceedings have to be taken for reversal of a sale of an occupancy-holding when the sale is impeached on the ground that the holding is not transferable by custom and is not liable to be sold in execution of a money-decree. In the case before us, as we have just explained, this proceeding was infructuous in so far as the respondents are concerned, because they were not brought before the Court and were not afforded any opportunity to contest the application of the judgment-debtors. Consequently, in so far as they are concerned, they are clearly entitled to maintain the position that there was a valid sale. See *Menajudi* v. *Toam Mandal* (2).

It has been finally argued on behalf of the appellants that even though the sale be treated as a valid sale, the plaintiffs have acquired no valid title because the sub-lease in their favour was granted in contravention of the provisions of clause (2) of section 85 of the Bengal Tenancy Act. In our opinion, there is no substance in this contention, because, it is not open to the present appellants to question the validity of the sub-lease on the grounds alleged. As explained in the cases of *Manik Borai* v. *Bani Charan Mandul* (3) and *Arabali* v. *Rochimuddi* (4), an under-*raiyat* who holds under a permanent lease granted by a *raiyat* can suc-

(1) 26 C. 727; 3 C. W. N. 586.
(2) 15 Ind. Cas. 176.
(3) 10 Ind. Cas. 469; 13 C. L. J. 649.
(4) 10 Ind. Cas. 562; 13 C. L. J. 656

cessfully maintain a suit for possession or defend his possession against the *raiyat* or his representatives-in-interest. The true object of section 85 of the Bengal Tenancy Act is to entitle the landlord of the *raiyat* to question the validity of a sub-lease granted in contravention thereof.

The conclusion follows that the plaintiffs have established their title as against the defendants whose title must be taken to have been extinguished by the sale, in so far, at any rate, as the present plaintiffs are concerned. The decree made by the Subordinate Judge must, therefore, be affirmed and this appeal dismissed with costs.

It is conceded that this judgment will govern the other appeal (No. 1486 of 1910) which is, therefore, also dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 168 OF 1910.

May 7, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

NIM CHAND SHAHA—PLAINTIFF—APPELLANT

versus

JOY CHANDRA NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 48—*Land in holding of* raiyat, *of different qualities—No indication to show rates of assessment of various classes of lands—Part of land sub-let to under-*raiyat—*Whether s.* 48 *applicable.*

Section 48 of the Bengal Tenancy Act does not expressly mention the land held by the under-*raiyat*, but the meaning plainly is that the landlord of the under-*raiyat* who holds under a money rent is not entitled to recover rent exceeding by more than a quarter the rent which he himself pays in respect of the land let out to the under-*raiyat*.

Therefore, in cases in which the land comprised in the holding of the *raiyat* is of different qualities and there is no indication to show at what rates the various classes of lands were assessed, section 48 cannot be made applicable, if only a part of the land has been sub-let to an under-*raiyat*.

Appeal from the decree of the District Judge of Tipperah, dated October 11th, 1909, modifying that of the Fourth Munsif of Comilla, dated March 29th, 1909.

Babus *Tara Kishore Chowdhury* and *Gopal Chandra Das*, for the Appellant.

Babu *Birendra Chandra Das*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in an action for rent. The sole point in controversy relates to the rate at which the plaintiff is entitled to realise rent, in view of section 48 of the Bengal Tenancy Act. The plaintiff is an occupancy *raiyat* and the defendants are under-*raiyats* under him. The defendants were on a previous occasion sued in ejectment; they then pleaded that they held these lands on payment of rent at the rate of Rs. 10 a year. On the present occasion, the plaintiff claims at the rate of Rs. 14 a year. The defence is, that under section 48 of the Bengal Tenancy Act, he is not entitled to claim rent at a higher rate than Rs 3-5. This contention was overruled by the Court of first instance and a decree was made at the rate of Rs. 10 a year. Upon appeal, the District Judge has allowed the contention of the defendants to prevail. The question raised is apparently one of first impression and the solution must depend upon the true construction of section 48.

The plaintiff has an occupancy-holding which contains 12 *kanis* and 13 *gandas* of land. In his lease, the lands are classified and rent is assessed at rates varying from Rs. 2-4 to Re. 1 a *kani*; the aggregate rent is stated to be Rs. 21-14 a year. The defendants have taken a lease of one of these plots only, the rent whereof was assessed at Rs. 2-4 a *kani* in the lease of the plaintiff. The contention of the defendant is that under section 48, clause (*b*), the plaintiff is not entitled to recover rent at a rate in excess of Rs. 2-13 a *kani*. In our opinion, there is no foundation for this contention.

Section 48 of the Bengal Tenancy Act provides that the landlord of an under-*raiyat* holding at a money rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than 25 per cent. It will be observed that the section does not expressly mention the land held by the under-*raiyat*, but the meaning plainly is that the landlord of the under-*raiyat* who holds under a money rent is not entitled to recover rent exceeding by more than a quarter the rent which he himself pays in respect of the land let out to the under-*raiyat*. It

has not been disputed that in cases in which the land comprised in the holding of the *raiyat* is of different qualities and there is no indication to show at what rates the various classes of lands were assessed, section 48 cannot be made applicable, if only a part of the land has been sub-let to an under-*raiyat*. But the learned Vakil for the respondent has suggested that where, as here, on the face of the lease of the *raiyat*, the rates at which the different classes of land were assessed can be determined, the under-*raiyat* is not bound to pay more than 25 per cent. of the rent assessed with respect to the parcels in his possession. This argument, in our opinion, is based on a fallacy. It cannot be affirmed that the *raiyat* pays so much rent for any particular parcel. No doubt, for the purposes of the assessment of the aggregate rent, certain rates were taken as the basis of the calculation by the superior landlord. Nevertheless, the *raiyat* holds the entire land of the holding for the aggregate amount. If he fails to pay any portion of this rent, the entire holding is liable to be sold, and he cannot clearly save any particular parcel out of the holding by payment of the rent assessed upon the land comprised therein. In our opinion, section 48 applies to cases in which the land held by the *raiyat* is co-extensive with the land held by the under-*raiyat*. The section was never intended to apply to cases of the class now before us.

We may add that in the course of the argument at the bar, reference was made to the decision of Mr. Justice Giedt in the case of *Akhil Chandra Biswas* v. *Amjad Ali* (1), where a question similar in scope to the one before us, appears to have been raised but not decided; that judgment, so far as it goes, supports the view we take.

The result, therefore, is that this appeal is allowed, the decree of the Court below set aside and that of the Court of first instance restored with costs in this Court.

Appeal allowed.

(1) S. A. No. 415 of 1903 (unreported).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1756 OF 1910.

April 22, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

NARAYANA PILLAI—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TANJORE—RESPONDENT.

Madras Land Encroachment Act (Mad. III of 1905), *s.* 14—*Suit for refund of penal assessment levied—Party aggrieved—Cause of action—Notice by Government, whether constitutes cause of action—Proof of possession—Presumption as to prior possession.*

Under Madras Act III of 1905, section 14, the cause of action arises when a party deems himself aggrieved by the levy of a penalty or by eviction or forfeiture, that is, on the date of the levy of the assessment or penalty or of the eviction or forfeiture. A mere preliminary notice given by Government before exercising these powers under the Act cannot be regarded as a proceeding by which a person is "aggrieved". The notice itself is no grievance and cannot be the starting point for the computation of limitation.

When possession for a certain period is shown, it will be open to a Court deciding the facts to prove that possession prior to that period was also in the party whose subsequent possession is proved.

Venkatarama Iyer v. *Secretary of State for India*, 33 M. 362; 5 Ind. Cas. 118; 7 M. L. T. 139; 20 M. L. J. 74, referred to.

Second appeal against the decree of the District Court of Tanjore in A. S. Nos. 884 and 886 of 1909, presented against the decree of the Court of the District Munsif Tiruwalur, in O. S. No. 345 of 1908.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Appellant.

Mr. *J. L. Rosario*, Government Pleader, for the Crown.

This Second appeal coming on for hearing on 3rd and 4th days of January 1912, the Court (Sundara Aiyar and Spencer, JJ.) delivered the following

JUDGMENT.—It is not quite clear from the judgment of the learned District Judge whether he considered the question whether the plaintiff's predecessors-in-title were in possession of the two links of the *pial* in dispute before the plaintiff obtained his conveyance. The District Judge observes that the plaintiff's possession was proved to date only from 1903. He says also "plaintiff's possession is evidently not such as to throw the burden of proof on the other side," *i.e.*, apparently, that possession for two years is not sufficient to shift the onus.

We may also observe that when possession for a certain period is shown, it will be open to a Court deciding the facts to presume that possession prior to that period was also in the party whose subsequent possession is proved. See *Venkatarama Iyer* v. *The Secretary of State for India in Council* (1).

We request the lower Appellate Court to record a finding on the evidence on record on the question of possession of the two links of the *pial* and the seven links of the brick *alodi*. He will also record a finding on the 2nd issue. The findings will be submitted within one month from the date of the receipt of this order. Seven days will be allowed for objections.

In compliance with the above order, the District Judge of Tanjore submitted the following

FINDINGS:—On the question of possession, the finding was that the plaintiff and his predecessors-in-title were in possession of the 2 links of *pial* and the 7 links of *alodi* for a period of 30 years and more.

On the question of limitation, the District Judge said :—

"As regards the question of limitation, I think the suit is clearly time-barred by section 14 of Act III of 1905 (Madras). The suit is not one for a declaration of title to the disputed site but one for an injunction restraining the defendant from intefering with plaintiff's possession of the site by taking action against him under Act III of 1905, and for the recovery of the penal assessment already levied from him under that Act. Both these causes of action clearly come within the scope of section 14 of Act III of 1905, and are governed by the rule of limitation therein laid down. In the plaint the plaintiff himself has given the dates of his causes of action as 27th November 1907, the date on which the defendant served him with notice to vacate the disputed sites, and 18th January 1908, the date on which penal assessment was collected from him in respect of the alleged encroachment. Clearly, those are the dates on which the two causes of action arose and the plaintiff's suit was, therefore, time-barred in respect of both the reliefs prayed for by him or the date on which he presented his plaint to the District Munsif's Court *i.e.*, 28th September 1908. My findings on the second issue is, therefore, that the suit is barred by limitation.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—The finding of the lower Appellate Court is that the plaintiff and his predecessors-in-title have been in possession of the plaint lands for more than thirty years prior to the suit. The presumption, therefore, is that he was in possession prior to that time also, unless it be proved on behalf of Government that the land was unoccupied land or land in the occupation of Government before. The plaintiff's title, therefore, must be held to be established.

The next question is whether the suit is barred by limitation. The District Judge holds that it is barred under section 14 of Act III of 1905. That section, while entitling persons, deeming themselves aggrieved by any proceedings under the Act, to apply to the Civil Courts for redress, provides that the Civil Courts shall not take cognizance of any suit instituted by such persons for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose. Then the explanation to this section states that in respect of any assessment or penalty levied by Government, the cause of action shall be deemed to have arisen on the date on which such assessment or penalty was levied; and in respect of eviction or forfeiture, on the date of the eviction or forfeiture. The proceedings which the Government are entitled to take *suo motu* under the Act against persons, who, in its opinion, are in unauthorized occupation of land, are either the levying of penal assessment or summary eviction of the persons in occupation. Hence the statement in section 14 that the cause of action arises when a party deems himself aggrieved by either of these steps taken by Government. A mere preliminary notice given by Government, before exercising these powers under the Act, cannot be regarded as a proceeding under it by which a person is "aggrieved". The notice itself is no grievance. The result of the inquiry made by Government on the notice may be to recognise the title of the person to whom it

(1) 33 M. 362; 5 Ind. Cas. 118; 7 M. L. T. 139; 20 M. L. J. 74.

is issued. The party has a grievance only when his claim to the land is not recognized by Government and steps are taken by it either to evict him or to levy penal assessment.

In this case, the plaintiff's suit, so far as it seeks to recover the assessment levied by Government, must be held to be barred, but, in so far as the claim to the injunction is concerned, section 14 is inapplicable for the reasons already given. As against the Government, we consider it unnecessary to give an injunction. It will be enough to declare the plaintiff's title to the land with respect to which the injunction is sought. In the circumstances, there will be no order as to costs in any of the Courts.

Decree modified.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No 2306 OF 1909.

June 11, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Chapman.

Sheikh NUJEBAR RAHMAN—DEFENDANT—APPELLANT

versus

Syed MUKTASHED HUSAIN—PLAINTIFF—RESPONDENT.

Bond—Consideration—Promise to withdraw from prosecution of non-compoundable case—Unlawful consideration—Contract Act (IX of 1872), s. 23—Criminal Procedure Code (Act V of 1898), s. 345.

It is against public policy to compound a non-compoundable offence and any agreement to that end is wholly void in law.

Nubee Buksh v. *Bebee Hingon*, 8 W. R. 412, explained but not approved.

Williams v. *Bayley*, L. R. 1 H. L. 200, at p. 220; 12 Jur. (N. S.) 875; 14 L. T. 802; 35 L. J. Ch. 717, relied upon.

Keir v. *Leeman*, 13 L. J. Q. B. 259; 6 Q. B. 308; 8 Jur. 824; 66 R. R. 392, followed.

Appeal from the decree of the District Judge of 24-Pergunnahs, dated June 1st, 1909, affirming that of the Munsif of Basirhat, dated December 23rd, 1908.

Babus *Dwarka Nath Mitter* and *Satendra Nath Mukherji*, for the Appellant.

Moulvi *Wahed Hossein*, for the Respondent.

JUDGMENT.

CARNDUFF, J.—The appellant before us was the *gomashta* of the respondent. He was prosecuted by the respondent for criminal breach of trust under section 408 of the Indian Penal Code in respect of certain moneys collected in the course of his duty. The Magistrate, before whom the case was being tried, suggested, after having drawn up a charge, that the matter was one which might appropriately be settled out of Court. Accordingly, the matter was settled out of Court. The appellant executed a mortgage-bond for the amount embezzled, and, though the withrawal of the criminal prosecution is not mentioned in the instrument as forming part of the consideration, the prosecution was in fact dropped by the respondent after the execution of the deed and the appellant was then acquitted or discharged. The suit, out of which this appeal arises, was afterwards brought upon the mortgage-bond executed in the circumstances just described, and it has been decreed by both the Courts below. The defendant has now preferred this second appeal to the High Court.

In my opinion, the appeal clearly must be allowed. The lower Appellate Court has held that no general rule as to what is, or what is not, contrary to public policy can be, or has been, laid down; and, relying on *Nubbee Buksh* v. *Musammat Bibee Hingon* (1), has declared that its conscience felt no repugnance towards the agreement between the respondent and the appellant and that it entirely failed to see any danger to the public good therein. Now, the case cited by the learned District Judge stands, as far as I know, absolutely alone, and it appears to me to run counter to the trend of all authority. It is a case, moreover, of 1867, that is to say, at a time when the law on the subject had not been codified by the Indian Contract Act of 1872 and when the Code of Criminal Procedure in force contained no provision such as that to be found in section 345 of the present Code for the compounding of offences. The law, therefore, as to where there might be a compromise in a criminal case was not settled and the law as to agreements contrary

(1) 8 W. R. 412.

to public policy was probably equally unsettled. Now, we have for our guidance section 345 of the Code of Criminal Procedure of 1893 and section 23 of the Indian Contract Act of 1872 with its Illustration (*h*) and there can, so far as I can see, be no doubt as to what the legal position is.

The broad principle is laid down by Lord Westbury in *Williams* v. *Bayley* (2) and the learned District Judge has himself referred to that decision, although he seems to have failed to appreciate its effect. If a criminal case is declared to be non-compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law. Criminal breach of trust is (see section 345 of the present Code of Criminal Procedure) non-compoundable, either with or without the sanction of the Court. *Keir* v. *Leeman* (3), which was affirmed by the Exchequer Chamber in *Keir* v. *Leeman* (4) and followed by the Court of Appeal in *Windhill Local Board of Health* v. *Vint* (5), is ample authority for holding the view that the circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference whatever. And the principle, established by *Collins* v. *Blantern* (6), that illegality may be pleaded as a defence to an action on a bond has been so often recognised and is so well settled that it would be useless to enter into any discussion regarding it.

This appeal, therefore, must be allowed, the decrees of the Courts below discharged and the respondent's suit dismissed with costs throughout.

CHAPMAN, J.—I agree but desire to carefully confine my reason for holding that the bond was void to the ground that the consideration for the bond was found by the lower Court to be a promise to withdraw from the prosecution in a case, the compromise of which is expressly forbidden by the Code of Criminal Procedure.

Appeal allowed.

(2) L. R. 1 H. L. 200 at p. 220; 12 Jur. (N. S.) 875; 35 L. J. Ch. 717; 14 L. T. 802.

(3) (1844) 13 L. J. Q. B. 359; 6 Q. B. 308; 8 Jur. 846; 66 R. R. 392.

(4) 9 Q. B. 371; 72 R. R. 298; 15 L. J. Q. B. 359; 10 Jur. 742.

(5) 45 Ch. D. 351; 59 L. J. Ch. 608, 63 L. T. 366; 38 W. R. 738.

(6) 1 Sm. L. C. 11th Ed. at p. 369.

CALCUTTA HIGH COURT.

CIVIL RULE No. 472 OF 1912.

May 14, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Chapman.

ALI AHMAD KHAN AND OTHERS—PLAINTIFFS—PETITIONERS

versus

H. F. BROWN AND OTHERS—DEFENDANTS 1ST PARTY, AND OTHERS—DEFENDANTS 2ND PARTY—OPPOSITE PARTIES.

Ex parte *decree—Application to set aside—Decree against contesting defendants—Whether suit to be re-opened entirely—Decree executed against contesting defendants—Contesting defendants not made parties to application to set aside* ex parte *decree—Civil Procedure Code (Act V of* 1908), *O. IX, r.* 13 *proviso and r.* 14.

The plaintiff brought a suit against four defendants for redemption and recovery of arrears of rent due to the plaintiffs under a *zur-i-peshgi* lease. The suit was decreed *ex parte* against defendants Nos. 2 and 3, and the decree directed that defendants Nos. 1 and 4 should merely yield up possession of two villages. The plaintiffs did not appeal against the decree so far as defendants Nos. 1 and 4 were concerned, but executed it and recovered possession of the two villages.

Defendants Nos. 2 and 3 applied to have the *ex parte* decree against them set aside. In that application defendants Nos. 1 and 4 were not made parties. The Court set aside the *ex parte* decree against defendants Nos. 2 and 3, but declined to re-open the whole suit even as against the other defendants. The plaintiffs moved the High Court:

Held, (1) that there was really no question of jurisdiction or irregular exercise of it within the meaning of section 115 of the Civil Procedure Code, (2) that having regard to the fact that the plaintiffs were satisfied with their decree against defendants Nos. 1 and 4, the decree should not be set aside in so far as those defendants were concerned, (3) that the case was not covered by the proviso to rule 13 of Order IX of the Civil Procedure Code, and (4) that as defendants Nos. 1 and 4 were not parties to the application to set aside the *ex parte* decree, the Court below should not have passed an order prejudicial to them behind their backs.

Rule against the order of the First Sub-Judge of Mozaffarpur, dated January 9th, 1912.

FACTS.—The plaintiffs instituted a suit for recovery of Rs. 4,360 as rents and profits due under a *zur-i-peshgi* lease and for its redemption. The lease was executed by the predecessor of the plaintiffs in favour of one Mr. C. R. Brown for seven years (1894 to 1901). On the death of Mr. C. R. Brown, his widow, Mrs. Brown, and son, Mr. R. C. Brown, sold their rights to Mr. H. F. Brown in 1905 and the latter again sold his interest to Mr. H. K. Gray in 1906. The plaintiffs

made the widow and the son of the original lessee as defendants Nos. 2 and 3, and Mr. H. F. Brown and Mr. H. K. Gray as defendants Nos. 1 and 4 respectively in the suit.

The defendants Nos. 2 and 3 did not appear; but defendants Nos 1 and 4 contested the suit. They contended that they did not purchase any of the mortgaged properties and were, therefore, not liable for rents and profits, but they admitted that they held two of the mortgaged properties under a private arrangement from the heirs of the mortgagee, for which they paid rents to them.

The Sub-Judge held that defendants Nos. 1 and 4 did not purchase the *zur-i-peshgi* lease and there was no cause of action against them, and directed that they should yield up possession to the plaintiffs of the two properties which they admitted to hold under the mortgagees. The plaintiffs in execution of the decree recovered possession of the two properties from the defendants Nos. 1 and 4.

Subsequently, defendants Nos 2 and 3 applied to the Sub-Judge for setting aside the *ex parte* decree passed against them on the ground that no summons was served on them, and the Court on January 9th, 1912, set aside the *ex parte* decree and restored the suit so far as they were concerned, but declined to re-open the whole suit even as against the contesting defendants Nos 1 and 4 on the ground that it would be inequitable to require the contesting defendants "to fight the battle over again after their victory". In this application to set aside the *ex parte* decree, the defendants Nos. 1 and 4 were not made parties.

The plaintiffs moved the High Court and obtained this Rule against the defendants Nos. 1 and 4 to show cause why the order of the Court below should not be modified by setting aside the original decree in its entirety on the ground that it was of such a nature that it could not be set aside as against defendants Nos. 2 and 3 only.

Babu *Umakali Mukherjee* and Moulvi *Mohammad Mustafa Khan*, for the Petitioners.

Babu *Atul Krishna Roy*, for the Opposite Parties, defendants Nos. 1 and 4, in showing cause contended, *first*, that as the Court below had power to set aside the whole decree or the decree as against the applicants defendants Nos. 2 and 3 only, there was no want of jurisdiction, and the High Court could not interfere under section 115 of the Civil Procedure Code; *secondly*, as the defendants Nos. 1 and 4 were not made parties to the proceeding to set aside the *ex parte* decree, no order could be passed against them in their absence; *thirdly*, as the plaintiffs did not appeal against the original decree but executed it and recovered possession of the two properties from defendants Nos. 1 and 4, they could not now ask the Court to re-open the whole suit even as against those defendants; and *fourthly*, the case did not fall under the proviso to rule 13 of Order IX of the Civil Procedure Code.

The following cases were cited. *Manaku* v. *Sitaram* (1); *Monomohini Chowdhurani* v. *Nara Narayan Roy* (2); *Jadubansa Narain* v. *Mohunt Hari Charan Bharati* (3).

JUDGMENT.—The petitioners as plaintiffs sued four defendants for redemption and the recovery of Rs. 4,000 odd, being the arrears of rents and profits due to them under a *zur-i-peshgi* lease. The second and third defendants did not contest the suit. The first and fourth defendants were alleged to be assignees from the second and third defendants, or rather the first defendant was said to be an assignee from the second and third defendants and to have transferred his interest to the fourth defendant. The first and fourth defendants pleaded that they had nothing to do with the mortgage, but admitted that they had, by a subsequent private arrangement, been put in possession of two of the mortgaged villages.

After a keen contest, the Court below found that the statement of the first and fourth defendants was true; and in decreeing the suit against the 2nd and 3rd defendants *ex parte*, it directed that the rents and profits should be recovered from them alone, and that the 1st and 4th defendants should merely be required to yield up possession of the two villages occupied by them. This decree the petitioners did not appeal against. On the contrary, they accepted it and actually executed it by obtaining possession of the two villages from the 1st and 4th defendants.

The 2nd and 3rd defendants, however, moved to have the *ex parte* decree against them set aside, and the lower Court set it aside accordingly. The question whether it ought also to be set aside in so far as the 1st and 4th defendants were concerned, was

(1) 18 B. 142.
(2) 4 C. W. N. 456 at p. 458.
(3) 6 C. L. J. 226 at pp. 229, 231.

very carefully considered by it, and it was deliberately held that it would be most inequitable, as the lower Court put it, to require those defendants "to fight the battle over again after their victory".

The petitioners have obtained the present Rule against the opposite party to show cause why the whole decree should not be set aside; and we are of opinion that the relief they seek, cannot for the following reasons be granted.

First, there is really no question of jurisdiction or irregular exercise of jurisdiction within the meaning of section 115, Civil Procedure Code. The Court below clearly had jurisdiction, and it certainly did not exercise it arbitrarily. No doubt, this Court has still wider powers of interference under section 15 of the Charter: but, having regard to the fact that the petitioners were satisfied with their decree against the 1st and 4th defendants and, as we have said, put it in execution, we are not disposed to interfere in the exercise of those powers by setting the decree aside now in so far as those defendants are concerned.

In the *second place*, the real object of this Rule is to set aside that part of the decree which was in favour of the 1st and 4th defendants; and, we are inclined to think that that can hardly be done under the proviso to Order IX, rule 13. It is there laid down that, where the decree is of such a nature that it cannot be set aside only as against the defendants who did not appear, it may be set aside against all or any of the other defendants also. As we have said, this does not seem to cover the case of a decree in so far as it is in favour of the contesting defendants, nor in this instance is it clear that the decree was of such a nature that it could not be set aside against the non-appearing defendants only.

Finally, the 1st and 4th defendants had no notice of the application made under Order IX, rule 13, and were apparently no parties to that proceeding: and on first principles, it seems to us that the Court below could not have passed an order prejudicial to them behind their backs.

The result, therefore, is that this Rule must be discharged with costs. We assess the hearing fee at two gold *mohurs*.

Rule discharged.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 110 OF 1911.

April 30, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

PUTHENPURAYIL AMMAN PARUYKYI AND OTHERS—APPELLANTS

versus

MANGALASERI PULLIKANDI PAKRAM HAJI—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 82, 83, 100—Contract Act (IX of 1872), s. 69—Contribution, suit for—Several lands burdened with payment of common revenue—Liability of owners who have not paid to person who pays the revenue—Nature of decree—Plaintiff's right to a charge.

Where several lands are liable for payment of a definite amount of Government revenue and the amount has been paid by the owner of one of such lands, the latter is entitled, in a suit for contribution, to a charge on the land of each of the others for the proportionate fraction of the amount payable by each, and not to a personal decree.

Rajah of Vizianagram v. *Setrucherla Somasekhraraz* 26 M. 686; *Alayakammal* v. *Subbraya Gounden*, 28 M. 493; 15 M. L. J. 219 and *Sri Maharajah Parbu Narain Singh* v. *Babu Beni Singh*, 14 C. W. N. 361; 5 Ind. Cas. 779, referred to.

Subramanya Chetti v. *Mahlingaswami Sivan*, 33 M. 41; 3 Ind. Cas. 624; 19 M. L. J. 627; 6 M. L. T. 198, explained.

Appeal against the order of remand by the District Court of North Malabar, in A. S. No. 342 of 1910, presented against the decree of the District Munsif of Kootuparamba, in O. S. No. 624 of 1909.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *T. K. Govinda Aiyar*, for the Respondent.

JUDGMENT.

MILLER, J.—The District Judge bases his decision on the ground that the plaintiff and defendants are co-owners in the *parambas* on which the plaintiff has paid the land revenue, but the allegations in the plaint do not seem to support this view. The plaintiff in the plaint alleges that the defendants are, by a *karar*, which is not on the record, owners in *jenmi* right of one of the three *parambas* contained in the survey field in question, and that he himself is the owner in *jenmi* right of the other two. The plaintiff does not claim any interest in the *paramba* of defendants, nor admits that the defendants have any interest in his *parambas*.

The District Munsif gave him time to amend his plaint and rely on the *karar* by which *parambas* were divided, but he failed

to take advantage of the opportunity so given. If then, the District Judge's order is to be supported, it must be on the ground that the fact that the survey field is undivided for purposes of assessment of the land revenue upon it, brings the case within the rule established, so far as we are concerned, by the Full Bench of this Court in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* (1).

Now, in that case, both Bashyam Iyengar, J., (in the referring order) and Benson, J., were inclined to hold that sections 82 and 100 of the Transfer of Property Act were applicable and the former learned Judge points out (at page 709) that those sections would clearly have applied but for the fact that the property then in question was not strictly the "several properties of several owners." Here, in the plaint, the *parambas* are the "several properties of several owners," and they are all charged, by reason of the Revenue Recovery Act, with the payment of a single debt, the revenue assessed on the survey field. I have no doubt that Bashyam Iyengar, J., and, I think, also Benson, J., would have held in the present case that the plaintiff is entitled to a charge by virtue of section 82, Transfer of Property Act read with section 100.

I should be content to base my decision on the Transfer of Property Act on the authority of those learned Judges, but it may equally rest on the principles of equity on which both Subramanya Iyer, J., and Benson, J., rested theirs in the same case in delivering the judgments of the Full Bench. The principle does not, I think, depend on the parties being co owners in the lands; they must be co-sharers of the burden, and, in this case, as the pleadings show, the burden is common to the plaintiff and defendants because their lands are both charged with the payment of the whole revenue. It is true that defendants are not debtors of the Government not being the registered *pattadars*, but their land is nonetheless subject to the burden, and has been by the plaintiff relieved of it. But as the common burden is a burden on the land only, as the Government could recover the revenue only from defendants' land and not from them personally, so all that plaintiff is entitled to is a charge on the land for the amount, if any, paid by him.

(1) 26 M. 686.

I think, therefore, that, though the District Judge is wrong in holding the plaintiff and defendants to be co-owners of the land, so far as the pleadings have at present disclosed their position, he is right in reversing the decision of the District Munsif on the 2nd issue. I do not think we can or need decide what are the interests of the parties in the land. The plaintiff, if he has paid the revenue, is entitled to a charge on the lands, and the other issues in the suit must be decided. I would, therefore, confirm the order of the District Judge and dismiss the appeal with costs.

SADASIVA IYER, J.—I entirely agree. The case of *Subramania Chetty* v. *Mahalingasami Sivan* (2), went upon the ground that a person, who, as *pattadar*, pays the whole revenue on the *pattah* land, cannot sue for a mere money contribution from the owner of a share in the *pattah* land, that is, cannot get a *personal decree* for money claimed as due on such share because neither section 35 of the Revenue Recovery Act, nor section 69 of the Contract Act gives the *pattadar* such right or imposes an obligation on the owner of the share.

The question whether, when several shares on the same land or when several lands are liable under a common burden, the dischage of the whole burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums they were equitably liable for was not gone into in *Subramania Chetty* v. *Mahalingaswami Sivan* (2), but was, on the other hand, expressly decided in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* (1). The reason why it was not gone into in *Subramania Chetty* v. *Mahalingaswami Sivan* (2) was because the question did not arise in that case.

In the present case, the plaintiff claims recovery of the proportionate sums chargeable as revenue in defendant's *paramba* both from defendants personally and by sale of defendant's *parambas* on which he claims a charge for such proportionate sums. It may be that *Subramania Chetty* v. *Mahalingaswami*

(2) 33 M. 41; 3 Ind. Cas. 624; 19 M. L. J. 627; 6 M. L. T. 198.

Sivan(2) would prevent plaintiff from getting a personal decree against defendants for any portion of such amounts. The case of *Rajah of Vizianagram* v. *Somasekhararaz* (1), undoubtedly, prevents him from getting such a personal decree for more than three years' dues. But the *ratio* of the decision in that case allows him clearly a charge on defendants' *parambas* for the proportionate dues, the limitation period being twelve years under Article 132. The present suit claims a charge of only six years before suit.

A co-owner or co-sharer may not be liable personally to contribute towards sums paid to remove a burden on his property also, the whole burden being jointly imposed on the payor's and his co-owner's property. He may not have cared to discharge the burden as he might have been content to lose the property itself as not worth the expense of the removal of the burden It may, therefore, not be equitable to give a personal decree against him as the contribution required may be larger than the value of his property. But these considerations do not apply to the claim for a charge on his share for a proportionate share of the burden. The case of *Rajah of Viziangaram* v. *Rajah Setrucherla Somasekhararaz* (1), allowing such a charge, has been followed in *Alayakammal* v. *Subbaraya Goundan* (3), the limitation to enforce such a charge being twelve years. I find also that in *Sri Maharaja Parbu Narain Singh* v. *Babu Beni Singh* (4), the learned Judges, while refusing plaintiff's right to rely on section 69 of the Contract Act, gave him a charge on the defendants' shares for the proportionate fraction of the amount paid by plaintiff to dischage the burden on all the shares.

The remand order of the District Judge is, therefore, right and the appeal will be dismissed with costs.

Appeal dismissed.

(3) 28 M. 493; 15 M. L. J. 219.
(4) 14 C. W. N. 361; 5 Ind. Cas. 779.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3628 OF 1909.

March 4, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

GOBINDA CHANDRA ROY—PLAINTIFF—APPELLANT

versus

UDAY CHANDRA SUT AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Registered tenant—Surrender by registered tenant—Collusion with landlord—Prejudicing right of unregistered co-sharer tenant—Validity of surrender—Bengal Tenancy Act (VIII of 1885), *s.* 86.

It is not open to a registered tenant of an occupancy-holding to surrender, in collusion with the landlord, a part of the holding in favour of the latter, with the express object of destroying the right of his co-sharers or their transferees and thus prejudice their title and possession; and the surrender cannot be accepted as a good foundation for an action in ejectment by the landlord.

Tamizuddin Khan v. *Khoda Nawaz Khan*, 5 Ind. Cas. 116; 11 C. L. J. 16; 14 C. W. N. 229 and *Ananda Mohan Roy Chowdhury* v. *Guru Dayal Saha*, 7 Ind Cas. 19, distinguished.

Appeal from the decree of the District Judge of Tipperah dated August 10th 1909, modifying that of the First Munsif of Nabinagore dated May 18th, 1908.

Babu *Joy Gopal Das*, for the Appellant.

Babu *Akshay Kumar Banerjee*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in an action in ejectment. The subject-matter of the litigation is an occupancy holding which was purchased by the third defendant on the 30th January 1885. It has been found that the purchase, though made in the name of the third defendant, was for the benefit of his father. Consequently, upon the death of the latter, the third defendant and his brother, the fourth defendant, along with the other heirs of their father, became jointly interested in the tenancy. It appears that the first two defendants held a decree for money against the fourth defendant and in execution thereof attached the tenancy. The wife of the fourth defendant preferred a claim on the allegation that the property belonged to her father-in-law and had been transferred to her by way of gift. This was supported by the third defendant. But the claim was overruled. She then instituted a suit for declaration of her title and was unsuccessful. The decree was thereupon executed and the right, title and interest

of the fourth defendant has been purchased by the first two defendants who, it has been found, obtained possession of the land. The third defendant thereupon preferred a claim under section 335 of the Code of 1882 which proved infructuous, and a subsequent suit by him for declaration of title was equally unsuccessful. He then preferred an objection in execution proceedings under section 244, Civil Procedure Code. But there also his efforts were fruitless. Thereupon, on the 17th July 1907, he went to the landlord and executed in his favour a deed of surrender in respect of the portion of the land purchased by the first two defendants at the execution sale. The plaintiff landlord now sues to recover possession on the basis of this surrender, and the question in controversy is, whether the plaintiff is entitled to eject the first two defendants. On his behalf, reliance has been placed upon the provisions of section 86 of the Bengal Tenancy Act and upon the cases of *Tamiz-ud din Khan* v. *Khoda Nawaz Khan* (1) and *Ananda Mohan Roy Chowdhury* v. *Guru Dayal Saha* (2). It has been broadly contended that as the third defendant was the registered tenant, it was open to him to surrender a part of the holding in favour of the landlord and thus prejudice the title and possession of the first two defendants. In our opinion, this contention cannot prevail. The learned Judge has found that this surrender was collusive. As we understand his decision, his finding is that this surrender was made by the third defendant with the express object of destroying the right of the first two defendants. Now, it cannot be disputed that the effect of the purchase of a part of the holding by the first two defendants was not to operate as forfeiture of the tenancy. In support of this proposition, reference may be made to the leading case of *Kabil Sardar* v. *Chunder Nath Nag Chowdhury* (3), as also to the decisions in *Chandra Mohun* v. *Biresswar* (4); *Durga Prosad* v. *Doula Ghazee* (5); *Gozaffur* v. *Dablish* (6) and *Jogendra Nath* v. *Tincowri*(7). As was pointed out by Mr. Justice Banerjee in the case of *Peary Mohun Mandal* v. *Radhika Mohun Hazra* (8), the effect of his purchase is to constitute the purchaser a joint tenant of the holding along with the tenants whose right, title and interest have not been sold. The landlord is entitled to look for payment of rent to his registered tenants and to bring the holding to sale in execution of the decree obtained against them. But he is not entitled to treat the purchaser as a trespasser and sue him in ejectment. In fact this position is not seriously disputed on behalf of the appellants, and they base their title to re-enter on surrender. The question, therefore, arises whether this surrender, which has been found to be collusive, because made with the express object of defeating the title of the first two defendants, can be accepted as a good foundation for the claim. In our opinion, it cannot be so accepted. The cases of *Tamizuddi* v. *Khoda Newaz* (1) and *Ananda* v. *Guru Dayal*(2), upon which reliance is placed on behalf of the plaintiff, are plainly distinguishable, and so we need not examine whether they were correctly decided. It is obvious from an examination of the judgment that no question of fraud or collusion arose in those cases.

The result is that the decree made by the learned Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(8) 8 C. W. N. 315.

(1) 5 Ind. Cas. 116; 11 C. L. J. 16; 14 C. W. N. 229.
(2) 7 Ind. Cas. 19.
(3) 20 C. 590.
(4) 1 C. W. N. 158.
(5) 1 C. W. N. 160.
(6) 1 C. W. N. 162.
(7) 10 C. L. J. 147; 3 Ind. Cas. 205; 6 M. L. T. 190.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 9 OF 1912.

April 19, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Rafique, A. J. C.

Rani JAI RAJ KUNWAR—PLAINTIFF—APPELLANT

versus

Pandit DWARKA PRASHAD PANDE—DEFENDANT—RESPONDENT.

Lunacy Act (XXXV of 1858), s. 9—Lunatic's estate—Appointment of manager—Court of Wards, failure to assume superintendence of an estate of lunatic, effect of—Guardian of property, appointment of.

Where a person, possessed of landed estate, was declared by the District Judge as of unsound mind, it

was not necessary for the Judge under the provisions of Act XXXV of 1858 to inquire from the Court of Wards whether it would assume the management of estate and only in case of refusal by that Court to appoint a manager of the lunatic's property. The appointment by the Civil Court of a manager of a lunatic's property is valid, until the Court of Wards avails itself of its power of assuming the management of the estate.

Manohar Lal v. *Gauri Shankar*, 1 A. 476, followed.

Appeal against an order of the District Judge of Gonda, dated 17th November 1911.

Babu *Ishwari Dayal*, for the Appellant.

Pandit *Gokaran Nath Misra* and Babu *Ishwari Prasad*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Gonda, passed in certain proceedings in lunacy taken under the Lunacy (District Courts) Act, 1858 (Act XXXV of 1858). The facts of the case are that one Shankar Bakhsh, who is a proprietor of certain property and an under-proprietor of certain other property situated in the Gonda district, has become of unsound mind. The learned District Judge has found expressly that Shankar Bakhsh is of unsound mind. Having so found, the other matter which was before the District Judge was the appointment of a manager for the estate of the lunatic. In this connection, there were two applications before the Court. One of them was on behalf of Rani Jairaj Kunwar and the other on behalf of the wife of the lunatic, *Musammat* Oudhraj Kunwar. Rani Jairaj Kunwar appears to have suggested the Raja of Mankapur as a suitable candidate for the position of guardian of the lunatic. The Raja of Mankapur, however, refused to accept the responsibility. *Musammat* Oudhraj, the wife of the lunatic, suggested the appointment of Pande Dwarka Prasad, who is described in the learned District Judge's order as a man of wealth and respectability and one who holds the position of Honorary Magistrate. The learned Judge has appointed Pande Dwarka Prasad. The present appeal is against this order and filed on behalf of *Musammat* Jairaj Kunwar. The main contention for the appellant is that in accordance with the provisions of section 9 of Act XXXV of 1858, the District Judge ought, before passing any order for the appointment of Dwarka Prasad, to have suggested to or directed the Court of Wards to assume the management of the estate. This, however, is not the interpretation which we place upon section 9 and the matter appears to be concluded by a ruling of the Allahabad High Court reported as *Manohar Lal* v. *Gauri Shankar* (1). According to the view taken by the Allahabad High Court, until the Court of Wards avails itself of its power of assuming the management of the estate, the appointment by the Civil Court of a manager of a lunatic's property is valid. It cannot, therefore, be said in the present case that Dwarka Prasad's appointment is invalid merely by reason of the fact that the Court of Wards has not been invited by the District Judge to assume the management. As for the merits of the case, it is complained that the District Judge gave the applicant no opportunity of showing cause against the appointment of Dwarka Prasad. Various allegations have been set out before us with the intention of showing that he is not a fit person for appointment. We do not think we can pay any attention to allegations of this kind made on behalf of a person who is at the best a very distant relation of the lunatic. It seems to us that when a person so intimately related to the lunatic as his own wife has expressed a desire for the appointment of a particular person, the appointment of such a person is in every way a proper one. We are not, therefore, disposed to interfere with the Judge's order appointing Dwarka Prasad manager of the lunatic's estate.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 1 A. 476.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 686 OF 1909.

May 25, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Chevis.

JHINDU AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOPALA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Agnate—Person belonging to

JHINDU *v.* GOPALA.

same gôt—Cognate—Village proprietary body—Gift—Reversion to donor's heir.

A village was founded some three hundred years ago by a *Daiya Jat*, who called in other *Jats* and some *Brahmins* to help him. Some of the proprietors in the village were *Bugla Jats*:

Held, that there could be no presumption that *Bugla Jats* in the village were related to each other.

The mere fact that two persons belong to the same *gôt* or sub-caste is insufficient to prove that they are related to each other as agnates.

In the absence of all agnates of a propositus, any cognate can claim to succeed to his property.

The rights of the proprietary body cannot as a rule be regarded as superior to the claim of persons who are related by blood to the last male owner.

Badhawa v. *Dewa Singh*, 141 P. R. 1893, distinguished.

Waryama v. *Hira*, 63 P. R. 1908; 126 P. W. R. 1908, relied upon.

Land gifted by the founders of a village would not revert to the village proprietary body or the heirs of the original donor, unless there are left no descendants, male or female, of the donee.

Gurdit Singh v. *Musammat Prem Kaur*, 84 P. R. 1909; 76 P. L. R. 1909; 118 P. W. R. 1909; 3 Ind. Cas. 604, *Lachhman* v. *Bhagwan Sahai*, 68 P. R. 1911; 10 Ind. Cas. 277; 160 P. L. R. 1911, relied upon.

Second appeal from the order of the Additional Divisional Judge, Delhi, dated the 3rd June 1909, reversing that of the District Judge, Karnal, dated the 1st May 1909, dismissing plaintiffs' claim.

Mr. *Beni Prashad Khosla*, for the Hon'ble Mr. *Shadi Lal*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The dispute in this case is between the plaintiffs and the defendants as to succession to the land of Ramdia. The genealogical trees given on page 4 of the paper book are admitted to be correct. The plaintiffs first claimed on the grouud that their ancestors had gifted the land to Ramdia's ancestors, but both the lower Courts have found that no such gift was ever made. As the learned Divisional Judge remarks, it is much more likely that the plaintiffs' ancestors, coming in from another village, Fatehgarh (Naraingarh *tahsil*), where they still hold ancestral land, acquired land by gift from Ramdia's ancestors. Subsequently, the plaintiffs put forward another reason for their claim, *viz.*, that one of their ancestors had married a daughter of one of Ramdia's ancestors. This plea was advanced by plaintiffs' Pleader on 16th February 1909, the day after issues were framed. Gopala plaintiff was then examined, and stated that Raja had married Mansa's daughter. Pakhar, defendant, was then examined, and admitted that "plaintiffs' ancestors were the daughter's sons of the ancestors of Ramdia" but said he could not give details. The first Court held that this admisssion was not binding on the defendants, but the learned Divisional Judge held that it was. It is also to be noted that the mutation proceedings mention the *Bugla Jats* (*i.e.*, the defendants) said that the ancestors of Gopala etc, were *nawasas* (daughter's sons) of Ramdia's ancestor. It is urged on behalf of the defendant-appellants that this was a random statement, not necessarily correct, and that plaintiffs have taken advantage of it to attach a second string to their bow, and that plaintiffs should be required to prove the alleged relationship. But, as already noted, the admission was repeated by Pakhar in the trial of this case, and we see no reason for holding that a matter which has been admitted requires to be proved. We agree, therefore, with the Divisional Judge that the plaintiffs are cognates of Ramdia.

The defendants allege that they are agnates of Ramdia, but both the lower Courts have disbelieved the evidence of the *parohit* and his *bahi*, by which it was sought to prove the alleged relationship, and we see no reason to differ from the concurrent findings on this point.

The defendants are, no doubt, of the same *got* as the deceased Ramdia, but this alone is not sufficient in our opinion. The history of the village is that a *Daiya Jat* founded it, and called in other *Jats* and some *Brahmins* to help him. For defendants it is argued that the presumption is that all *Bugla Jats* to be found in the village are agnates, but we cannot agree. The village is said to be about 300 years old, and we consider that there can be no presumption that all *Bugla Jats* in this village are related. One *Bugla Jat* may have come in from one village, and another *Bugla Jat* may have come in from another village.

Then it is urged that such distant cognates cannot be preferred to the defendants who are some of the proprietary body, so as to oust the defendants from the possession which they already hold, and *Badhawa* v. *Dewa Singh* (1) is relied on. But, as is pointed out in *Waryama* v. *Hira*

(1) 141 P. R. 1893.

Nand (2), this case was decided partly on the ground that the common ancestor of the plaintiff and the deceased owner had got the land by gift from the founders of the village, and so in default of heirs of the deceased owner, the land would revert either to the *shamilat* or to the heirs of the original donor.

But, according to the recent rulings of this Court, the land would not so revert unless there were left no descendants, male or female, of the donee [*Gurdit Singh* v. *Musammat Prem Kaur* (3) and *Lachhman* v. *Bhagwan Sahai* (4).] The learned Divisional Judge has decided in plaintiffs' favour on the strength of *Waryama* v. *Hira Nand* (2). The Counsel for the defendants-appellants urges that in that case the cognates were preferred only to a heterogeneous proprietary body of a different *got*. But here, too, the proprietary body are not all of one *got*. The defendants are of the same *got* as the deceased, no doubt, but in the absence of proof that they are agnates of the deceased, we fail to see how they can have any greater claim than any other members of the proprietary body. Then it is urged that the plaintiffs' degree of relationship in the present case is not clear, and that *Waryama* v. *Hira Nand* (2) is an extreme case, and cognates more remotely related than in *Waryama* v. *Hira Nand*(2) should not be allowed to take possession. But the principle laid down in *Waryama* v. *Hira Nand* (2) would apply to cognates even more distantly related. The principle is, that in the absence of all agnates, any cognate can claim to succeed.

It may, of course, be said that the defendants must be agnates if we go back far enough, which is as much as to say that all men are descended from Adam, but this is an argument which does not appeal to us. We repeat that we cannot look upon the defendants as possessing any higher *status* than that of the proprietary body in general, and the rights of the proprietary body as a rule are even less than those of the Crown (*vide* Rattigan's Digest, Art. 28) and certainly cannot be regarded as superior to the claim of persons who are related by blood to the last male owner.

We, therefore, agree with the learned Divisional Judge that the plaintiffs are entitled to a decree.

The plaintiffs have filed a cross-objection as to costs. The first Court dismissed the suit with costs. The learned Divisional Judge, though accepting the plaintiffs' appeal and decreeing the claim, left the first Court's order as to costs intact. We cannot see why the plaintiffs, when succeeding in their claim, should pay the defendants' costs in any Court. At the same time, we note that the case is not one in which the plaintiffs are near relations, and, but for the admission by the defendants, the plaintiffs might have found it very hard to prove any relationship at all; we note, too, that the plaintiffs set up a fanciful story of a gift which they failed to prove, and have succeeded only on a ground which was not originally advanced.

We, therefore, dismiss the appeal, upholding the Divisional Judge's decree for possession, but allowing the cross-objections we order the parties to bear their own costs throughout.

Appeal dismissed.

(2) 63 P. R. 1908; 126 P. W. R. 1908.
(3) 84 P. R. 1909;76 P. L. R. 1909: 118 P. W. R. 1909; 3 Ind. Cas. 694.
(4) 68 P. R. 1911; 10 Ind. Cas. 277; 160 P. L. R. 1911.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 350 OF 1910.
WITH CIVIL RULE No. 2265 OF 1912.
June 4, 1912.
Present:—Mr. Justice Carnduff and
Mr. Justice Chapman.
RAGHU NATH SAHAY AND OTHERS—
DEFENDANNTS—APPELLANTS
versus
CHANDRA PROTAP SINGH—PLAINTIFF
—RESPONDENT.

Specific performance—Dismissal of suit for specific performance—Decree for refund of earnest money though not asked for by plaintiff as alternative relief—Civil Procedure Code (Act V of 1908), O. VII, r. 7.

It does not necessarily follow from the dismissal of a suit for specific performance that an order for the refund of the purchase-money should also be denied.

Ibrahim Bhai v. *Fletcher*, 21 B. 827; *Alokeshi Dassi* v. *Hara Chand Das*, 24 C. 897; 1 C. W. N. 705; *Amma Bibi* v. *Udit Narain Misra*, 31 A. 68; 9 C. L. J. 512; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89; 1 Ind Cas. 890, and *Howe* v. *Smith*, 27 Ch. Div. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773, followed.

If a suit for specific performance be dismissed, the

Court can, nevertheless, give the plaintiff a decree for refund of the deposit, although he had not asked for any such alternative relief.

Appeal from the decree of the Sub-Judge of Gaya, dated May 16th, 1910.

Babus *Provash Chunder Mitter* and *Susil Madhub Mallik*, for the Appellants.

Dr. *Sarat Chandra Basak* and Babu *Chandra Sekhar Prosad Singh*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought to enforce specific performance of a contract.

The defendants, who are the appellants before us, entered into an agreement on the 22nd April 1908, to sell certain landed property to the plaintiff, the father of the substituted minor respondents in this appeal, for the sum of Rs. 25,000. A sum of Rs. 6,000 towards the purchase-money was paid down by the plaintiff at the time of the agreement on the understanding that the necessary conveyance would be executed and duly registered within two months, and that the balance of Rs. 19,000 would be forthcoming on completion. It was, as evidenced by the written agreement Exhibit I, further stipulated that, if the transaction were not completed in consequence of any default on the part of the defendants, the plaintiff would be free to enforce specific performance at law and would be entitled to be credited with interest on his deposit from the date on which it was made; whereas, if the transaction were to fall through owing to the plaintiff's default, then the plaintiff would be entitled to the refund of the bare deposit without interest, and the defendants would be at liberty to dispose of the property in any other way they might choose. The transaction did fall through, and the plaintiff brought his suit for specific performance alone.

The Court below refused him a decree for specific performance, but, nevertheless, gave him a decree for the refund of the deposit with interest, although he had not asked for any such alternative relief. The defendants have now appealed to this Court.

According to the findings of the Court of first instance, which have not been challenged by the respondents either in their cross-appeal or in the arguments before us, the plaintiff alone was to blame for the non-execution and non-registration of the necessary conveyance in June 1908. Subsequently, however, he changed his mind, or circumstances altered; and he brought his suit for specific performance a year later. It is suggested by the learned Subordinate Judge that he did so because of the discovery of minerals on the property; but as an issue on this point was expunged and cross examination upon it was stopped, we think that this further finding ought to be ignored. The contention is that, in the circumstances, the suit ought to have been dismissed *in toto*.

We have come to the conclusion that, in the broad view that he took of the case, the learned Subordinate Judge was, in the main, right. It does not necessarily follow from the dismissal of a suit for specific performance that an order for the refund of any part payment of the purchase-money should also be denied. If any authority, as to this, be required, we need only refer to the cases of *Ibrahim Bhai* v. *Fletcher* (1); *Alokeshi Dassi* v. *Hara Chand Dass* (2); *Amma Bibi* v. *Udit Narain Misra* (3) and *Howe* v. *Smith* (4). The plaintiff could, notwithstanding that his suit for specific performance had been dismissed, and no matter on what ground it failed, have brought a suit for the recovery of his deposit. This is, we think, clear from the terms of section 29 of the Specific Relief Act, 1877, and the case of *Parangodan Nair* v. *Perumtoduka Illot Chata* (5). And now that the same Courts administer both law and equity, and Order VII, rule 7 of the Civil Procedure Code, 1908, lays it down that "it shall not be necessary for the plaintiff to ask for general or other relief, which may always be given as the Court may think just to the same extent as if it had been asked for," it seems to us the Subordinate Judge was right in refusing to relegate the parties to further litigation. There could have been but one result of another suit on the contract. As Bowen, L. J., said in *Howe* v. *Smith* (4), already referred to, "the question as to the right of the purchase to the return of the deposit money, must, in each case, be a question of the conditions of the contract." Here the conditions of the contract were very clearly expressed. The right

(1) 21 B. 827.
(2) 24 C. 897; 1 C. W. N. 705.
(3) 31 A. 68; 9 C. L. J. 512; 11 Bom. L. R. 525, 19 M. L. J. 295; 6 M. L. T. 89; 1 Ind. Cas. 890.
(4) 27 Ch. Div. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.
(5) 27 M. 380.

of the plaintiff to withdraw from the contract and obtain a refund of his deposit money without interest, was recognised and it was distinctly stipulated that the only penalty for the plaintiff's breach should be the loss of interest. It seems to us, therefore, that there is no substance whatever in the contention that, if the plaintiff had expressly claimed the refund in the alternative, the defendants would have been able to prove and set off damages caused by his failure to complete the transaction. Time has been found, as alleged by the defendants, to have been of the essence of the contract, and, therefore, it was for the defendants to make other arrangements as soon as the two months fixed had expired without the completion of the contract. Any loss caused in this respect was their affair. We consider, therefore, that the decree of the Court below is substantially correct, but we are of opinion that it is wrong in one respect, namely, as regards the interest which it has been made to carry. On the plaintiffs' own showing, he would not have accepted the refund, because his case was that he was throughout anxious to enforce the contract as a subsisting one. That being so, he ought, in our view, to be allowed no interest whatever.

The decree will, therefore, be modified so as to allow the plaintiff Rs. 6,000 (rupees six thousand) without any interest up to the date of the lower Court's decree and the usual interest at the rate of six per cent. per annum from that date till the date of realisation. In other respects the decree will stand.

We make no order as to the costs of this appeal.

Rule No. 2265-12.

This rule stands discharged, and as to it we make no order as to costs.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 161 AND 170 OF 1911.

March 20, 1912.

Present:—Mr. Piggott, J. C.

IN S. A. No. 161.

Hakim Syed MOHAMMAD SHABBIR—PLAINTIFF—APPELLANT

versus

Hakim Syed MUHAMMAD JAWAD—DEFENDANT—RESPONDENT.

IN S. A. No. 170

Hakim Syed MUHAMMAD JAWAD—DEFENDANT—APPELLANT

versus

Hakim Syed MUHAMMAD SHABBIR—PLAINTIFF—RESPONDENT.

Party wall—Treatment as such by common consent of a wall built by one owner—Evidence of conduct, force of—Memorandum of appeal, point not raised in—Privacy, right of—Easement—Pleading.

Where a wall stands between two houses, it is open to each of the owners of the two houses to show that it is a mere party wall. Although the wall may have been built by one of the two owners, yet if their conduct shows that they have by common consent always treated it as a party wall, it must be treated as such.

A Court is not bound to allow a point to be raised which has not been taken in the grounds of appeal.

A plaintiff cannot ask the defendant to close his windows on the ground of the invasion of his right of privacy when it is proved that the said windows do not look out upon the plaintiff's house but upon certain plots of land acquired by him less than 20 years before the construction of the windows and in respect of which no right of privacy by custom or otherwise has been established.

Appeal against an order of the Additional District Judge, Lucknow, dated 18th February 1911, modifying that of the Munsif, North Unao, dated 13th September 1910.

Messrs. *P. C. Gupta*, *Mohammad Fasih* and *Samiullah Beg*, for the Appellant.

Messrs. *Wazir Husain* and *Zahur Ahmed*, for the Respondent.

JUDGMENT.—These are cross-appeals in a suit for recovery of possession over a certain wall, for demolition of a room newly built in the house of the defendant and certain similar reliefs. The facts found by the lower Appellate Court seem to me to dispose at once of the greater part of the plaintiff's case. The plaintiff's father, Hakim Mohammad Sajjad, was the elder brother of the first defendant, Hakim Mohammad Jawad.

The former went to Calcutta and gradually acquired a lucrative practice there as a doctor. He eventually sent for his younger brother, Mohammad Jawad, and associated him with himself in carrying on the said practice. There was a plot of land belonging to the family in their native village, and out of the savings of the income earned by the two brothers in the practice of their profession in Calcutta, a house was built upon a portion (apparently just about half) of the said land, which is the house marked A in the plan prepared in the present suit. The younger brother, Mohammad Jawad, eventually married a lady of considerable wealth and returned to his own village. He then proceeded to construct, with the consent of his elder brother, the house marked B on the plan, adjoining the house A on the east side, and in this house he eventually resided, while Hakim Mohammad Sajjad, and his sons after his death, remaining in the house marked A. From a variety of circumstances disclosed by the evidence, both oral and documentary, the lower Appellate Court has come to the conclusion that, from the time when the house marked B was built, the wall between the two houses was, by common consent of the two brothers, treated as nothing more than a party wall between the houses, and that the brothers were joint owners of the same. The evidence has been discussed before me in considerable detail and I may say that I think the finding of the learned Additional Judge is a very reasonable one. It is in any case a finding of fact, and I do not see that the plaintiff-appellant has made out the beginning of a case against the defendant in second appeal. He seems to think that the mere fact that the house A was built before the house B is in itself sufficient to make it impossible for the wall between the two houses to be nothing more than a party wall and the joint property of the owners of the said houses. I find no force in this contention. There is good evidence that, at the time when the house marked A was built, the intention of the parties was, at sometime or another, as soon as funds were available, to extend the building over the rest of the land belonging to the family to the east of the said house marked A. Then, at the time when the second house marked B came to be built, there is abundant evidence that what was formerly the eastern wall of the first house was treated by consent of both parties as nothing more than a party wall between the two houses. It may be that the Courts below could have determined this suit upon a somewhat different basis by holding that there was no adequate evidence that Mohammad Sajjad and Mohammad Jawad had ever come to a formal partition of the land owned by them in their native village, or of the houses built thereon; but assuming for the sake of argument that the house marked A could be treated as the separate property of the plaintiff and his brothers (I may note in passing that the plaintiff has two brothers who have refused to join with him in this vexatious litigation against his uncle, and whom he has, therefore, been compelled to implead as defendants), and that the house marked B is the exclusive property of Mohammad Jawad, defendant No. 1, I think it is fully established by the finding of the lower Appellate Court that the wall between the two houses is nothing more than a party wall and the joint property of the persons in possession of the two houses. This finding is sufficient to justify the dismissal of the plaintiff's appeal, except as regards one single point. The construction of which the plaintiff complained was upon an upper story of the house marked B, and had been effected by means of beams resting upon a portion of what I have held to be the party wall between the two houses. The plaintiff claimed the removal of this structure and of these beams, primarily on the ground that the wall in question was his exclusive property and the defendant had no right to make any use of it whatever in erecting an upper story on a portion of his roof. He further claimed, however, that there were small doors or windows on the east side of the upper story room of the plaintiff's house, which had been closed by the new constructions set up by the defendant Mohammad Jawad, and that the plaintiff had a right of easement in respect of light and air through these doors or windows which had been interfered with by the new constructions. The Court of first instance granted the plaintiff the relief claimed in respect of this part of the case upon a finding that what has now been held to be the party

wall between the two houses was the exclusive property of the plaintiff; it consequently did not enter into any discussion of the claim to an alleged right of easement. The learned Additional Judge on appeal found against the plaintiff on the question of the ownership of the wall and did not go on to discuss the alternative plea to relief on the ground of easement which had certainly been put forward in the plaint. I have felt some hesitation as to whether I ought not to remit an issue on this point, but I am most reluctant to allow this preposterous and vexatious litigation to continue. I am content to say that I have examined the evidence and that I do not believe a case for relief on the ground of easement has been made out in respect of the small doors or windows in question. Moreover, I do not think that this point has really been taken in the memorandum of appeal presented on behalf of the plaintiff to this Court. It is certainly not pleaded in express terms that the lower Appellate Court should have determined the question whether the plaintiff was or was not entitled to a right of easement in respect of the free admission of light or air through any doors or windows in the upper story of his house, and whether such right had been interfered with by the new constructions of the defendant Mohammad Jawad. The fifth paragraph of the memorandum of appeal I can only understand as referring to the finding of the lower Appellate Court on quite a different question, namely, the alleged interference with the plaintiff's right of privacy. I am not bound to allow any point to be raised in appeal which is not taken in the mamorandum of appeal itself, and I do not think that this is a suitable case for permitting the plaintiff any such indulgence. The question about the right of privacy to which I have referred above has been very properly decided against the plaintiff by the lower Appellate Court. The new windows or doors which the defendant Mohammad Jawad is said to have opened in his own upper story do not look out upon the plaintiff's house marked A in the plan, but upon certain plots of land to the south of that house which were only acquired by the appellant's father in the year 1900, and in respect of which no right of privacy by custom or otherwise has been proved. They seem to be mainly occupied by a mosque and the courtyard appertaining to the same. The plaintiff's appeal, therefore, fails altogether and I dismiss it with costs.

I have before me also a cross-appeal by the defendant Mohammad Jawad in respect of the order directing him to close a certain spout. That spout, it has been held by the Courts below, has been newly opened by the said appellant in his upper story and it discharges water on to the plot of land occupied by the mosque. The Courts below have not recorded any finding as to whether the plaintiff and his brothers are or are not the exclusive owners either of this plot of land or of the mosque standing thereon. The plaintiff undoubtedly claimed the plot of land in question as the property of himself and his brother. The defendant replied that this plot of land No. 1290 had been gifted by the plaintiff's father to *Musammat* Sultan Begam, the wife of the said defendant. Neither party pleaded that the plot in question was occupied by a mosque, that it had been dedicated to the Almighty or that it belonged to the public generally. The defendant-appellant does not seem to have proved his plea regarding the alleged gift to his wife. The lower Appellate Court contented itself with remarking that the plaintiff appeared to have in any case a sufficient interest in this mosque, or in the land on which it stood, to entitle him to proceed against a trespasser, or a person interfering with the same by opening a new spout so as to discharge water upon it. I am not prepared to say that, on the pleadings and on the findings arrived at by the lower Appellate Court, this decision is wrong. I accordingly dismiss also the defendant's cross-appeal with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1151 OF 1909.

May 8, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott Smith.

SAHIB DITTA—PLAINTIFF—APPELLANT

versus

NARINJAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Valuation of suit—Jurisdiction—Appeal—Suit for declaration in respect of land.

AIYYA PILLAY *v.* VRITHACHELLAM PILLAY.

For the purposes of determining the course of appeal and jurisdiction, the value of a suit for a declaration that an alienation of land is null and void so far as plaintiff's proprietary rights in it are concerned, is thirty times the land revenue of the land in respect of which the declaration is sought.

Jalla v. *Ghena*, 60 P. R. 1907; 76 P. W. R. 1907; 79 P. L. R. 1908, followed.

Ghulam Ghaus v. *Nabi Baksh*, 24 P. R. 1903; 35 P. L. R. 1903, distinugished.

Second appeal from the order of the Additional Divisional Judge, Shahpur Division, dated 22nd April 1909, confirming that of the District Judge, Jhang, dated 2nd December 1908, dismissing the claim.

Lala *Bahadur Chand*, for the Appellant.

Rai Bahadur Lala *Sukh Dial*, for the Respondents.

JUDGMENT.—The appellant, Sahib Ditta, who was a minor at the time when the appeal was filed in this Court, has now come of age and he has applied that his next friend, *Musammat* Bhagwan Devi, be discharged. He elects to proceed with the appeal. The application is accepted and the name of *Musammat* Bhagwan Devi is struck out.

It also appears from Sahib Ditta's application that he has compromised the case with Jinda Ram, respondent, who was a rival pre-emptor, and Rai Sukh Dial, who appears for Jinda Ram, states that his client has no desire to contest the appeal and prays that his name be struck out. We grant the application and strike out the name of Jinda Ram.

The first question for decision is whether an appeal lies to this Court or not. The value of the suit, so far as the claim for pre-emption in regard to two-thirds share of the land in dispute is concerned, is admittedly Rs. 207-15-8, and we have to see what the value of the suit is as regards the claim in respect of the remaining one-third share of the land in question, as to which the appellant sued for a declaration to the effect that the sale thereof by his elder brother was not binding upon him and was null and void so far as his proprietary rights in it were concerned. The appellant valued the relief which he sought in respect of that one-third share at Rs. 1,055, but, on the authority of *Jalla* v. *Gehna* (1), the value of this kind of suit is thirty times the land revenue of the land in respect of which the declaration is sought, and it is not pretended that thirty times the land revenue of the one-third share in dispute is more than Rs. 104. The total value of the suit as brought by the plaintiff is, therefore, not more than about Rs. 312 and as both the Courts have agreed in dismissing the suit, no further appeal lies to this Court. *Ghulam Ghaus* v. *Nabi Bakhsh* (2), which is relied upon by the plaintiff's Pleader, is clearly inapplicable to the facts as stated above.

It is not contended that there is any ground for revision in this case under either clause (*a*) or clause (*b*) of the old section 70 of the Punjab Courts Act, and we, therefore, dismiss this appeal.

Appeal dismissed.

(1) 60 P. R. 1907; 76 P. W. R. 1907; 79 P. L. R. 1908.

(2) 24 P. R. 1903; 35 P. L. R. 1903.

MADRAS HIGH COURT.

REFERRED CASE NO. 17 OF 1911.

April 11, 1912

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

AIYYA PILLAY—PLAINTIFF

versus

VRITHACHELLAM PILLAY—DEFENDANT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 18—Suit by trustee—Claim based on agreement by defendant to pay a specified sum to plaintiff.

A suit by a trustee for the recovery of a specified amount agreed to be paid to him by the defendant for being used as a trust is not a suit relating to a trust within the meaning of Article 18 of Schedule II of the Provincial Small Cause Courts Act and is triable by a Small Cause Court if the amount of the claim falls within its pecuniary jurisdiction.

Sundralingam Chetty v. *Mariyappa Chetty*, 26 M. 200 and *Venkatachelapatti* v. *Kanakasabapathy Pillay*, 20 M. L. J. 146; 5 Ind. Cas. 912; 8 M. L. T. 67, referred to.

Case referred, under Order XLVI, rule 7 of Act V of 1908, by the District Judge of Tanjore, in O. P. No. 859 of 1911 (O. S. No. 254 of 1911 on the file of the Court of the District Munsif of Tiruvadi and S. C. S. No. 374 of 1911 on the file of the Court of the Subordinate Judge of Tanjore).

FACTS.—The following plaint was filed in the Court of the District Munsif of Tiruvadi:—

* * * * * * * * * * * * *

3" The plaintiff is the *Dharmakarta* and the *pooja* maker for the *Samadi* of

Tatwarayaswami in Keel Kapisthalam aforesiad.

4 "For the *pooja* of the said *Samadi*, Rs. 200 was given as a present by one Ramaswami Pillay who is not a party herein. That amount was given as a loan to Siva Chidambaram Pillai, who is not a party herein, by the plaintiff and by Ramasawmi Pillai who made the present aforesaid, and for that amount an *othi* deed was executed on 3rd July 1902 by Siva Chidambaram Pillai aforesaid in favour of Ramasawmi Pillai and was also duly registered. In accordance with the term of that *othi* deed, Ramaaswami Pillai aforesaid let the *othi* lands for the *Samadi* of Tatwarayaswami aforesaid to Siva Chidambaram Pillai aforesaid on lease, had enjoyment thereof and gave their profits for the *pooja* Naivedyam of the said *Samadi*.

5 "Afterwards Ramaswami Pillai aforesaid transferred the said *othi* right created in his favour to the defendant in this suit on 16th March 1909 and left the lands also in possession of the defendant.

6 "Then an assignment was made to the defendant by Ramasawami Pillai aforesaid so that the amount of Rs. 200 *as per* the said *othi* deed may be given to the plaintiff; and in the said deed of transfer also it is stated that through the assignment of the payment to be made to the plaintiff, the *pooja* maker of the said *Samadi*, it has been debited to self; further, Ramasawmi Pillai aforesaid made an assignment on the said date to the defendant that payment be made to the plaintiff of Rs. 95, the value of 40 *kalams* of paddy, being the *kuttagai* balance due from the said Siva Chidambaram Pillai's heirs who had leasehold enjoyment of the lands on his behalf till the time of the said deed of transfer; a deed of transfer of lease was also executed and the defendant also agreed with the plaintiff on 16th March 1909 aforesaid at *Kasba* Mayaveram in the jurisdiction of the District Munsif of Mayaveram to pay off the said amount of Rs. 295.

7 "The defendant, who is accordingly in enjoyment of the *othi* property, has not paid as agreed Rs. 200, the amount of consideration for the said deed of transfer, and Rs. 95 in the matter of the transfer of lease.

8 "As the defendant, who is bound to give the above compound amount of Rs. 295 to the plaintiff, has not made immediate payment, it is reasonable that by way of damages, interest at the rate of one per cent. a month should be paid on the said amount.

9 "The cause of action in respect of this claim has accrued at *Kasba* Mayaveram, Mayaveram District Munsifi from 16th March 1909, when the defendant agreed to pay to the plaintiff the amounts aforesaid assigned in accordance with the said transfer deeds.

10 "Although the cause of action has arisen in the jurisdiction of the District Munsif of Mayaveram, yet, as the defendant lives at Divangudi in the jurisdiction of this Court, this claim has been preferred in this Court.

11 "Jurisdictional value for purposes of Court-fees put in by the plaintiff on this claim is Rs. 360.

12 "The plaintiff, therefore, prays that this Court may be pleased to pass a decree that the under-mentioned amount, further interest and costs of suit be paid by the defendant."

On this plaint, the District Munsif passed the following order:—

"The suit is based on an agreement by the defendant to the plaintiff to pay him a specified sum of money. The fact that the money is claimed by the plaintiff as a trustee cannot make the suit one relating to a trust. The suit, as framed, is clearly cognizable by a Small Cause Court. It is, therefore, returned."

Thereupon, the plaintiff presented the plaint to the Court of the Subordinate Judge of Tanjore, who exercises Small Cause powers up to the pecuniary limit of Rs. 500.

The Subordinate Judge passed the following order:—

"The plaintiff brings this suit as *poojari* and trustee of some *Samadi*. It is a suit relating to trust, and, as such, falls under Article 18 of Schedule II of the Provincial Small Cause Courts Act. I return the plaint to be presented to the proper Court. Costs to abide the result."

Subsequently, on plaintiff's application, the District Judge of Tanjore referred the matter for the order of the High Court.

The parties were unrepresented,

NAND LAL v. GOOJAR.

The High Court passed the following

ORDER.—No one appears on either side. We are of opinion that the suit is cognizable by the Small Cause Court. The only reason suggested by the Subordinate Judge for his contrary view is the fact that the plaintiff is a trustee; and that is clearly not a sufficient reason. [Vide *Sundaralingam Chetti* v. *Mariyappa Chetty* (1) and *Venkatachelapathy* v. *Kanakasabapathi Pillay* (2).] These authorities support the view that the present case is not a suit relating to a trust within the meaning of Article 18 of the second Schedule of the Provincial Small Cause Courts Act and is cognizable by the Subordinate Judge.

We set aside the order of the Subordinate Judge and direct him to receive the plaint and dispose of the suit according to law.

Order set aside.

(1) 26 M. 200.
(2) 20 M. L. J. 146; 5 Ind. Cas. 912; 8 M. L. T. 67.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 864 OF 1910.

May 8, 1912

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

NAND LAL—PLAINTIFF—APPELLANT

versus

GOOJAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Mortgage by conditional sale—Mortgagee entitled to but not obtaining possession—Foreclosure proceedings taken after 12 years—Suit for possession barred—Regulation XVII of 1806—Limitation Act (XV of 1877), Sch. II, Arts. 135, 144.

In a mortgage by conditional sale, the mortgagee was entitled to immediate possession but he never took possession under the mortgage. He did not take foreclosure proceedings under Regulation XVII of 1806 within 12 years of the date fixed in the deed of mortgage for payment of mortgage-money.

After the expiry of 12 years, he took foreclosure proceedings and then sued for possession as owner:

Held, that the suit was barred by limitation either under Article 135, or Article 144, of Schedule II, Limitation Act, 1877.

Moman v. *Ishri Pershad*, 35 P. R. 1899, followed.

Bhandhari v. *Musammat Jasodhan*, 90 P. R. 1895; *Nagar* v. *Saudagar*, 57 P. R. 1908; 115 P. W. R. 1908, distinguished.

Second appeal from the order of the Divisional Judge, Jullundur Division, dated 22nd February 1910, confirming that of the Munsif, 1st class, Jullundur, dated 22nd March 1909, dismissing the claim.

Mr. *Mool Chand*, for the Appellant.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The question for decision by the Division Bench is given in the order of the Judge who referred the case dated the 17th May 1911. Briefly, the question is whether a mortgagee under a deed of conditional sale, who has not taken foreclosure proceedings under Regulation XVII of 1806 within 12 years of the date fixed in the deed for payment of the mortgage-money, is barred by time when suing for possession as an owner. The Judge who referred this case found some conflict between the rulings reported as *Bhandari* v. *Musammat Jasodhan* (1) and *Moman* v. *Ishri Pershad* (2) on the one hand, and *Nagar* v. *Saudagar* (3) on the other.

In *Bhandari* v. *Musammat Jasodhan* (1), it was held that the plaintiff's suit was within time as he had taken foreclosure proceedings according to the Regulation within 12 years of the due date. The case is, therefore, distinguishable from the present.

The case reported as *Moman* v. *Ishri Pershad* (2) is on all fours with the present case. In that case the suit, not having been instituted within 12 years of the date fixed on the mortgage-deed for payment of the mortgage-money, was held to be barred by limitation either under Article 135 or Article 144 of the second Schedule of the Limitation Act.

In *Nagar* v. *Saudagar* (3), the head-note is that there is no time limit for the foreclosure of the mortgage by conditional sale, and the mortgagee in possession is entitled to take out such proceedings at any time during the subsistence of his mortgage. The important words to be noted in this are "the mortgagee *in possession*."

In the present case, the mortgagee was entitled to immediate possession from the date of the mortgage, but the lower Courts have concurred in holding that he never took possession under the mortgage, and as this is an appeal under section 70 (1) (*b*) of the Punjab Courts Act, we are precluded from questioning the finding of fact. In *Nagar* v. *Saudagar* (3), the Judges were

(1) 90 P. R. 1895.
(2) 35 P. R. 1899.
(3) 57 P. R. 1908; 115 P. W. R. 1908.

careful to distinguish *Moman* v. *Ishri Pershad* (2) by saying that "no question arises in the present case as to the suit being barred under Article 135 as it is not a suit for possession." That was a suit for declaration that plaintiffs-mortgagees who had all along been in possession were absolute owners by reason of foreclosure. The present case is distinguishable from it. *Moman* v. *Ishri Pershad* (2) was followed in Civil Appeal No. 915 of 1906 and also in No. 792 of 1905. We see no reason to dissent from the views expressed in the above quoted rulings and we, therefore, dismiss the appeal with costs, without calling upon respondent's Pleader to reply.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 147 OF 1911.

February 14, 1912.

Present:—Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

S. R. M. C. T. CHETTY—APPELLANT

versus

KO AUNG GYI—RESPONDENT.

Insolvency, right to benefits of—Insolvent's accounts—Effect of failure to keep proper accounts—Reckless contracting of debts.

The benefit of Insolvency Acts is intended for traders who act honestly and straightforwardly and according to the recognized proper mode essential to knowing their position but who through misfortune incur loss. The benefit should not be extended to those traders who fail to keep proper accounts or who deal extravagantly and contract debts recklessly without any reasonable prospect of being able to pay them.

Appeal against the judgment and order passed by the learned Commissioner of Insolvency in Case No. 121 of 1909.

JUDGMENT.

FOX, C. J.—It appears to me that the proper order in the case would have been an order dismissing the petition. A grosser case of extravagance and reckless contracting of debts without any reasonable prospects of being able to pay them can scarcely be imagined.

Further it seems obvious that the insolvent had not made a full and proper disclosure of his dealings and his affairs. The excuse that Burmese paddy brokers do not keep accounts or are negligent about accounts cannot be accepted. If they or any other traders fail to keep proper accounts, they must understand that they do so at the risk of the benefits of Insolvency Acts not being extended to them if they fall into difficulties. These benefits are intended for traders who act honestly and straightforwardly and according to the recognized proper mode essential to knowing their position, and through misfortune incur loss.

I cannot agree with the learned Judge's definite statements that there had been no fraud on the part of the insolvent, and that his creditors had got all his property. It appears to me that there is manifestly strong ground for further inquiry into the extent of the insolvent's interest in the Taungwin estate, and the reality of his sale of a one-third share in it. As to the former, the insolvent himself admitted that his mother did not subscribe anything towards the purchase-money of the property, and her name was put in as a purchaser only because she was the eldest of the family. As regards the reality of the sale, the insolvent appears to have continued to receive a share of the rents after the sale, as if nothing had happened to affect his interest in the property. The reason given by the learned Judge for not acceding to the opposing creditors' request to postpone the discharge without protection, does not appear to me to be a very cogent one under the circumstances.

In my opinion, the order, so far as it gave protection from arrest during the two years for which the insolvent's discharge was postponed, should be altered by striking out the words "with protection." The appellant should have his costs of this appeal out of the estate if any is recovered.

HARTNOLL, J.—I concur.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 127 OF 1911.

April 23, 1912.

Present:—Mr. Lindsay, J. C.

Raja MUHAMMAD ABUL HASAN KHAN—DEFENDANT—APPELLANT

versus

LALTA *alias* CHHOLKU AND ANOTHER—DEFENDANTS NOS. 1 AND 2—AND OTHERS PLAINTIFFS—RESPONDENTS.

Possession—Dispossession, suit based on—Grove-holder—Right of, to mortgage—Re-entry, no provision as to—Wajib-ul-arz, *custom recorded in—Custom as to non-transferability.*

Certain grove-holders mortgaged their trees though under the custom embodied in the "*Wajib-ul-arz*" they had no right to do so.

The *Wajib-ul arz*, however, did not contain any provision enabling the *Talukdar* to re-enter and take possession of any trees which may have been dealt with in a manner contrary to that allowed by the village custom:

Held, that the *Talukdar* under the circumstances had no right to dispossess the mortgagee forcibly. If the mortgagee is so dispossessed, he is entitled in law to recover possession on the ground of his previous possession and dispossession.

Gopal v. *Sant Bakhsh*, 2 O. C. 3, referred to.

Appeal against an order of the Subordinate Judge, Barabanki, dated 27th January 1911, reversing that of the Munsif of Fatehpur, dated 30th November 1910.

Pandit *Gokaran Nath Misra* and Syed *Wazir Hasan*, for the Appellant.

Babu *Basdeo Lal*, for the Respondents.

JUDGMENT.—The appellant in this case, Raja Mohammad Abul Hasan Khan, was a defendant in a suit brought in the Court of the Munsif of Fatehpur (Bara Banki) by the plaintiffs-respondents Keshori Lal and Sarabjit. The suit was one for recovery of possession of certain trees standing on plots Nos. 672 and 664 in the village of Pakariapur. The case of the plaintiffs was that the trees standing on these plots had been mortgaged to their father on the 19th April 1892 by the defendants, Lalta and Luchmi Narayan. Under the terms of the mortgage, the mortgagee was entitled to take possession after a period of five years in case the mortgage-debt was not sooner paid. They alleged that in accordance with this condition, their father got possession of the trees in suit in 1897 and that from that date he, and, after his decease, they themselves remained in possession of the trees till the 11th May 1910, when they were forcibly dispossessed by a servant of the appellant. The relief sought by the plaintiffs was either that they might be put in possession of the trees as mortgagees or that they might have a decree for the mortgage-money against the mortgagors. The defence raised on behalf of the defendant-appellant was to the effect that Lalta and Lachmi, the mortgagors, had no title to transfer any interest in the trees to the plaintiffs and that, therefore, the plaintiffs were not entitled to a decree for possession. The Court of first instance refused to give the plaintiffs a decree for possession. It gave them a decree for the mortgage-money against the first and the second defendants. In appeal this decree was reversed by the Subordinate Judge of Bara Banki. He differed from the Munsif and held that it was not proved that Lalta and Lachmi had no transferable interest in the trees and that, therefore, the plaintiffs were entitled to recover possession. He gave a decree accordingly. This decree is attacked here on behalf of the appellant on the same grounds on which the claim of the plaintiffs was resisted in the Court of first instance. It is argued that under the terms of the *wajib-ul-arz* embodying the village custom, the mortgagors had no right to transfer any interest in these trees to the plaintiffs' predecessor-in-title. The case for the appellant rests entirely upon the provisions of the *wajib-ul-arz* and that portion of the Settlement Record which is known as the *Hissa Kashi Baghat*. I do not consider it necessary to enter into a discussion of all the points pressed on behalf of the appellant in support of the argument that by the village custom the mortgagors had no right to transfer the trees. Whatever may be the interpretation to be put on these documents, it is quite clear and is in fact admitted that they contain no provisions enabling the *Talukdar* to re-enter and take possession of any trees which have been dealt with by tenants in a manner contrary to that allowed by the village custom. The matter, therefore, resolves itself into this. Are the plaintiffs, who were admittedly in possession from 1897 till 1910, entitled to recover possession as against the defendant-appellant? Under the law they are clearly entitled to possession unless the appellant has succeeded in establishing that he is the

rightful owner. The rule of law is that possession is good title against all persons except the rightful owner and entitles the possessor to maintain an action in ejectment against any other person than such owner who dispossesses him [Cf. *Gopal* v. *Sant Bakhsh* (1) and the authorities referred to in that ruling]. It is admitted that in the present case a servant of the defendant-appellant took forcible possession of these trees in May 1910 and, as already said, there is no evidence to show that the appellant is the rightful owner or that he was in any way entitled to take possession. It follows, therefore, that whether or not the plaintiffs have a good title, they are justified in asking that their possession be maintained against any person who has not proved himself to be the rightful owner of the trees. In my opinion, the appellant has failed to prove his title and this being so I consider that the decree of the Court is quite correct and that the plaintiffs are entitled to have the appellant ejected. It was argued that the suit brought by the plaintiffs was not one based upon a possessory title but, so far as the case of the appellant was concerned, it is quite clear that as against him the case was one of this nature. The appeal must, therefore, fail and is dismissed with costs.

Appeal dismissed.

(1) 2 O. C. 3.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 2101 OF 1910.
April 24, 1912.
Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Ayling.
MATILDA FERNANDEZ BAI AND OTHERS —APPELLANTS
versus
ALEX PINTO—RESPONDENT.

Kumaki *rights, nature of—Transferability of the right—Easements Act (V of* 1882*), s.* 4*—Transfer of Property Act (IV of* 1882*), s.* 6 *(c).*

Kumaki lands are waste lands adjoining *warg* lands, and a *Kumaki* privilege is the right which the *ryot*, holding the *warg* land, has to collect leaves for manure and to pasture his cattle as an assistance to the cultivation of the *warg* land.

Secretary of State for India v. *Krishnaya*, 28 M. 257; 15 M. L. J. 147, referred to.

These *Kumaki* privileges are extinguishable by Government, which may assign the land over which they are exercised to another person than the holder.

Subbaraya v. *Krishnappa*, 12 M. 422, and *Secretary of State for India* v. *Krishnaya*, 28 M. 257; 15 M. L. J. 147, referred to.

The *Kumaki* right is essentially in the nature of a right by way of easement as defined in section 4 of the Easements Act and is governed by the principle of section 6 (*c*) of the Transfer of Property Act. The *Kumaki* rights are not rights "in gross" but only rights "appendant" and are not transferable apart from the lands, for the benefits of which they are allowed.

Nagappa v. *Subba*, 16 M. 304, explained.

Second appeal against the decree of the District Court of South Canara, in A. S. No. 239 of 1909, presented against the decree of the District Munsif of Mangalore, in O. S. No. 107 of 1908.

Mr. *B. Sitaram Raw*, for the Appellants.

Mr. *K. Narain Row*, for the Respondents.

JUDGMENT.—Mr. Narain Row took the preliminary objection that the 1st appellant could not prosecute this appeal since she had parted with her interest in the subject-matter of the suit. The appellant is still on the record as defendant in the suit. In our opinion, the preliminary objection fails.

The decision of this appeal turns on the effect to be given to a clause in a sale-deed, Exhibit H, executed in 1874 by certain *wargdars*, Krishna Naick and his wife and mother. By this document, the vendor purported to sell to one Juan Fernandez, a portion of the lands comprised in the *warg*, while retaining for the benefit of Krishna Naick's son, Vankatesu Naick, their *warg* lands, and also certain *Kumaki* rights over a specified area which admittedly would ordinarily attach to the *warg* lands, which were sold to Juan Fernandez. It is these *Kumaki* rights which are now the subject of dispute. The plaintiff (respondent), who claims under Venkatesu Naick, sues to enforce them, which defendants (appellants) who now represent the vendee under Exhibit H, claim them as inseparably attached to the *warg* lands, title to which has passed to them.

The District Munsif dismissed the suit, holding that the plaintiff had no interest in the plaint land, and that the defendants were entitled to enjoy the *Kumaki* rights therein as being attached to their *warg* lands.

The District Judge reversed this decision apparently holding that the *Kumaki* rights

were transferable and were validly transferred under Exhibit H, and that the defendants were precluded from contesting the validity of the transfer. He, therefore, gave a decree in plaintiff's favour and granted a perpetual injunction restraining the defendants from interfering with the land in question.

It seems to us that the view of the District Munsif is correct. There is no dispute now as to the nature and extent of *Kumaki* privileges. "*Kumaki*" land, (*i e.*, lands over which *Kumaki* privileges are exercised), are waste lands adjoining *warg* lands on which the *ryot* holding the latter is allowed to collect leaves for manure and to pasture his cattle as an assistance to the cultivation of the *warg* lands. This is in effect the definition of *Kumaki* found in the District Manual, as also that adopted by this Court in *Secretary of State for India* v. *Krishnayya* (1), in which the exact meaning of the term is fully discussed. These *Kumaki* privileges are extinguishable by Government, which may assign the land over which they are exercised to another person than the holder [Vide *Subbaraya* v. *Krishnappa* (2) and *Secretary of State for India* v. *Krishnaya* (1)], and it is abundantly clear that the reason of their existence is simply to facilitate the cultivation of the *warg* lands which they adjoin.

Can such privileges be transferred apart from the lands for the benefit of which they are allowed? In our opinion, they cannot.

[They are not rights "in gross"—to follow the classification of English law—but rights "appendant" and as such inseparable from the land to which they are appendant. Strictly speaking, of course, they are only "rights" in a limited sense inasmuch as they are exercised only by the permission of Government, and it is on this ground a Bench of this Court held in *Nagappa* v. *Subba* (3) that the *Kumaki*' right was not, strictly speaking, an easement. This decision was arrived at solely with reference to the questions of whether the claim *there* under adjudication was barred by section 15 of the Easements Act, and does not, in our opinion, preclude us from holding that the *Kumaki* right is essentially in the nature of a right by way of easement as defined by section 4 of the Easements Act [*Vide* illustration (*d*)] and one which should be regarded as governed by the principle of section 6 (*c*) of the Transfar of Property Act.

The learned Vakil for the respondent has endeavoured to support the District Judge's decision on the ground that the appellants are estopped from contesting the validity of the severance of the *Kumaki* rights from the *warg* land. In our opinion, no question of estoppel arises. The respondent sues to establish a right, and, if we hold—as we do—that the right in question is not his, but passed with the *warg* land to Juan Fernandez and his assignee, the plaintiff's suit must fail.

We set aside the decree of the District Judge and dismiss the suit, but, in the circumstances of the case, direct that each side must bear its own costs throughout.

Appeal allowed.

(1) 28 M. 257; 15 M. L. J. 147.
(2) 12 M. 422.
(3) 16 M. 304.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL SIDE No. 7 OF 1912.

March 18, 1912.

Present:—Sir Lawrence Jenkins, KT., K. C., Chief Justice, and Mr. Justice Woodroffe.

J. C. GALSTAUN—PLAINTIFF—APPELLANT

versus

W. O. HUTCHISON—DEFENDANT—RESPONDENT.

Stamp Act (II of 1899), Sch. I, Art. 1—Acknowledgment of debt—Balance-sheet signed by debtor—Amount due taken to separate account "errors and omissions excepted"—Whether such acknowledgment requires one anna stamp.

A balance-sheet prepared and signed by debtor and showing a balance, errors and omissions excepted, due from him and which was carried forward, is not an acknowledgment of debt within the meaning of Article 1 Schedule I of the Stamp Act, 1899, which requires an anna stamp, and is admissible in evidence without being stamped.

Nund Kumar Shaha v. *Shurnomoyi*, 15 C. 162, followed.

Appeal from the decree of Mr. Justice Chitty, made in Original Suit No. 694 of 1911, dated August 27, 1911.

Mr. *J. E. Bagram*, instructed by Messrs. *Morgan and Co.*, Attorneys, for the Plaintiff-Appellant.

GALSTAUN *v.* HATCHISON.

JUDGMENT.

JENKINS, C. J.—The plaintiff has brought this suit to recover Rs. 58,932-1-3. In his plaint he alleges that from and after the 28th August 1905, he and the defendant had various monetary dealings; that the defendant from time to time made various part payments on account of principal and interest: that on the 1st September 1908 the account was adjusted and stated between the plaintiff and the defendant showing a balance of Rs. 45,039-9-3 due to the plaintiff and the same was admitted and signed by the defendant as correct; that thereafter further dealings took place; and that there is now due and owing from the defendant to the plaintiff Rs. 58,932-1-3.

The plaint was instituted on the 6th of July 1911, and, as provided by Order VIII, rule 1, the defendant was required to present a written statement of his defence.

The defendant entered an appearance through his Attorney, but he failed to present a written statement.

The suit was transferred from the list of defended causes to the list of undefended causes, and was heard by Chitty, J., who passed a decree in the plaintiff's favour for Rs. 2,435-10-6 with interest and costs.

He, however, refused the rest of the plaintiff's claim, not because it was not proved, but because it was barred by limitation as the document by which it was sought to gain the advantage of a fresh period of limitation did not bear an anna stamp, and so (in his opinion) was inadmissible.

From this decree, the present appeal has been preferred by the plaintiff.

It is beyond dispute that the sum of Rs. 58,932-1-3 would be recoverable unless barred by limitation, and that there is an acknowledgment of liability made in writing, and signed by the defendant on the 1st of September 1908, which would be a complete answer to the bar of limitation if it can be utilized.

Chitty, J., held that this acknowledgment could not be proved for want of an anna stamp, as in his opinion the instrument was an acknowledgment of a debt within the meaning of Article 1 of Schedule I to the Indian Stamp Act, 1899.

For the instrument to require such a stamp, all the conditions indicated in that Article must be present.

Though each case must depend on its own peculiar circumstances, I am unable to draw any fair distinction to the plaintiff's detriment between the present case and that which was the subject of decision in *Nund Kumar Shaha* v. *Shurnomoye* (1), where it was held that a balance-sheet prepared and signed by the defendant and showing a balance due from him was not an acknowledgment within the corresponding article of the Stamp Act of 1879.

If anything, the present instrument is more removed from the provisions of the Stamp Act, for here a balance was carried forward, errors and omissions were expressly excepted; and, having regard to all the circumstances of the case, I am not satisfied that the document on which the plaintiff relies is an acknowledgment within the meaning of Article 1. Any other conclusion might, I think, lead to considerable inconvenience and detriment.

The result then is that, in my opinion, the plaintiff is entitled to the relief he seeks, and the decree of Chitty, J, should be varied by passing in the plaintiff's favour a decree for Rs. 58,932-5-3 with costs of the suit as directed by Chitty, J, and also the costs of the appeal.

WOODROFFE, J.—Learned Counsel has relied on the decision reported in *Nand Kumar Shaha* v *Shurnomoyee* (1). On the question whether a particular document in suit amounts to an acknowledgment of a debt, one decision can hardly be an authority for another, for each case must depend on its own circumstances. The observations, however, as to the general nature of signed accounts in the cases next mentioned are relevant to the matter before us. If, however, we look at that decision in *Nund Kumar Shaha* v. *Shurnomoyee* (1), we find nothing stated beyond this:—"We have looked at the document ourselves, and we think that it is not an acknowledgment of a debt within the meaning of Article 1, Schedule I, of the Stamp Act and we are fortified in this opinion by a decision of Mr. Justice Prinsep and Mr. Justice O'Kinealy on a very similar point in the case of *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2)." I may note in passing that the suit in this case was brought to recover what was due on a balance or

(1) 15 C. 162.
(2) 9 C. 127.

nikash sheet after crediting the defendant with certain amounts admitted to be due to him. It appears, therefore, that the amount of the balance sheet did not show the actual debt due by the defendant. The case, as appears from the report, was decided with reference to that in *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2), which was stated to raise a very similar point, and we must, therefore, look at the latter case. This held that the document in question was not a promissory-note and did not require a stamp. Prinsep, J., said:—"It is exactly of the same nature as the document which forms the subject of the suit in the case of *Brojender Coomar* v. *Bromomoye Chowdhrani* (3)." Then citing White, J.'s judgment in that case, he dismissed the appeal. We are thus taken back to the decision in *Brojender Coomar* v. *Bromomoye Chowdhrani* (3), which was the foundation for the decision of the other two cases. Now, the facts of this latter decision are not entirely the same as those before us, but, as stated, the observation as to the general nature of signed accounts, is helpful. There a sum of Rs. 20,825 made up of seven different advances on different dates was sued for. Each advance was entered on a *hatchitta* and was signed as it was made. The first advance was stamped and the remaining six were not. These entries were held not to come within Stamp Act for the following reasons:—The account had two sides, *viz.*, one side sums advanced, and the other of those received, the Court said "the amount due varies from time to time, and depends upon the relation of the amount advanced to the amount received. In the present case no sum is entered under the head of amount received, but that is an accident, and makes no difference in considering the question as to what is the nature of the document which is offered in evidence. The intention of the parties in requiring the signature or seal of the borrowers to each sum advanced is, strictly speaking, to secure under their hands an acknowledgment that the sum is *advanced*. Whether or not that sum is *due*, or a larger sum or a less sum, *depends upon the state of the account*." The entries were not intended to stand alone, in which case the Court said it might have been contended that they were acknowledgments requiring a stamp. In that case also, no sum was entered under the "amount received" column, yet the Court held that to be an accident and made no difference in considering the question as to what was the nature of the document (*viz.*, an account), which was offered in evidence. If, for instance, an account is balanced at the end of a year and is accepted as correct and a separate entry were made admitting its correctness and acknowledging the balance found to be due on that account as owing to the creditor, then I conceive that such an entry might amount to an acknowledgment within the meaning of the Stamp Act and require a stamp. The Court in such a case might, perhaps, reasonably infer an intention to acknowledge a debt notwithstanding that such debt was transferred to the next yearly account. The question is, however, one of intention to be gathered from the circumstances of each case, and it is only necessary to deal with the facts before us. In the present case, the words "I accept this correct" were written by the plaintiff and signed by the defendant against the balance of the 1st September 1903, showing, (errors and omissions excepted), that a sum of Rs. 45,039-9-3 appeared to be payable on that account by the defendant up to that date. It was an admission that up to that date the account was correct. This amount was carried forward in the account which was continued and further debit entries were made after the date of the acknowledgment, for which alone the plaintiff has been given a decree. To use the language in the case last cited, it was an accident that no further credit entries were made. There is nothing to show that it was intended that none were to be made or that the account should close with the acknowledgment. This accident did not, in the terms of the case cited, alter the character of the document. Balances were frequently struck during the course of the account, the last being in July 1911. The plaintiff in his evidence stated that it did not occur to him at the time that the acknowledgment was taken with the object of supplying evidence (of the debt) but that he did it "so as not to worry for accounts in future. I suppose I took it to use it when the time came as I am now doing." The question is whether in fact the writing is now used as an acknowledgment of a debt as apart from an acknowledgment of liability, and whether it is in fact so within the meaning of the Stamp Act

(3) 4 C. 885; 3 C. L. R. 520.

It may be that as the result of such acknowledgment of liability, together with the accident itself and other evidence in the case, the law annexes as a consequence the obligation to pay the sum against which the acceptance of the defendant appears, but, from this it does not follow that the defendant intended to acknowledge that particular sum as a debt within the meaning of the Stamp Act. Further. the account was *E. and O. E.* Even assuming that such a provision was for the benefit of the creditor only and that the defendant, had he gone into the witness-box, would have been bound by his signature, (though it is by no means clear that the defendant would not also have shown that such signature was given by mistake), it may well be argued that the insertion of such proviso made the defendant's acceptance one which was conditional on the correctness of the account. Let it be supposed that an inquiry under the *E. and O. E.* provision disclosed that the amount shown in the balance was incorrect and that the amount due was more or less than that claimed, could it be said than that the defendant had acknowledged a "debt" when the acknowledged sum did not represent that rightly claimed? It may be admitted that the case in *Nund Kumar Shaha* v. *Shurnomoye* (1) is in one respect perhaps stronger than the present one, (for the signature against each sum as it was advanced was strong evidence to show that the signature was given to witness that particular advance) as also that the dividing line may be in many cases a narrow one, but in a matter of this kind, which seems to put the matter, most adversely to the plaintiff, at least open to doubt, I think we ought to follow the general principles of the decision in *Brojender Coomar* v. *Aromoyee Chowdhrani* (3), upon which learned Counsel for the appellant relies, and I agree in holding that the entry relied on does not, under the circumstances of this case, amount to an acknowledgment which requires an anna stamp.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 37 OF 1911.

April 24, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

BIJJUKALLU PAPAKKA AND OTHERS—APPELLANTS

versus

YEDDULA ROSI REDDI—RESPONDENT.

Vendor and purchaser—Evidence Act (I of 1872), s. 92—Rescission of sale-deed by mutual consent—Parol evidence, admissibility of—Non-delivery of possession after sale—Acquisition of prescriptive title—Onus *of proof.*

Oral evidence to prove that parties to a sale-deed, which was duly executed and registered, subsequently rescinded it by mutual consent, is inadmissible under section 92 of the Indian Evidence Act.

Umedmal Motiram v. *Davu* bin *Dhondiba*, 2 B. 547, referred to.

Where a sale-deed has been duly executed by one party to another and duly registered, the onus of proving that possession was not given to the vendee in accordance with the sale-deed and that the vendor had acquired a title by prescription lies on the party asserting it.

Second appeal against the decree of the District Court of Cuddapah, in A. S. No. 84 of 1909, presented against the decree of the District Munsif of Prodattur in O. S. No. 486 of 1907.

FACTS.—The facts of the case are clear from the following judgment of the lower Appellate Court:—

Plaintiff brought a suit to establish his title and recover possession of certain immoveable property which he purchased from the first defendant. The suit having been dismissed, he appeals.

He purchased the property in 1907 for Rs. 1,500 under a registered sale-deed Exhibit A. Second defendant contends that the property was conveyed to her husband and one Rosiah in 1877 under Exhibit II. It is executed by first defendant and one Veerakka. Who that Veerakka is and what interest she had in the property is not known. It mentions the relationship of all sorts of persons and purports to make over the entire property to the transferees on condition that they are to pay Rs. 100 every year for maintenance and they have to discharge the debts due. I shall first consider thisdocument. It is clearly not a sale-deed. The only way of looking upon it is to consider it as a surrender of her rights by a Hindu widow. Under *Behari Lal* v. *Madho Lal Ahir* (1), this would be a

(1) 19 C. 236; 19 I. A. 30.

perfeclty valid transaction if she had conveyed the *whole* of her estate, without any reservation; but, inasmuch as she had reserved to herself a portion, I consider it enough to invalidate the document. There is another proviso in it. It says that in case of disputes, she is to get back a portion of the lands in lieu of the Rs. 100. This is clearly not a conveyance of the entire estate.

Not long after this document, second defendant's husband died and the two widows, first and second defendants, continued to live together. First defendant died whilst the suit was pending but she admitted plaintiff's claim. Now, the plaintiff has put in Exhibits D to K, which clearly show that she was managing the property; which goes to support the contention of the plaintiff that Exhibit II was never given effect to. He has adduced ample oral evidence in support of this. Second defendant contends that she was only acting on her behalf and the evidence on this point is that of a tenant who was given a *cowle*, and told by 1st defendant that though it was in her name, it was really meant for second defendant. I cannot understand why it was necessary for first defendant to manage for second defendant seeing that the latter is younger, and the former a very old woman. The only point in second defendant's favour is that the *patta* for nine out of eleven fields stands in her name, whereas the first defendant holds only the *patta* for two fields. *Patta* is no evidence either of title or enjoyment and no importance can be placed on this evidence.

A considerable amount of irrelevant matter has been introduced regarding the giving up of one-third share to one Basamma, which I need not enter into. Having held that Exhibit II is an invalid document which was in fact never given effect to, it is needless to go into the oral evidence on both sides, which is teeming with falsehood as usual. As regards Exhibit A, it has been contended that it bears no consideration. The question of consideration can only be pleaded as between the parties and not by a third party; that is, a document without consideration is not by itself void but is voidable at the instance of the transferor. Taking this view, I set aside the decree of the lower Court, and pass a decree in plaintiff's favour with costs of both Courts.

The defendants appealed to the High Court.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Appellant.

Messrs. *J. R. Vencataruma Sastri* and *S. Krishnamurti Aiyar*, for the Respondent.

JUDGMENT.—We are unable to support the judgment of the District Judge in this case. The 1st defendant parted with her woman's estate in the property by Exhibit II in 1877. It was not contended in the lower Court that that document was a sham one and not intended to be operative in law. Certainly, no reason was given for the execution of a sham instrument. The first issue, whether the 1st defendant was entitled to sell the suit property to plaintiff, was framed in very vague terms. Apparently, the contention was that after the execution of Exhibit II, effect was not given to it for some reason or other. This can only mean one of two things, *i.e.*, that the parties by mutual consent rescinded it. But there is no evidence of such rescission, and oral evidence of rescission would be inadmissble under the provisions of section 92 of the Evidence Act. See *Umedmal Motiram* v. *Davu* bin *Dhondiba* (2). Or the contention must be taken to be that possession was not given to the 2nd defendant's husband in accordance with the terms of Exhibit II. In other words, the title acquired under Exhibit II was lost by limitation and the 1st defendant acquired a title by prescription. But this case does not seem to have been raised in either of the Courts below. Although the District Munsif found that the management of the property by the 1st defendant was on behalf of 2nd defendant, no ground was taken in the memorandum of appeal to the lower Appellate Court that the 1st defendant's possession was adverse and exclusive. We find that one of plaintiff's witnesses, P. W. No. 3, admitted in his deposition that the 2nd defendant's husband was in joint enjoyment of the property with the 1st defendant after the execution of Exhibit II. It is, therefore, impossible to say that no effect was given to Exhibit II at all. The 1st defendant lived with the 2nd defendant's husband and subsequently with the 2nd defendant. When members of a family live together, the ordinary presumption will be that the legal possession is in the person who had the title. n a case like

(2) 2 B. 547.

this, it was incumbent on the plaintiff to allege clearly that the 1st defendant acquired a title by prescription after the execution of Exhibit II. We do not find that such a contention was put forward in the lower Appellate Court, and we do not think we should allow it to be raised here. The District Judge says nothing more than that she was managing the property. This does not amount to a finding that her possession was adverse to the 2nd defendant. We cannot now frame an issue on the question of acquisition of prescriptive right by the 1st defendant. The result is, there is nothing to displace the title acquired by the 2nd defendant's husband under Exhibit II. We are unable to follow the District Judge when he says that Exhibit II is not a sale-deed. His observation that it is not a valid surrender of the 1st defendant's right such as would accelerate the succession of the reversioner is absolutely irrelevant. We reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 167 OF 1910.
January 9, 1912.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
MOHENDRA NARAIN SINGH—
PLAINTIFF—APPELLANT
versus
AJODHYA PROSAD SINGH—
DEFENDANT—RESPONDENT.

Road Cess Return—Admissibility in favour of zemindar—Return filed by temporary lessee if can be used in favour of zemindar—Return previously used by tenant in suit against zemindar—Return filed by tenant's predecessor-in-interest, evidentiary value against tenant—Bengal Cess Act (Bengal Act IX of 1880), s. 95—Evidence Act (I of 1872), s. 21.

The mere circumstance that a road cess return was successfully used in evidence by a tenant against his landlord for the purposes of another litigation, does not show that it is admissible in evidence in a subsequent rent suit on behalf of the landlord himself.

A Road Cess Return is not admissible in evidence under section 95 of the Bengal Cess Act in favour of the person by or on behalf of whom it has been filed or in favour of one who claims through him or may be deemed to be his representative-in-interest.

A Road Cess Return, filed by a *ticcadar* or temporary lessee of a property, is admissible in evidence in favour of the *zemindar* who cannot be regarded as a person by or on behalf of whom the return was filed or one who claims through the *ticcadar*.

The evidentiary value of a Road Cess Return, which was made by a predecessor-in-interest of the tenant defendant, is very considerable in favour of the plaintiff landlord and against the defendant tenant.

The provisions of section 95 of the Bengal Cess Act are not exhaustive. They merely limit the application of section 21 of the Evidence Act, and exclude Road Cess Returns when they are sought to be admitted in favour of the person by or on behalf of whom they have been filed.

Mohan Pandey v. *Lala Bhagwati*, 1 Ind. Cas. 813; *Chulkho Singh* v. *Jharo Singh*, unreported and *Hem Chandra* v. *Kali Prosanna*, 30 C. 1033; 8 C. W. N. 1; 30 I. A. 1, relied upon.

Appeal from the decree of the District Judge of Patna, dated October 12th, 1909, affirming that of the Sub Judge of that District, dated July 8th, 1903.

Babus *Umakali, Mukherjee* and *Ganesh Lutt Singh*, for the Appellant.

Babu *Sajani Kant Singh*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for recovery of arrears of rent. The substantial question in controversy between the parties relates to the character of the holding, whether it is a holding at a money rent as the tenants allege or at a produce rent as the landlords contend. The Courts below have concurrently decided this question in favour of the tenants. That decision has been attacked in this Court as erroneous in law because relevant evidence has been excluded. The evidence in question is a Road Cess Return filed in 1896 by a *ticcadar* of the property by name Bisonath Singh. The learned Vakil for the appellant has contended that the Road Cess Return is admissible in evidence, *first*, because it was used in evidence against the plaintiffs by the defendants in another suit for declaration of title; *secondly*, because section 95 of the Bengal Cess Act of 1880 does not present a bar to the admission of the Road Cess Return; and *thirdly*, because the person by whom it was filed was no other than a *benamdar* for the grandfather of the defendants themselves.

In so far as the first reason assigned by the appellants is concerned, we do not feel impressed by it. The mere circumstance that the Road Cess Return has been successfully used in evidence by the tenants against their landlords for the purposes of another

litigation, does not show that it is admissible in evidence in the present litigation on behalf of the landlords themselves.

In so far, however, as the second ground is concerned, it is, in our opinion, well founded. Section 95 of the Bengal Cess Act has no application to the case before us. That section provides that every return filed by or on behalf of any person in pursuance of the provisions of the Act shall bear the signature and address of such person or his authorized agent, and shall be admissible in evidence against such person but shall not be admissible in his favour. Now, as was pointed out in the cases of *Mohan Pandey* v. *Lala Bhagwatichuran* (1) and *Chulkho Singh* v. *Jharo Singh*, S. A. No. 205k of 1909 decided 30th May 1911, the provisions of section 95 of the Bengal Cess Act are not exhaustive. They merely limit the application of section 21 of the Indian Evidence Act and exclude Road Cess Returns when they are sought to be admitted in favour of the person by or on behalf of whom they have been filed. [*Hem Chandra* v. *Kali Prosanna* (2).] It has not been disputed that if a Road Cess Return is not admissible in favour of such person, it is equally inadmissible in favour of a person who claims through him or who may be deemed to be his representative-in interest. Now in the case before us, the Road Cess Return was not filed by the present plaintiffs; nor was it filed on their behalf. It was filed by Bisno Nath Singh in his capacity as temporary lessee of the property. The question, therefore, arises whether when the plaintiffs seek to have the document admitted in evidence, they can rightly be regarded as persons by or on behalf of whom the return has been filed. In our opinion, the question ought to be answered in the negative. The learned Vakil for the respondent has ingeniously contended that as during the subsistence of the *ticca*, a part of the superior interest was vested in the *ticcadar*, upon the expiry of the term of the *ticca* when the landlord became the sole owner, he must be deemed to have acquired a part of the interest through his *ticcadar*. This argument is obviously unsound. The landlord cannot be said to claim through his tenant in whose favour he had created an interest limited for a time. We are, therefore, of opinion that the Road Cess Return is admissible in evidence notwithstanding the provisions of section 95 of the Bengal Cess Act.

As regards the third reason assigned on behalf of the appellant, it is obvious that if the Road Cess Return was, as a matter of fact, made by a predecessor-in-interest of the defendants, its evidentiary value in favour of the plaintiff and against the defendants is very considerable. This does not appear to have been appreciated by either of the Courts below and consequently the question of *benami* has not been investigated.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him for re-consideration. The Road Cess Returns will be treated as admissible in evidence and the question of *benami* must also be determined. The parties will be at liberty to adduce additional evidence in regard to this point; such evidence may be taken either by the District Judge himself or under his direction by the Subordinate Judge.

We may add that a subsidiary question has been raised before us, namely, whether in the event of a finding adverse to the landlords, the amount of rent payable in cash should not be assessed in this proceeding. We are of opinion that the question ought not to be determined in this suit. If the plaintiffs are unable to establish that they are entitled to recover the amount claimed by them, the only decree they can legitimately obtain is a decree for the sum admitted by the defendants. What is a fair rent in respect of this land must be determined in proceeding properly framed for that purpose. The costs of this appeal will abide the result

Appeal allowed.

(1) 1 Ind. Cas. 813.
(2) 30 C. 1033; 8 C. W. N. 1; 30 I. A. 177.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 126 OF 1912.

May 15, 1912.

Present:—Sir Arthur Reid, Kt., Chief Judge.

ACHAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BADHAWA SINGH—DEFENDANT—RESPONDENT.

Limitation—Suit to remove encroachment on public way—Continuing cause of action—Suit to oust defen-

dant from shamilat—*Limitation Act* (*XV of* 1877), *s.* 23, *Sch. II, Arts.* 32, 120, 142, 144, 146*A*.

A suit for ejectment of a person from a specific field is not brought within section 23 of the Limitation Act by the fact that the field has been recorded as part of a thoroughfare and *shamilat deh*.

Where in spite of an encroachment on a road, the road left is sufficiently broad for the use of the public, the encroachment cannot be treated as an interruption of easement giving a recurring cause of action *de die in diem* under section 23 of the Limitation Act.

Sreemati Soojan Bibi v. *Shamed Ali*, 1 C. W. N. 96, distinguished.

A suit to oust the defendant from a specific portion of the *shamilat deh* occupied by him adversely to the rest of the proprietors or to remove an obstruction to the enjoyment of the *shamilat* is governed by Article 120 of the Limitation Act.

Sreemati Soojan Bibi v. *Shamed Ali*. 1 C. W. N. 96; *Narain Singh* v. *Ishar Singh*, 8 P. R.1899, followed.

Article 32, 142, 144, or 146*A* does not apply to such a suit.

Sharoop Dass Mondal v. *Joggessr Roy*, 26 C. 564, *Muhammad Amanullah Khan* v. *Badan Singh*, 17 C. 137; 16 I. A. 148, distinguished.

Second appeal from the order of the Divisional Judge, Jullundur, dated 28th August 1911, reversing that of the Munsif, 2nd Class, Phillaur, dated 11th August 1909, decreeing plaintiff's claim.

Mr. *Nihal Chand*, for the Appellants.

R. S. Pandit *Shiv Narain*, for the Respondent.

JUDGMENT.—The facts are stated in the judgment of the lower Appellate Court. The appeal was admitted under section 70 (1) (*b*) on the question of limitation only.

The plea that section 23 of the Limitation Act applies to the suit, by reason of the act complained of by the plaintiffs being a continuing wrong and a fresh period of limitation beginning to run at every moment of time during which the wrong continues, has no force. The suit was for ejectment of the respondent from a specific field and the fact that that field had been recorded as part of a thoroughfare and *Shamilat-i-deh*, does not bring this suit within section 23. It was found by a Revenue Court several years ago that in spite of various encroachments, the road was sufficiently broad for the use of the public, and the encroachment now complained of was made before that finding. There has been no interruption of the right of way itself and *Sreemati Soojan Bibi* v. *Shamed Ali* (1) does not help the appellants. In that suit, the plaintiff claimed a right of way over the defendant's land, basing his claim on section 26 of the Limitation Act and on a previous decree giving him the right of way. It was held that any interruption of the easement gave the plaintiff a recurring cause of action *de die in diem* under section 23 and that the two years' rule prescribed by section 26 was not applicable. The nature of that suit differs clearly from the nature of the present suit, the object of which is to oust the respondent from a specific portion of the *Shamilat-i-deh*, occupied by him adversely to the rest of the proprietors.

Authorities on the question of limitation for suits arising out of diversion of water are obviously not in point.

Narain Singh v. *Ishar Singh* (2) is in point and supports the conclusion of the lower Appellate Court, that Article 120 of the Limitation Act governs the case. This authority was approved in *Asa Ram* v. *Paras Ram* (3). The suit was not for possession by establishment of the plaintiff's exclusive right to the property in suit, but was nominally on behalf of the village community to remove an obstruction to the enjoyment of the *Shamilat* by the proprietors generally.

The learned Pleader for the respondent contended that Article 32, prescribing two years' limitation from the date of the appropriation of the land in suit, applied and cited *Sharoop Dass Mondal* v. *Joggessur Roy Chowdhry* (4). As at present advised, I am inclined to hold that Article 32 is not applicable and that Article 120 is applicable. Article 146*A* obviously is not applicable, as the suit is not by, or on behalf of, any local authority.

The argument for the appellants, that Article 144 is the general Article for suits of this description, is based on a dictum of their Lordships of the Privy Council in *Mahammad Amanulla Khan* v. *Badan Singh* (5). The dictum is:—"Article 144 as to adverse possession only applies where there is no other Article which specially provides for the case." This obviously does not bear the interpretation sought to be placed on it for the appellants and Article 144, like Article 142, applies to suits for possession based on the plaintiff's title, not to suits of the nature now under consideration.

Lower Appellate Court has held on the

(1) 1 C. W. N. 96.

(2) 8 P. R. 1899.
(3) 9 P. R. 1904.
(4) 26 C. 564.
(5) 17 C. 137; 16 I. A. 148.

facts that the respondent was in adverse possession for more than six years before the date of suit, and, in my view of the applicability of Article 120, the suit is barred by limitation. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 69 OF 1910.

March 5, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

PURNA CHANDRA SARMA—DEFENDANT No. 1 —APPELLANT

versus

PEARY MOHAN PAL—PLAINTIFF—RESPONDENT.

Bond—Money re-payable within one year, meaning of —Construction.

In a mortgage-bond, it was stipulated that the principal and interest would be paid within one year:

Held, that the case fell within the class of cases in which the mortgage is payable *before* a certain day, and not within the class where a day is fixed for the payment of the debt, and that, therefore, the debtor was entitled to pay off the debt on any day within one year.

Rose Ammal v. *Rajarathnam*, 23 M. 33, relied upon.

Raghubar v. *Budhu*, 8 A. 95 and *Brown* v. *Cole*, 14 Sim. 427; 14 L. J. Ch. 167, 9 Jur. 290, distinguished.

Appeal from the decree of the First Sub-Judge of Chittagong, dated December 2nd, 1909, reversing that of the Second Munsif of Patiya, dated May 31st, 1909.

Babu *Khitish Chandra Sen*, for the Appellant.

Babu *Akhil Bandhu Guha*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the first defendant in a suit to enforce a mortgage security executed by him on the 19th July 1907, for an advance of Rs. 300. It was agreed between the parties that interest would be paid at the rate of 40 *aris* of paddy or Rs. 100 annually; in other words, that 120 *aris* of paddy would be paid upon the principal amount each year. It was further provided that if interest was not paid in kind as stipulated, the value of the paddy would be taken as Rs. 100. There was, however, no time fixed for re-payment in the deed as drawn up; the position, thus, was that the mortgagee could enforce the security whenever he liked and the mortgagor could claim redemption whenever he pleased [*Fitzgerald's Trustee* v. *Mellersh* (1); *Harding* v. *Tingey* (2)]. Consequently, after the deed had been executed, a clause was added to the effect that "the money would be paid, principal and interest, within one year," and this was separately signed by the mortgagor. It is not disputed that on the 24th July 1907, the mortgagor tendered to the mortgagee the principal together with the interest which had accrued due up to that date. The mortgagee declined to accept the money whereupon the sum was deposited in Court. On the 15th March 1909, the mortgagee commenced this action and claimed to recover the principal sum together with interest up to the date of suit and *pendente lite*.

The Court of first instance overruled this contention and held that the mortgage had been redeemed by the tender of the principal and interest on the 24th July 1907. Upon appeal, the Subordinate Judge has held that the tender was premature and that the plaintiff is entitled to enforce the security.

On behalf of the appellant, the mortgagor, it has been argued that upon a true construction of the last clause in the deed, it was open to the mortgagor to redeem the security on the 24th July 1907. On behalf of the respondent, it has been contended, upon the authority of the cases of *Vadju* v. *Vadju* (3) and *Raghubar Dayal* v. *Budhu Lal* (4), that the mortgagor was not entitled to redeem before the expiry of one year from the date of the mortgage. It has further been argued that the right of redemption and the right of foreclosure are co-extensive; and in support of this proposition, reliance has been placed upon the observation of Lord Kingsdown in the case of *Pran Nath Roy Chowdry* v. *Rookea Begam* (5) and upon the cases of *Tirugnana* v. *Nallatambi* (6); *Husaini Khanam* v. *Husain Khan* (7); *Sayad Abdul Hak Sardar* v. *Gulam*

(1) (1892) 1 Ch. 385; 61 L. J. Ch. 231; 66 L. T. 178; 40 W. R. 251.

(2) (1864) 34 L. J. Ch. 13; 10 Jur. (N. S.) 872; 10; L. T. 323; 12 W. R. 684.

(3) 5 Bom. 22.

(4) 8 A. 95.

(5) 7 M. I. A. 323 at p. 355.

(6) 16 M. 486.

(7) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.

Jilani (8) and *Brown* v. *Cole* (9). In our opinion, the view taken by the Subordinate Judge is clearly erroneous and cannot be supported.

It need not be disputed that, unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be deemed co extensive. In each particular instance, therefore, it must be determined, upon the terms of the contract between the parties, whether there is any special provision in the contract which takes the case out of the general rule. No doubt there are observations in the case of *Vadju* v. *Vadju* (3), which may be taken to support the contention of the respondent. But the case of *Raghubar* v. *Budhu Lal* (4) is clearly distinguishable. There, it is obvious from the judgment, a date had been specifically fixed for redemption and such date was binding equally upon the mortgagor and mortgagee. The case of *Brown* v. *Cole* (9) also was obviously a case of this description. Now, in the case before us, the particular covenant upon which both the parties rely is to the effect that the mortgagor shall pay the amount of principal and interest within the term of one year. The mortgagee invites us to treat this covenant as if it provided that the mortgagor was not to pay the amount of principal and interest before the expiry of one year. It is, in our opinion, impossible to construe it in this way. It is fairly clear that this particular clause was inserted for the benefit of the mortgagor so that he might be at liberty to pay the principal with interest before the expiry of one year. *Rose Ammal* v. *Rajarathnamammal* (10). In fact, the present case falls within the class of cases in which the mortgage is payable before a certain day, and not within the class where a day is fixed for the payment of the debt. In this view, it is clear that this appeal must be allowed, the decree of the Court below set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

Appeal allowed.

(8) 20 B. 677.
(9) 14 Sim. 427; 14 L. J. Ch. 167; 9 Jur. 290.
(10) 23 M. 33.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 435 OF 1909

June 4, 1912.

Present:—Mr. Justice Chitty and Mr. Justice Teunon.

SUNDAR DAS KHETRY, AND ON HIS DEATH, HIS HEIRS AND LEGAL REPRESENTATIVES SHAMBHU NATH KHETRY AND ANOTHER —DEFENDANTS—APPELLANTS.

versus

RAGHUNATH DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Title—Decree for rent of coal land—Judgment-debtor declared insolvent—Official Assignee made party in execution proceedings—Lease-hold property sold in execution—Subsequent sale by Official Assignee—Superiority of title—Official Assignee bound by execution sale—Purchaser in execution to have better title—Decree for rent of coal lands, whether can give first charge on property in arrears.

The defendant granted a *patta* of coal lands to *A.*, against whom he obtained a decree in the Sub-Judge's Court at Burdwan, for rent, in execution of which he attached the lease-hold interest of *A.* The sale of the property was fixed on September 10th, 1904, and on September 8, *A.* filed his petition of insolvency in the High Court and the vesting order was made on the same day. The defendant then applied to the Sub-Judge of Burdwan to substitute the Official Assignee in the place of the judgment-debtor in the execution proceedings, which was done and the sale was held on March 6, 1905, and the defendant became the purchaser and took possession on June 14, 1905. In the meanwhile on May 23, 1905, the Official Assignee sold the property with the permission of the High Court to one *B* from whom the plaintiff purchased and sued for recovery of possession:

Held, that, although the order for substituting the Official Assignee in place of the judgment-debtor in the execution proceedings, was incorrect,—*A. B. Miller* v. *Budh Singh Dudhuria*, 18 C. 43—yet he having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence; and he having taken no steps to have that sale set aside in the manner provided by law, the sale must be held to be good and effective as against him and also against the plaintiff who claims through him.

Obiter dictum.—The decree for rent, being in respect of coal lands and not agricultural lands, cannot give the decree-holder a first charge on the lease-hold property in arrears.

Appeal from the decree of the Additional Sub-Judge of Burdwan, dated September 8th, 1909.

Dr. *Rash Behary Ghose* and Babu *Surendra Krishna Dutt*, for the Appellants.

Babus *Mohendra Nath Roy*, *Bipin Bihari Ghose* (Junior) and *Satindra Nath Mukherji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to establish

their title to and recover possession of certain lease-hold properties along with the colliery, engines, machinery, tools, plant and whatever else there might be standing thereon. The contest is between the plaintiffs as purchasers from the Official Assignee of Bengal and the defendants as purchasers in execution of a decree.

The facts are shortly as follows:—On 1st December 1909, the defendants granted a *patta* of coal lands to Atul Nath Chatterjee and Rojindra Nath Chatterjee at an annual *jama* of Rs. 3,626-11-10 and a *salami* of Rs. 4,000. The lessees were two of four brothers, the others being Aghore Nath Chatterjee and Chandra Nath Chatterjee. The four brothers, who were members of a joint family, became heavily indebted to several creditors. On 6th December 1903, the present defendants filed a suit against their lessees for rent under the *patta*, and on 23rd June 1904, obtained a decree against them for Rs. 3,090 10-6 and costs Rs. 350-7. The other two brothers were also parties to that suit as *pro forma* defendants. On 13th July 1904, the defendants applied for execution of their decree by attachment of the immoveable properties belonging to the judgment-debtors. The lease-hold property was accordingly attached and 5th September 1904 was fixed for sale. On that day, the judgment-debtors Nos. 1 and 2 applied for time to enable them to raise money by sale of the attached property, and the sale was accordingly adjourned until 10th September. On 8th September, all four brothers filed their petition in the Court for the Relief of Insolvent-debtors at Calcutta and on the same day, the Court made the usual vesting order under section 7 of the Indian Insolvent Act. On 30th September 1904, the defendants applied to the Subordinate Judge of Burdwan to substitute the Official Assignee in the place of the judgment debtors in the execution proceedings under their decree. On 23rd November, notice was ordered to issue to the Official Assignee, to show cause why he should not be substituted in the place of the judgment-debtors and it was made returnable on 22nd December 1904. On 10th January 1905, the Subordinate Judge, finding that Mr. Miller had been duly served with the notice, ordered that he be substituted in the place of the judgment-debtors and 6th March 1905 was fixed for the sale of the attached property. On that day, the property was sold and purchased by the defendants, the decree-holders. On 18th April 1905, the sale was confirmed and on 14th June 1905 an order was made for delivery of possession to the defendants as purchasers and they accordingly took possession under it. Meanwhile, on 23rd May 1905, the Official Assignee applied to the Insolvency Court and obtained an order that he should be at liberty to sell either by public auction or private contract to the best purchaser the properties of the insolvents including the lease-hold premises in question. He did not, as a matter of fact, sell at that time; but on 24th March 1908, he sold the premises now in question to Harmusji Pistonji Banker, *alias* Bilimoria, a Parsee gentleman of Asansole. On 24th June 1908, three months later, Banker sold the property to the present plaintiffs. On 16th July 1908, this suit was instituted to recover possession of the property.

The learned Subordinate Judge has decreed the plaintiffs' suit and the defendants have appealed.

The first question is one of fact, whether the notice for substitution was duly served on the Official Assignee in the execution case. The Judge says that it is shown to have been served on a clerk of the Official Assignee, and, in the absence of evidence to show that this amounted to service on the Official Assignee, or that the clerk had authority to receive it, he finds that it was not properly served. This finding appears to us to be entirely against the evidence on the record. The clerk of the Official Assignee, Lakhinarain Dhar, states that he has been an assistant of the Official Assignee's office for 29 years. He admits that the notice was served in that office and that he signed acknowledging the receipt. He states that he received the notice on behalf of the Official Assignee, and made over the copy to Mr. Langer, the Head Assistant. The Small Cause Court bailiff (who has been bailiff for 30 years and who served the notice) says that he has known Lakhi Narain Babu as the head clerk or *Bara Babu* for 20 years and that he served notices for the Official Assignee upon him 20 or 30 times. He states that

he always served notices for Mr. A. B. Miller on Lakhi Narain Dhar in this manner. There can be no question on this evidence that the notice was served in the Official Assignee's office in the usual way; and, in the absence of any evidence to the contrary, we must presume that Lakhi Narain Dhar was a person authorized to receive such notices within the meaning of section 75 of the Code of Civil Procedure, 1882. It would have been simple for the opposite party to have called evidence from the Official Assignee's office to disprove this, had it been incorrect. We, therefore, hold that the notice for substitution was duly served on the Official Assignee.

The next question is, what was the effect of the sale in execution as against the Official Assignee. It was argued for the appellants (1) that the Official Assignee was bound by the execution proceedings and by the sale which took place as we have stated; (2) that the lease-hold interest did not vest in the Official Assignee because he did not take possession, and (3) that the decree being one for rent, the decree-holders were entitled to sell the lease-hold interest of the insolvents and to give a good title.

(1) With regard to the first question, it must be conceded that the order for substituting the Official Assignee in place of the judgment debtors in the execution proceedings was incorrect; [see the case of *A. B. Miller* v. *Budh Singh Dudhuria* (1)]; but the Official Assignee having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence and as binding upon him. The fact that a person, who was not the representative of the judgment-debtors, was brought upon the record as such representative would not affect the validity of the sale [see *Malkarjun* v. *Narhari* (2).] The Official Assignee having taken no steps to have that sale set aside in the manner provided by law, the sale must be taken to be good as against him.

(2) We cannot accept the second contention raised by the learned Pleader for the appellants that the property had not vested in the Official Assignee. It is true that in cases of lease-hold property, the Official Assignee has the right to elect whether or not he will accept the property under the vesting order. If he does so, there is no question that his acceptance relates back to the date of the vesting order [see *Abdul Razak* v. *J. G. Kernan* (3)]. That was the converse case and the question there was whether the Official Assignee could be made liable for the rent of the lease-hold property. It was held that, inasmuch as he had taken possession, he must be regarded as having elected to take over the property. Here, he paid no rent nor did he take actual possession; but the property did vest in him by the vesting order, and that he regarded it as having vested in him, is made plain by the application which he made to the Insolvency Court on 23rd May 1905 for leave to sell the property. He could not sell it unless it were vested in him. That being so, we must hold that the sale was effective as against the Official Assignee and also against the plaintiffs who claim through him. The plaintiffs are in fact in a dilemma. If the property had not then vested in the Official Assignee, it was sold away before the Official Assignee acquired any title to it if it, had vested in him, and we think that it had, it was sold in his presence and the sale was binding on him.

It is not necessary, under these circumstances, to discuss the third point raised by the learned Pleader for the appellants, that the decree being a decree for rent, it gave the defendants a first charge on the property. But we may say that we cannot understand how that could be the case with regard to a decree of this kind which was for rent of coal lands and not agricultural lands.

The appeal must be allowed and the plaintiffs' suit dismissed with costs in both Courts.

Appeal allowed.

(1) 18 C. 43.

(2) 25 B. 337; 27 I. A. 216; 2 Bom. L. R. 927; 5 C W. N. 10; 10 M. L. J. 368.

(3) 22 B. 617.

BANGA CHANDRA NANDI *v.* TARA KINKAR PAL.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1255 OF 1910.
June 6, 1912.
Present:—Mr. Justice Carnduff and
Mr. Justice Chapman.
BANGA CHANDRA NANDI—DEFENDANT—APPELLANT
versus
TARA KINKAR PAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act XIV of* 1882), *s.* 317—*Civil Procedure Code* (*Act V of* 1908), *s.* 66—*Bar of suit against certified purchaser buying* benami—*Provision applicable to purchaser in execution of certificate under Public Demands Recovery Act*—*Public Demands Recovery Act* (*I of* 1895), *s.* 19 *sub-s.* (2).

The provisions of section 317 of the Code of Civil Procedure, 1882, which bar a suit against a certified purchaser buying *benami* at a sale in execution of a decree, apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act, (I of 1895), by virtue of sub-section (2) of section 19 of that Act.

Appeal from the decree of the Sub-Judge of Chittagong, dated December 17th, 1909, reversing that of the Munsif of Cox's Bazar, dated April 28, 1909.

Babu *Khitish Chandra Sen*, for the Appellant.

Babu *Dhirendra Lal Kastagir*, for the Respondent.

JUDGMENT.

CARNDUFF, J.—The short point raised by this appeal is as to whether the provisions of section 317 of the Code of Civil Procedure 1882, which correspond with those of section 66 of the Code of 1908, and bar a suit against a certified purchaser buying *benami* at a sale in execution of a decree, apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act, 1895, (Bengal Act I of 1895), by virtue of sub-section (2) of section 19 of the said Act.

The application to such certificates of section 244 of the old Code, in Chapter XIX of which both that section and section 317 find place, has been the subject of a number of conflicting decisions. Thus, in *Umelali Bhuya* v. *Rajlakshmi Debya* (1), Brett and Woodroffe, JJ., held that section 244 was applicable; whereas in *Raghubans Sahai* v. *Ful Kumari* (2), Harington and Mookerjee, JJ., ruled that it was inapplicable. But as regards section 317 there is,, so far as I know, only one reported case, namely, that of *Ambica Prosad* v. *Gopal Baksh Das* (3), in which Banerjee and Rampini, JJ., expressed an opinion against the applicability of the provision. That opinion, however, was really an *obiter dictum*, the case having been decided on other grounds; and the learned Judges were then construing sub-section (2) of section 21 of the Public Demands Recovery Act of 1895, as it was enacted in the first instance when it ran as follows:—

"The procedure prescribed in Chapter XIX (with the exception of section 310A) shall, so far as it is applicable, be the procedure followed in execution proceedings to enforce such certificate and realise the amount recoverable thereunder."

Section 19, sub-section (2), which has, by section 12 of the Bengal Public Demands Recovery (Amendment) Act 1897, (Bengal Act I of 1897), been made to take the place of the earlier provision, is, however, very differently expressed in these terms:—

"Such certificate may be enforced and executed in the manner provided by Chapter XIX of the Code of Civil Procedure for the enforcement and execution of decrees for money; and all the provisions of that Chapter, except section 310A thereof, shall apply so far as they are applicable."

Now, the words of the present provision seem to me to be perfectly clear, and I would construe them exactly as they were construed by Woodroffe, J., in *Hari Charan Singh* v. *Chandra Kumar Dey* (4). They begin by declaring that certificates are to be enforced and executed as if they were decrees for money under the Civil Procedure Code: and then they go on expressly to render applicable, so far as may be, all the sections—223 to 343—to be found in Chapter XIX of that Code, with one carefully specified exception. What we are now asked by the learned Vakil for the respondent to do is to qualify the latter part of the enactment by inserting the words "for the enforcement and execution of a decree" after the words "that Chapter," or by adding after the word "applicable" the words "for the enforcement and execution of a decree" I think that it is not open to us

(1) 1 C. L. J. 538; 10 C. W. N. 130; 33 C. 84.
(2) 1 C. L. J. 542; 32 C. 1130.
(3) 1 C. L. J. 550.
(4) 34 C. 787 at p. 803; 11 C. W. N. 745; 5 C. L. J. 696.

to do anything of the kind. It seems to me, indeed, that the only argument in favour of the respondent's view is that mentioned by the lower Appellate Court, namely, that, if sub-section (2) of the new section 19 be sufficient to draw all the provisions of Chapter XIX of the old Code, then the new section 20, which explicitly applies sections 311 and 313 of that Chapter, becomes superfluous. But that is an argument which, standing alone, seems to me to carry but litle weight; it is useful only as an additional argument where there are already others to be supported. For it is well known that the Legislature, sometimes, it may be, *per incuriam*, and sometimes, doubtless, *pro majori cautela*, not infrequently commits itself to redundant provisions; and, if the construction, which I have indicated, makes section 20 of the amended Act superfluous, my reply is that the construction for which the learned Vakil for the respondent contends, reduces the latter part of sub-section (2) of section 19 to a similar superfluity. In other words, if the latter part of that sub-section is to be read as limited to such provisions only as bear upon enforcement and execution, then it carries the earlier part not a step farther.

In my view, the only limitation upon the application of any of the provisions (other than those of section 310A) contained in Chapter XIX of the old Code is that imposed by the words "so far as they are applicable," and I can find nothing in section 317 of that Code in any sense inapplicable to a purchase at a sale in execution of a certificate. On the contrary, its provisions are salutary and appropriate, and there is no difficulty whatever in applying them, *mutatis mutandi*, to purchasers at such sales.

The result is that the respondent's suit was, in my opinion, rightly dismissed by the original Court. This appeal must, therefore, be allowed, the decree of the lower Appellate Court discharged, and that of the Court of first instance restored with costs throughout.

CHAPMAN, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 734 OF 1911.

June 4, 1912.

Present:—Mr. Justice Piggott.

CHAND KHAN—DEFENDANT—APPELLANT

versus

ALI KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS

Adverse possession—Possession of one co-heir in the absence of others—Whether adverse.

A co-heir, in the absence of the other co-heirs, got possession of certain property left by a deceased Muhammadan:

Held, that the possession of such co-heir was not adverse to the others unless an adverse title was asserted.

Jafar Husain v. *Mashuq Ali*, 14 A. 193, referred to.

Second appeal from the decision of the District Judge of Jhansi, dated 28th April 1911.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—This was a suit for recovery of possession over certain house property situated in the city of Jhansi. The lower Appellate Court has dismissed a considerable portion of the plaintiffs' suit, and I am only concerned with that portion of the claim which has been decreed. The finding in respect of this is that it belonged to one Namdar Khan, who died somewhere about the year 1894 A. D. He left surviving him his widow, Raj Bibi, and two nephews (sons of his own brother Jawahir Khan) named, Ali Khan and Ghasi Khan. The latter has since died, leaving a son named Rahim Khan, a widow *Musammat* Muradi and a daughter *Musammat* Mahtabi. On the 22nd of February 1903, *Musammat* Raj Bibi executed a deed by which she purported to sell the property, with which I am now concerned, to Chand Khan and Moti Khan. In the present suit, the plaintiffs are Ali Khan and the heirs of Ghasi Khan, that is to say, his son, widow and daughter already named. The defendants are *Musammat* Raj Bibi, Chand Khan and Moti Khan, that is to say, the vendor and the vendees, under the sale-deed dated the 22nd of February 1903.

The lower Appellate Court has found that the property in dispute devolved on the death of Namdar Khan in accordance with

the ordinary rules of Muhammadan Law, so that Raj Bibi was entitled to the same to the extent of $\frac{1}{4}$th share only. It has accordingly decreed the claim of the plaintiffs to the extent of a $\frac{3}{4}$th share in the property conveyed by *Musammat* Raj Bibi under the deed of the 22nd of February 1903. It may be noted that *Musammat* Raj Bibi did not defend the suit at all, and that Moti Khan in effect admitted the plaintiffs' claim. Chand Khan has contested the suit throughout and has now brought it before this Court in second appeal.

The first point taken is substantially a matter of pleadings. The plaintiffs undoutedly came into Court with the allegation that their family, although converts to Islam, continued to be bound as amongst themselves by the Hindu Law, and in fact always constituted a joint Hindu family. There was also a special plea that the plaintiff Ali Khan had been adopted by his uncle, Namdar Khan. These points have been decided against the plaintiff by both the Courts below and are no longer in dispute. It is suggested, however, that on the pleadings as they stood, the Courts below were not entitled to carry their own findings to their correct legal conclusion but were bound to dismiss the plaintiffs' suit altogether without considering how the inheritance to Namdar Khan's estate would in fact devolve under the Muhammadan Law, when that was held to be the law applicable to the parties concerned. I am unable to accept this contention. No doubt the plaintiffs in their anxiety to invalidate altogether the transfer made by *Musammat* Raj Bibi came into Court with statements going beyond what they were able to prove. But the alternative plea that in any case the plaintiffs had rights as sharers, or rather as residuary heirs under the Muhammadan Law, underlay the whole case for the plaintiffs, and particularly the 7th paragraph of the plaint to which the learned District Judge has referred. On the issues as framed, I do not think that the defendants were in any way prejudiced by defective pleadings, and I am of opinion that the Courts below, having found that the estate of Namdar Khan devolved in accordance with the Muhammadan Law of inheritance, were right in giving the plaintiffs the benefit of that finding in so far as it operated in their favour.

The more important plea raised on behalf of the appellant, Chand Khan, is as regards the question of limitation. I take it from the learned District Judge that actual possession over the house property now in dispute upon the death of Namdar Khan remained with his widow, *Musammat* Raj Bibi. This in fact seems to be admitted in the plaint itself, where it is stated that the plaintiff Ali Khan and his brother, Ghasi Khan, were absent from Jhansi at the time of Namdar Khan's death, and were in fact earning a livelihood elsewhere. The plaintiffs' case is that they only came to know recently, after their return to Jhansi, that the property now in dispute, which seems in fact to have formed part of the old house property of the family, had been made the subject of alienation by *Musammat* Raj Bibi under the sale-deed of the 22nd of February 1903. The question, however, as to when the plaintiffs actually came to know of this alienation does not arise. The Courts below have in effect held that, in the absence of evidence to the contrary, it must be presumed that the possession of *Musammat* Raj Bibi was on behalf of herself and of her co-sharers, the remaining heirs of Namdar Khan, up to the time when that lady asserted an adverse title to the property now in dispute by dealing with it in the sale-deed of the 22nd of February 1903. In my opinion, this view is correct and is borne out by the rulings relied on by the District Judge. It does not violate the general principle laid down by this Court in *Jafar Husain* v. *Mashuq Ali* (1) and other cases, because it rests upon the presumption that the possession obtained by *Musammat* Raj Bibi in 1894 on the death of Namdar Khan was not adverse to the plaintiffs but was permissive and representative, so as to constitute in law the joint possession of herself and of the other lawful heirs of Namdar Khan. I think that under the circumstances of the present case, this presumption has been rightly drawn, and that it is sufficient for the plaintiffs to have brought the present suit within 12 years of the date on which

(1) 14 A. 193.

an adverse title is first shown to have been definitely set up by *Musammat* Raj Bibi. I accordingly dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1163 OF 1910.

May 2, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

N. RAMAKRISHNA AIYAR—APPELLANT

versus

SEETHARAMA IYER—RESPONDENT.

Easement—Right of support—Temporary structure, whether entitled to right of support—Injunction to restrain interference with right of support—Actual damage, proof of—Whether necessary.

To entitle a person to the right of support of a building, all that has to be proved is that the person claiming the right has acquired it for more than the period prescribed in section 15 of the Easements Act. It is immaterial whether the structure for which the right is claimed is temporary or permanent.

Maberly v. *Dowson*, 5 L. J. (o. s.) K. B. 261, referred to and explained.

In order to entitle a person to obtain an injunction restraining his neighbour from interfering with his right of support, it is not necessary to show actual damage.

Backhouse v. *Bonomi*, 9 H. L. C. 503; 34 L. J. Q. B. 181; 7 Jur. (N. S.) 809; 4 L. T. 754; 9 W. R. 769 and *Corporation of Birmingham* v. *Allen*, 6 Ch. D. 284, 46 L. J. Ch. 773; 37 L. T. 207; 25 W. R. 810, referred to.

Second appeal against the decree of the District Court of Trichinopoly, in A. S No 256 of 1909, presented against the decree of the District Munsif of Trichinopoly, in O. S. No. 238 of 1908.

Mr. *V. C. Seshachariar*, for the Appellant.

Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—In this case the plaintiff and defendant purchased adjacent houses. The wall between the two houses belongs to the defendant. The plaintiff has an upstair shed in his house which is supported on one side by the defendant's parapet wall C. D. The suit is, *inter alia*, to restrain the defendant from interfering with his right of support. Both the lower Courts have found that the plaintiff has been in enjoyment of the right of support for more than the period prescribed in section 15 of the Easements Act. The plaintiff has been given a decree restraining the defendant from interfering with the plaintiff's right of support.

Two points have been argued in this second appeal. The first is that the shed is only a temporary one and not permanently attached to plaintiff's house and that no right of support can be claimed for such a structure. But this contention was not raised in the lower Court. The point of contest there was as to how long the shed had been in existence and not the nature of the shed. It was not contended there that the shed should not be regarded as a permanent one from its very nature. *Maberly* v. *Dowson* (1), relied on for the appellant, is really of no use to him. In that case, which related to the right to light and air, it was found that the structure in question was only of a temporary nature. But here, as already pointed out, no such contention was raised. As a matter of fact, the shed seems to be of a premanent character with walls on three sides. It is, however, unnecessary to decide that point as it was not properly raised in the lower Courts.

The next contention is that as the defendant has not deprived the plaintiff of his support and as the plaintiff has sustained no damage by any act done by the defendant, the plaintiff has no cause of action and the decision in *Backhouse* v. *Bonami* (2) is relied on. That case related to interference with the natural right of support but not to disturbance of a right to support as an easement. The distinction between the two classes of cases is pointed out in *Backhouse* v. *Bonomi* (2) by Lord Wensleydale at 513; see also Goddard on Easements, page 401, 4th Edition. Moreover, it was held, in *Corporation of Birmingham* v. *Allen* (3), that actual damage is not necessary to entitle a person having the right to support to an injunction and the rule requiring damage was applicable only to an action for damages. The reason for holding that actual damage is necessary to sustain a suit for damages, where a natural right of support from the soil of an adjoining owner has been infringed, does

(1) 5 L. J. (o. s.) K. B. 261.

(2) 9 H. L. C. 503; 34 L. J. Q. B. 181; 7 Jur. (N. S.) 809; 4 L. T. 754; 9 W. R. 769.

(3) 6 Ch. D. 284; 46 L. J. Ch. 673; 37 L. T. 207; 25 W. R 810.

not seem to be applicable where the disturbance is of a right by easement to superficial support.

The next question raised is whether the plaintiff is entited to an injunction requiring the defendant to re-build the cornice pulled down by him in F. A. marked in the plan. The cornice was admittedly on the defendant's side and an appurtenance to his wall. The District Munsif disallowed the injunction on the ground that plaintiff failed to prove that any damage was caused to him. The District Judge has not really reversed that finding. He merely says that "it is defendant's wall that is likely to suffer but if it does, it will cause much harm to plaintiff's house and little to defendants.' It is admitted that there is no evidence on record that the wall is likely to suffer by the removal of the cornice. We set aside the District Judge's decree in so far as it modifes that of the Munsif and restore the Munsif's decree. The parties will bear their respective costs in this and in the lower Appellate Court.

Decree modifisd.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 550 OF 1911.

June 11, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

JANGLI SAHU—DEFENDANT—APPELLANT

versus

GOPINATH SAHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 20—Non-joinder of parties in appeal—Discretion of Court to make parties.

In a mortgage suit, the sole question was whether the contesting defendant had priority over the plaintiff. The defendant appealed and impleaded the plaintiff only as respondent to the appeal. The Court dismissed the appeal on the ground of non-joinder of other defendants as respondents to the appeal:

Held, that the lower Appellate Court ought to have made them respondents to the appeal under Order XLI, rule 20 of the Civil Procedure Code.

Second appeal from the decision of the District Judge of Gorakhpur, dated 23rd March 1911.

Mr. *Parmeshwor Dyal* (with him Mr. *Sarat Chandra*, for *Dr. Satish Chandra Banerjee* and Mr. *Haribans Sahai*), for the Appellant.

Mr. *Ramakant Malviya* (with him Dr. *Tej Bahadur Sapru*), for the Respondents.

JUDGMENT.—This was a suit upon a mortgage which was decreed by the first Court. Jangli Sahu, one of the defendants, appealed but did not make Har Sewak Man Tewari, the mortgagor, and Jagai Tewari, a subsequent mortgagee, respondents to the appeal. His case was that he was a purchaser of the property in lieu of the mortgages which had priority over the plaintiffs' mortgage, and that, therefore, the plaintiffs were not entitled to bring the property to sale unless they had redeemed the prior mortgages. At the hearing of the appeal, a preliminary objection was taken to the effect that non-joinder of the two aforesaid persons was fatal to the appeal. The lower Appellate Court gave effect to the objection and dismissed the appeal refusing to make those persons parties to the appeal. It says:—"I see no reason to allow parties to be added now." In second appeal to this Court it is contended that under the provisions of Order XLI, rule 20, the Court had discretion to make those persons respondents to the appeal and that it ought to have exercised the discretion vested in it, and made them respondents to the appeal. It is further contended that they were not absolutely necessary parties to the appeal. It is doubtful whether they are necessary respondents to the appeal or not. In these circumstances, in our opinion, the Court below ought to have made them parties and decided the appeal thereafter. We, therefore, set aside the decree of the lower Appellate Court and send down the case to that Court with directions that Har Sewak Man Tewari and Jagai Tewari should be made respondents to the appeal and the case be decided according to law. The appellant will have his costs of this appeal including fees on the higher scale.

Case returned for re-decision.

SHARFUDDIN *v.* NIAMAT ALI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 7 OF 1911.

May 6, 1912.

Present:—Mr. Lindsay, J. C.

SHARFUDDIN—DEFENDANT—APPELLANT

versus

NIAMAT ALI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. II, r.* 2—*Relinquishment of a portion of claim, effect of.*

By virtue of an oral agreement, the plaintiff became entitled, in the event of a certain litigation proving successful, to recover a certain sum of money and a quarter share of a certain house. The plaintiff filed a suit in the Small Cause Court for the recovery of the money due to him under the agreement, but omitted to bring a suit with respect to the share of the house to which he was also entitled. After getting a decree in the Small Cause Court, he instituted a suit for recovery of his share in the house:

Held, that the plaintiff's suit for recovery of the share in the house was barred under Order II, rule 2.

Appeal against an order of the Additional Judge, Lucknow, dated 20th October 1910, reversing that of the Munsif, Lucknow, dated 4th August 1910.

Pandit *Gokaran Nath Misra* and Mr. *Manmohan Nath Chak*, for the Appellant.

JUDGMENT.—This case was up before Mr Evans, Judicial Commissioner, in October last. He remitted an issue on a question of fact for determination by the Court below. The matter in dispute in this appeal is whether or not a suit which was brought by the plaintiff-respondent in the Court of first instance was barred by the provisions of Order II, rule 2 of the the Code of Civil Procedure. It appears that under an oral agreement executed between the plaintiff Niamat Ali and a man named Ilahi Baksh, who is now represented by the defendant-appellant, Sharfuddin who is his transferee, it was agreed that in the event of certain litigation proving successful, the plaintiff Niamat Ali was to be entitled to recover from Ilahi Bakhsh a certain sum of money and also a quarter share of a certain house. The litigation having proved successful, Niamat Ali proceeded to enforce the agreement. He instituted against Ilahi Bakhsh a suit in the Small Cause Court for recovery of the money which was due to him under the terms of the agreement he relied upon. No suit was brought with respect to the share of the house to which the plaintiff said he was entitled under the agreement. Consequently, when this present suit was brought against Ilahi Bakhsh's transferee for recovery of possession of a one-fourth share of the house, a plea was taken that the suit could not be maintained inasmuch as the claim in respect of the house had been omitted in the former suit. The reply to this plea, which was given by the plaintiff, was that at the date on which he filed his suit in the Small Cause Court for the recovery of the money due to him from Ilahi Bakhsh, his cause of action which enables him to sue in respect of this house had not then accrued. He stated that under the terms of the agreement his cause of action to bring a suit for possession of a share of the house could not and did not arise until six months had expired from the date of the decree in the case which Ilahi Bakhsh had brought against a trespasser for recovery of the property. If the plaintiff had succeeded in making good this point, his answer to the plea raised under Order II, rule 2, would have been a good one. In order to settle this matter, namely, as to whether it was a condition of the agreement between Niamat Ali and Ilahi Bakhsh that possession of a share of the house should not be given until six months after the date of the decree, Mr. Evans remanded an issue to the Court below directing the Court to decide whether or not, as a matter of fact, there was a condition in the agreement between Niamat Ali and Ilahi Bakhsh that possession cannot be demanded of the one fourth share of the house until six months had expired after the date on which the decree for possession was obtained against the trespasser. The Additional Judge of Lucknow, having received the evidence tendered by the parties on this issue has come to the finding that the agreement of the 20th May 1907 did not include any such condition. This finding is, therefore, against the case set up by Niamat Ali and if it is to be accepted, it must settle this appeal. Objections have been filed on Niamat Ali's behalf to the finding of the Court below but as that finding is one upon a question of fact, it cannot be challenged in second appeal even upon objections raised to the finding in remand. The result, therefore, is that it is not proved that Niamat Ali had no cause of action to sue for a one fourth share at the time he sued Ilahi Bakhsh for the money in the Small Cause Court. Therefore, the plea under Order II, rule 2 must be taken to be a valid one and it follows, therefore, that the suit could not be maintained. The appeal is accepted, the decree

of the Court below is set aside and it is ordered that Niamat Ali's claim do stand dismissed with costs. The respondent will pay the appellant's costs in all three Courts.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 193 OF 1910.

May 27, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Banerji.

MADAN LAL—DEFENDANT—APPELLANT

versus

CHUTTAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Award—Family arrangement acted upon for a very long time, whether binding on family.

In 1876, disputes arose between a daughter and the daughter's sons by another daughter of one *C.* in respect of the property left by *C.* The disputes were referred to arbitrators, and the arbitrators gave a portion of the property to the daughter and a portion to the daughter's sons by another daughter. The award was made a rule of Court and was acted upon for a very long time:

Held, that the award was a family arrangement which was binding not only upon the actual parties to it but upon the whole family.

Khunni Lal v. *Govind Kishore Narain*, 33 A. 356, 10 Ind. Cas. 477; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. L. 427; 10 M. L. T. 25; (1911) 2 M. W. N. 432; 21 M. L. J. 645, referred to.

First appeal from the decision of the Subordinate Judge of Shahjahanpur, dated 31st of March 1910.

Mr. *J. N. Chaudhri* (with him Mr. *G. L. Agarwala*), for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru* (with him Messrs. *Ibn Ahmed*, *Ghulam Mujtaba* and *Muhammad Ishaq*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought to recover possession of certain *zemindari* property. The property originally belonged to one Chandan Singh, who died on the 22nd of February 1866. He left him surviving a widow, named, *Musammat* Jasodha Kunwar, and three sons of a daughter, named, Gulab Kunwar. There was also a lady named Mohun Kunwar. Plaintiffs Nos. 1 and 2 are her sons. The third plaintiff is a transferee from these sons, evidently a person who has taken a transfer and is financing the litigation. Mohun Kunwar, it is alleged by the plaintiffs, was also a daughter of Chandan Singh but this is challenged by the appellants who say she was illegitimate. Gulab Kunwar pre-deceased Jasodha Kunwar, and Jasodha remained in possession of the property as the widow of Chandan Singh up to her death which took place on the 16th of February 1872. After the death of Jasodha, the property apparently was taken possession of by the collateral heirs of Chandan Singh. A suit was instituted by Jawahir and others, the sons of Gulab Kunwar, to recover possession of the property, and after some litigation a decree for possession was obtained. Mohun Kunwar, who, of course, would have been entitled to the property in priority to the sons of Gulab Kunwar, assuming her to be the legitimate daughter of Chandan Singh, apparently lay by and took no part in the litigation. She apparently was not recognised by the sons, nor did she put forward any claim on her own behalf. After the property had been recovered, however, some claim must have been put forward by or on behalf of *Musammat* Mohun Kunwar, because in the year 1876 we find that a submission to arbitration was entered into between *Musammat* Mohun Kunwar on the one part and the sons of Gulab Kunwar on the other. This submission to arbitration recited that there were disputes between *Musammat* Mohun Kunwar and the sons of Gulab Kunwar in regard to the property of Chandan Singh in respect of which a decree had lately been obtained and the parties submitted their differences to arbitration with a view to have their disputes settled. The nature of the dispute does not appear, and we think that if there was any question as to the legitimacy of *Musammat* Mohun Kunwar, it is probable the matter would be set forth vaguely as a dispute and would not be directly referred to. An award was made giving to *Musammat* Mohun Kunwar four villages, in value about one-seventh of the property. The rest of the property was given to the sons of Gulab Kunwar and one Bal Makund, who had been a co-plaintiff with them in their successful suit to recover possession of the property. This award was made a rule of Court. Ever since, until this suit was instituted, possession has gone in occordance with this award. It cannot be urged we think that *Musammat* Mohun

Kunwar was tricked or induced to sign the submission to arbitration and an award knowing nothing about it. She was probably a *pardanashin* lady and illiterate, but we find that her husband was her general attorney and he singed her name on the award as such. A son of Mohun Kunwar, who was evidently of full age, identified her at the registration of the power-of-attorney to the father. As a matter of fact, *Musammat* Mohun Kunwar lived until the 17th of October 1908. The award has been acted upon ever since. On the death of *Musammat* Jasodha and after the property had been recovered by the sons of Gulab, if there had been no question as to the title of *Musammat* Mohun Kunwar, she would have been entitled to immediate possession of the entire property during her life, and on her death, her sons, as the daughter's sons of Chandan Singh, would also have been entitled to share in the estate with their cousins. Therefore, not only was it the interest of Mohun Kunwar that she should get the proprety if she was entitled to it in the year 1876 but it was also the interest of her husband and her sons. She, no doubt, would be the legal owner but for all practical purposes, they would share at least equally with her the benefit and profits of the estate. From the year 1876 up to the time of the institution of the present suit, the award has never been challenged, either by *Musammat* Mohun Kunwar herself or by any one of her four sons. There are two sets of defendants to the present suit:—*First*, the transferees from the sons of Gulab Kunwar of the property which they acquired under the award, and *secondly*, transferee from Mohan Kunwar herself of the property which was allotted to her. The Court belowhas decreed the plaintiffs' claim in respect of all the property which was alienated by the sons of Gulab Kunwar. It also has decreed the claim for such of the property as was alienated by *Musammat* Mohun Kunwar in the alienation of which her sons did not join or in respect of which legal necessity for alienation was not proved.

The defendants have appealed against the decrees for possession in this and some of the connected appeals. The plaintiff has also preferred an appeal in respect of so much of the claim as was dismissed.

In our opinion, the whole case depends upon whether the submission to arbitration and the award can be regarded as a family settlement which ought to be given effect to. It is, of course, impossible now for the transferees of the sons of Gulab Kunwar to prove that Mohun Kunwar was illegitimate. They are strangers to the family and it is no longer the interest of the family to help them. In our opinion, the transaction was a family arranagement and ought to be regarded as such. We have already mentioned the circumstances under which the submission to arbitration was entered into. We have pointed out that it has been acted upon for very many years and we think that it would be very wrong to disturb the possession of those persons who have acquired the property on the strength of the submission and award. There cannot be the least doubt that the award was acted upon and that *Musammat* Mohun Kunwar and her sons took possession of the property that was allotted to her while the sons of Gulab Kunwar were allowed to take possession and deal with the property which was allotted to them.

It is contended on behalf of the plaintiffs that this plea of family arrangement is not open to the defendants and reliance is placed upon paragraph 9 of the written statement. In the written statement of those defendants who claimed through the sons of Gulab Kunwar, it is alleged that *Musammat* Mohun Kunwar was illegitimate. Paragraph 9 goes on to say that the arbitration and award were fictitious and colourable. It is contended by the plaintiffs that, so far from relying upon the award as a family settlement, this set of defendants at least were alleging the whole transaction to be fictitious. In our opinion, there is no substance in this contention. It never was or could be the case of any of the defendants that the submission to arbitration and award were fictitious in the sense that they were never acted upon. It was the common case of both sides that the award was acted upon for very many years, and there is not the least doubt that numerous transfers of the property have taken place on the strength of it, some of the transfers being made by Mohun Kunwar and her sons and some by the sons of Gulab Kunwar. The real meaning, we think, of paragraph 9 of the written statement was that the award was

really a colourable method adopted by the parties of giving *Musammat* Mohun Kunwar a small share in the property in consideration of her relinquishing all claim to the remainder. They also referred to section 115 of the Evidence Act as being a bar to the plaintiffs' claim, that is to say, they raised a plea of estoppel. This, we think, shows that the real meaning of paragraph 9 was the meaning we have attributed to it. As a matter of fact, the set of defendants, who represented the transferees from *Musammat* Mohun Kunwar herself and her sons, did rely on the submission to arbitration and award as a family settlement and the Court framed an issue on the point. It is true that this set of defendants raised the plea for another purpose, namely, as being a ground for their claiming the property as being the absolute property of *Musammat* Mohun Kunwar and not property to which she was merely entitled for a daughter's estate. We do not think that it can be urged that any one is now being taken by surprise or that the full facts are not before the Court. Having regard to the circumstances of the present case and the fact that the submission to arbitration, the award and subsequent alienations were never challenged up to the institution of the present suit, we are entitled to assume that in the year 1876 there was a genuine and real dispute between the parties, whether that dispute had reference to the legitimacy of *Musammat* Mohun Kunwar or to some other matter. The submission to arbitration referred these matters to the settlement of arbitrators and an award was made by consent of parties and that award was made a rule of Court. We think that this can clearly be regarded as a family settlement and that it fulfils the test approved of and laid down by their Lordships of the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* (1). In the present case, just as in the case referred to by their Lordships of the Privy Council, the true character of the whole transaction was a settlement between several persons of their disputes, whatever those disputes may have been. This being so, the transaction was binding not only upon the actual parties to it but the family.

(1) 33 A. 356 at p. 367; 10 Ind. Cas. 477; 15 C.W.N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 2 M. W. N. 432; 21 M. L. J. 645.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' claim as against Madan Lal, the appellant in this case, with costs in both Courts including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1216 OF 1908.

May 3, 1912.

Present:—Sir Arnold White, KT., Chief Justice, and Sir Ralph Benson, Judge.

VAITHILINGA MUDALI—APPELLANT

versus

MUNIGAN *alias* NATESA MUDELAY AND OTHERS—RESPONDENTS.

Hindu Law--Adoption—Invalid adoption, effect of—Right of adoptee in natural family—Adoption of orphan whether valid—Presumption—Estoppel--Suit in ejectment—Whether can be converted into a suit for partition.

An invalid adoption does not, under Hindu Law, *per se* destroy the adoptee's rights in his natural family.

Bawani Sankara Pandit v. *Ambabhay Ammal*, 1 M. H. C. R. 363 and *Laksmappa* v. *Ramava*, 12 B. H. C. R. 364 at p. 397, referred to.

As no one but the parents of a child can give him away in adoption, an orphan cannot be given away in adoption either by himself or by any one else.

Subbaluvammal v. *Ammakutti Ammal*, 2 M. H. C. R. 129, *Balvantrav Bhasakar* v. *Bayabai*, 6 B. H. C. R. (o. c. J.) 83; *Bashetiappa* bin *Basalingappa* v. *Shivlingappa* bin *Balleppa*, 10 B. H. C. R. 268, referred to.

There is no presumption in law that an apparent adoption, which had taken place long ago and was throughout acquiesced in by all concerned, was made in pursuance of an authority given by some person competent to give away the son in adoption.

Anandrav Sivaji v. *Ganesh Eshvant Bokil*, 7 B. H. C. R. App. XXXIII at p. XXXIV, distinguished.

The adoption of an orphan would be valid, if there was evidence to show that the adoptee's natural parents had given the boy away to a person who made the adoption years afterwards and even after the death of the natural father.

Venkata v. *Subhadra*, 7 M. 548, referred to.

Parvatibayamma v. *Ramakrishna Rau*, 18 M. 145, referred to.

There is no estoppel against the plea of invalid adoption, even though the adoption was acquiesced in by the family, so as to debar the adoptee being restored to his natural family, unless the position of those contesting such right has, in consequence of the adoption, been changed to their disadvantage.

Gopalayyan v. *Raghupatiayyan*, 7 M. H. C. R. 250, referred to.

VAITHILINGA MUDALI *v.* MUNIGAN.

A suit in ejectment cannot be converted into one for partition.

Second appeal against the decree of the District Court of Tanjore, in A. S. No. 565 of 1907, presented against the decree of the District Munsif of Tirutaraipundi, in O. S. No. 75 of 1905.

Mr *S. Muthiah Mudeliar*, for the Appellant.

Mr. *T. V. Gopalswami Mudeliar*, for the Respondent.

JUDGMENT.—The facts out of which this second appeal arises may be stated as follows:—

There were four divided brothers in a Hindu family. The plaintiffs are two of these. Another was Akshayalinga, who was apparently adopted by one Subba Mudaliar in 1873, but in the course of the suit, it was found that the adoption was invalid because both the father and mother of Akshayalinga were dead at the time of his apparent adoption. The fourth brother was Visvalinga who died in 1892. The dispute is in regard to his property. The plaintiffs claimed it as his reversionary heirs, and their suit was to recover it from the defendant, who is the son of Akshayalinga, and who is said to have trespassed upon it in 1901. The defendant originally claimed the property as the self-acquisition of Akshayalinga, purchased *benami* in the name of Visvalinga, but both the Courts below found against that plea. In the alternative, defendant resisted the plaintiffs' suit on the ground that, as the adoption of Akshayalinga was invalid, he (defendant) had not lost his rights in his natural family, and was, therefore, entitled to one-third of the property and plaintiff could not recover even the remaining two-thirds in this suit as it is framed as a suit in ejectment against a trespasser, and cannot be converted into a suit for partition. The District Judge accepted this alternative defence and dismissed the plaintiffs' suit.

The plaintiffs appeal. They contend that the adoption of Akshayalinga having been made so long ago as 1873, and having been treated as a valid adoption by Akshayalinga himself (Exhibit J in 1878) and by Subba Mudaliar (see his Will Exhibit II in 1898) and generally by the family, the defendant cannot now deny the validity of the adoption. It is not, however, shown how any estoppel arises against the defendant's plea. The four brothers were divided before Akshayalinga's apparent adoption, and it is not shown that, in consequence of the adoption, the plaintiffs' position has been in any way changed to their disadvantage, so as to render it inequitable that the defendant should be restored to his place in his natural family. This appears to be the test which should be applied in accordance with the principle underlying the decisions in *Gopalayyan* v. *Raghupatiayyan* (1), and *Parvatibayamma* v. *Ramakrishna Rau* (2). It is hardly necessary to quote authority for the proposition that an invalid adoption does not *per se* destroy the adoptee's rights in his natural family; *Bawani Sankara Pandit* v. *Ambabay Ammal* (3), approved in *Laksmappa* v. *Ramaya* (4).

But it is contended for the plaintiffs that the apparent adoption having taken place so long ago as 1873 and having been acquiesced in by all concerned for so long, it ought to be now presumed by the Court that the adoption was made in pursuance of an authority given by some persons competent to give away the son in adoption. No doubt, that presumption was raised in the case of *Anandrav Sivaji* v. *Ganesh Eshvant Bokil* (5) but no authority for the decision is quoted, and that case was essentially different from the present case for, there the adoptee desired to maintain the adoption, whereas, in the present case the adoptee's son disclaims it, the adoptee being dead. No doubt, if there was evidence that Akshayalinga's father gave him to Subba Mudalier and the latter accepted him with a view to adoption, the adoption, though made years afterwards, and after the death of the father, would be valid because there was the essential giving and taking of the child with a view to adoption [*Venkata* v. *Subhadra* (6)]. But there is no such evidence in the present case, nor are there any other circumstances by which the suggested presumption could be supported. There is abundant authority that no one but the parents of a child can give him away in adoption and, therefore, that an orphan (as Akshayalinga was at the time of adoption) cannot be given

(1) 7 M. H. C. R. 250.
(2) 18 M. 145.
(3) 1 M. H. C. R. 363.
(4) 12 B. H. C. R. 364 at p. 397.
(5) 7 B. H. C. R. App. XXXIII at p. XXXIV.
(6) 7 M. 548.

away in adoption either by himself or by any one else. *Subbaluvammal* v. *Ammakutti Ammal* (7), *Balvantrav Bhaskar* v. *Bayarai* (8), *Bashetiappa* bin *Basalingappa* v. *Shivlingappa* bin *Ballappa* (9)

We, therefore, hold that the adoption of Akshayalinga was invalid, and the defendant has not lost his rights in his natural family.

We think that the District Judge is right in holding that the present suit, which is one in ejectment, cannot be properly converted into a suit for partition so as to give plaintiffs a decree for $\frac{2}{3}$rds of the plaint property. There may be other property which would have to be brought into hotchpot if the plaintiffs should sue for partition.

Their right to obtain partition in a suit properly framed for the purpose is apparently not yet barred, and they must be left to that remedy.

We dismiss the second appeal with costs.

Appeal dismissed.

(7) 2 M. H. C. R. 129.
(8) 6 B. H. C. R. (o. c. J.) 83.
(9) 10 B. H. C. R. 268.

A. L. L. Court. Vakil

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 158 OF 1910.

March 6, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

Raja JANAKI BALLAV SEN—PLAINTIFF—APPELLANT

versus

Maharaj Kumar GOPAL LAL ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Patni *lease—Construction—Annual rent fixed at certain amount—Payment of Government dues to be made by tenant out of rent—Remission of portion of Government dues—Who is to get benefit.*

Under a *patni* lease, the annual rent was fixed at Rs. 1,580-8-7, out of which Rs. 1,080-8-7 was to be paid into the Collectorate by the tenant on account of Government dues payable by the landlord and the balance Rs. 500 was to be paid to the landlord as *malikana*. The lease provided that if any new imposts be levied by the Government in the future over and above the amount stated in the *kabulyat*, the tenant would be liable for the same but it did not provide that the tenant would be entitled to the benefit of any remission. The lease also provided that save and except *malikana*, the landlord will have no right and interest whatever. Subsequently the Government demand was reduced by Rs. 48-7-3 a year:

Held, that the landlord was entitled to the benefit of this sum, that is, he may realise it from the tenant in addition to the *malikana* Rs. 500.

Jotindra Mohan Tagore v. *Bibi Jarao Kumari*, 10 C. W. N. 201; 3 C.L.J. 7; 1 M. L. T. 8; 33 C. 140; 33 I. A. 30 and *Hemendra Nath Mukerjee* v. *Kumar Nath Roy*, 9 C. W. N 96; 32 C. 169, distinguished.

Appeal from the decree of the District Judge of Rungpur, dated October 7th, 1909, reversing that of the First Munsif of that place, dated June 24th, 1909.

FACTS.—This is a suit to recover a certain sum of money as rent alleged to be due to the plaintiff in respect of his share in a *patni* tenure. It is alleged in the plaint that the annual rent of the *patni* was fixed at Rs. 1,580 8-7, that out of the said rent, Rs. 1,080-8-7 was, according to the terms of the *kabulyat*, payable to the Collector on account of Government revenue, Road and Public Work cesses, and *dak* cess, and the balance Rs. 500 was payable to the *zemindar* as *malikana*, that owing to a reduction having been subsequently made in the Road and Public Works cesses and abolition of the *dak* cess, the defendant has to pay to the Collector Rs. 1,032-1-4 instead of Rs. 1,080-8-7 and that the plaintiff and the *pro forma* defendants are, therefore, entitled to receive the amount remitted in addition to the *malikana*.

The defence mainly was to the effect that upon the terms of the *kabulyat*, the defendant ought to get the benefit of the remission.

The necessary portion of the *kabulyat* was as follows:—

"Out of the entire *sangastha jama* of Rs. 2,064, you kept fixed the *jama* of a total of Rs. 1,580 8-7 made up of the Sudder revenue of Rs. 943-1-4, the Road cess and the Public Works cess amounting to Rs. 128, and *dak* fund Rs. 9-7-3, and your *malikana* profit amounting to Rs. 500; and excluding collection charges gave up a sum of Rs. 200 as profit to me. Thereupon, I agreed to pay as consideration-money a sum of Rs. 2,000. You, therefore, * * granted to me a *patta* by making a permanent *patni* settlement at a yearly rent of Rs. 1,580-8-7 * * together with the Road cess, *dak* cess and Sudder revenue amounting to Rs. 1,080-8-7. * * I shall on depositing in the Collectorate the Sudder revenue etc., and, making over the *dakhilas* thereof to you, and the profit payable to you, shall take the *dakhila* thereof. * * From and out of the said fixed *jama* of Rs. 1,580-8-7, of the *patni mahal*, I shall pay Rs. 943-1-4 as Sudder revenue, Rs. 128 as the Road cess and the Public Works cess, and Rs. 9-7-3 as *dak* fund, which have remained fixed, and shall separately deposit in the Collectorate any new impost that may be levied by the Government in the future over

and above the *jama* stated in this *kabulyat*. * * Save the *malikana*, you will not be able to interfere with the *patni mahal* in any other way or to demand any sum in excess to the fixed *jama*, nor shall I be able to make any objection asking for remission of the *jama* on any account. * * Save and except the *malikana*, you will have no right and interest whatever. * *"

The question was, whether the difference Rs. 48-7-3 was payable to the plaintiff and the *pro forma* defendants as a part of the rent.

The first Court held upon a construction of the *kabulyat* that what was agreed to be paid to the Collector was a part of the *patni* rent, and intended by the parties to be regarded as such, and as the defendant has to pay to the Collector Rs. 48-7-3 less than what was formerly payable, that sum being a part of the *patni* rent, was payable now to the plaintiff and the *pro forma* defendants. That Court gave a full decree to the plaintiff.

The defendant appealed, and the lower Appellate Court held that the sums payable to Government are not part of the rent—*Jotindra Mohan Tagore* v. *Bibi Jarao Kumari* (1), that the rights of the *zemindar* are limited to the Rs. 500 payable as *malikana*, that the intention of the parties was that the amount payable as *malikana* should be a constant quantity, for twice over it is stated in the *kabulyat* that besides the right to the *malikana* of Rs. 500, the landlord shall retain no right of any kind on the property leased. That Court directed that the amount to which the plaintiff was entitled should be calculated on the *malikana* of Rs. 500.

The plaintiff appealed to the High Court.

Babus *Boidya Nath Dutt* and *Hem Chandra Mitra*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Ramani Mohan Chatterji*, for the Respondent.

JUDGMENT.—The sole point in controversy in this appeal, which arises out of a suit for rent, is, whether the landlord or the tenant is entitled to the benefit of an annual deduction in the Government demands to the extent of Rs. 48-7-3. The *patni* lease, on the basis whereof the claim by the landlord, the plaintiff-appellant, is founded, was executed on the 8th June 1896. Under that lease, the annual rent for the *patni* was fixed at Rs. 1,580-8-7. This amount is described in more than one place in the instrument as "the fixed *jama*." After reciting that the annual rent was fixed at this sum, the document proceeds to describe the mode of payment; Rs. 1,080-8-7 was to be paid into the Collectorate on account of the Government demands and the balance Rs. 500 was to be paid to the landlord as *malikana*. The Government demands were on account of Revenue, Road cess and *dak* cess, and the payment thereof was undertaken by the tenant. In 1906, the Government demand in respect of cesses appears to have been reduced by Rs. 487-3 a year. The contention of the landlord is that he is entitled to the benefit of this sum; in other words, he seeks to realise it from the tenant in addition to the annual payment of Rs. 500. The contention of the tenant defendant is that he is liable to pay nothing beyond Rs. 500 a year to his landlord, and that if the Government demand has been remitted in whole or in part, he alone is entitled to the benefit thereof. Upon this sole question in controversy, the Courts below have adopted divergent views. The Court of first instance upheld the contention of the landlord, while the District Judge has taken a contrary view on the authority of the decision of the Judicial Committee in *Jotindra Mohan Tagore* v. *Bibi Jarao Kumari* (1). The answer to the question raised, must, in our opinion, depend upon the construction of the contract between the parties.

It is manifest that the rent reserved under the lease is not Rs. 500 but Rs. 1,580-8-7, which was payable by the tenant to the landlord for use and occupation of the land comprised in the tenancy. This is plain, not merely from the recitals in the document but also from the schedule where, although the *malikana* is made payable in four equal instalments, the sum payable for each instalment is added to the corresponding instalment of Government demand; and the rent payable for each instalment is shown as the aggregate of the two sums. We start then with the assumption that the rent payable was Rs. 1,580-8-7, and the whole of this sum, therefore, was the property of the plaintiff. The defendant, as his agent, undertook to pay out of this sum Rs. 1,080-8-7 to the Collector on account of demands primarily

(1) 10 C. W. N. 201; 33 C. 140; 33 I. A. 30; 3 C. L. J. 7; 1 M. L. T. 8.

leviable by the State from the landlord. The tenant also undertook to produce receipts for the payments, which ordinarily would be issued in the name of the *zemindar* and to make them over to his landlord. The question, therefore, arises, if the tenant finds it unnecessary to pay a portion of this sum of Rs. 1,080-8-7 because such portion has been remitted by the State, who is the person entitled to the benefit of such remission? On behalf of the tenant, reliance has been placed mainly upon three clauses in the lease in support of the contention that the benefit of the remission accrues to him. The first of those provides that if any new imposts be levied by the Government in the future over and above the *jama* stated in the *kabulyat*, the tenant would be liable for the same. The second clause is to the effect that save as regards *malikana* the landlord will not be able to interfere with the *patni mahal* in any way or to demand any sum in excess of the fixed *jama* nor will the tenant be able to make any objection for remission of the *jama* on any account. The third clause is to the effect that save and except *malikana* the landlord will have no right and interest whatever. It is not disputed that if the first of these clauses had been bilateral and if it had expressly provided, as is provided very often in leases of this description, that the tenant would not only be liable for any new impost but also be entitled to the benefit of any remission, there would have been no room for controversy. But the learned Vakil for the respondent has contended that although the clause has not been framed in that way, the combined effect of the first and the third clauses is precisely the same. We are unable, after anxious consideration of the matter, to accept this argument as well founded. The effect of the second and third clauses is to make it impossible for the landlord to interfere with the tenant in any way, his claim is limited to the *malikana*. But it is significant that the *malikana* is not described as fixed whereas the sum of Rs. 1,580-8-7 is in more places than one described as the fixed *jama*. In our opinion, it is fairly clear, upon a consideration of all the clauses in the *kabulyat*, that the landlord is entitled to the benefit of the remission allowed by the State.

The case of *Jotindra Mohan Tagore* v. *Bibi Jarao Kumari* (1), upon which reliance has been placed by the learned Judge, is obviously distinguishable. There the sum payable to the superior landlord was, as appeared from the terms of the lease, not regarded as a portion of the rent. It was, consequently, held that it was not recoverable as if it was rent. Nor is the case of *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (2) of any assistance to the respondent, because the terms of the instrument were materially different from those of the instrument before us. But it is needless to review the authorities, commencing with *Basanta Kumari* v. *Ashutosh Chuckerbutty* (3), which will be found analysed in *Banku Behary Sikdar* v. *Gopal Chandra Neogy* (4). As pointed out in that case, the question whether a particular sum is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant, must depend upon the true construction of the contract in each case. In the case before us, there is no room for controversy that the sum claimed was rent; and as there was no express provision in the instrument that the tenant would have the benefit of the remission of any portion of the Government demands, the landlord is entitled to recover it.

We may add that a preliminary objection was taken that the appeal is incompetent because the sum claimed is not in the nature of rent, and reference was made to *Banku Behari Sikdar* v. *Gopal Chandra Neogy* (4). In the view we take, it is obvious that the preliminary objection fails. The result is that this appeal is allowed, the decree of the Court below set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below. The cross-objection necessrily fails and is dismissed.

Appeal allowed.

(2) 9 C. W. N. 96; 32 C. 169.
(3) 27 C. 67; 4 C. W. N. 3.
(4) 14 C. L. J. 589; 10 Ind. Cas. 406.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1226 OF 1911.

May 30, 1912.

Present:—Mr. Justice Chamier.

Thakur CHAUHARJA SINGH—PLAINTIFF—APPELLANT

versus

SARABJIT—DEFENDANT—RESPONDENT.

Landlord and tenant—Ejectment—Tenancy denied—Jurisdiction of Civil or Revenue Court.

CHAUHRAJA SINGH *v.* SARABJIT.

Plaintiff sued for ejectment of defendant in a Revenue Court alleging that he was a tenant from year to year. The defendant replied that he had bought the property from one *H.* whose house stood on the plot.

The Assistant Collector, not being sure that the defendant had become plaintiff's tenant, dismissed the suit. The plaintiff then sued in a Civil Court for ejectment:

Held, that the suit was maintainable.

Narain Singh v. *Govinda Ram*, 8 A. L. J. 431; 33 A. 523; 9 Ind. Cas. 1022, distinguished.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated 19th July 1911.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Satya Chandra Mukerji*, for the Respondent.

JUDGMENT.—In this case, the Subordinate Judge held that the plaintiff had no right to sue as a *thekadar*. That decision was reversed by Mr. Justice Karamat Husain, who remanded the case to the lower Appellate Court for the determination of the remaining issues. The Subordinate Judge has now dismissed the suit on another ground, namely, that the suit is not maintainable in the Civil Court. The plaintiff again appeals to this Court. The Subordinate Judge finds support for his view of the case in the decision of Knox and Karamat Husain, JJ., in *Narain Singh* v. *Gobind Ram* (1). In that case the plaintiff went first to the Revenue Court saying that he was an occupancy-tenant and the defendant was his sub-tenant. The Revenue Court dismissed his application for the ejectment of the defendant. The plaintiff then came into the Civil Court alleging that the defendant had been his sub-tenant, but had become a trespasser, because he had pleaded in the Revenue Court that he was not the sub-tenant of the plaintiff, but was himself an occupancy tenant of the land and the Revenue Court had so held. This Court held that the plaintiff was not entitled to maintain the civil suit. I am not quite sure that that decision is in accordance with other decisions of this Court but it does not appear to me to cover the present case. Here the plaintiff sued in a Revenue Court to eject the defendant saying that he was a tenant from year to year. The defendant replied that he had bought the property from one Harbansa and that Harbansa's house formerly stood on the plot. The Assistant Collector, after referring to the *wajib-ul-arz* said that he thought that the case was not a clear one and that the question should be tried out by a competent Court with reference to the customs of the village, but then he went on to say: "*Prima facie* I hold that the defendant has the first claim to hold the land on payment of rent" and then he says that the plaintiff should first have the status of the defendant determined. He dismissed the suit. It seems to me that although he was inclined to hold that the defendant was entitled to become the tenant of the plaintiff, he was not sure that the defendant had become the tenant of the plaintiff and he dismissed the suit, because in his opinion the Revenue Court could not decide the real question in the case which could be solved only by inquiry into the customs of the village. There does not seem to me to be a definite finding that the defendant is a tenant of the plaintiff. The present case appears to me to be covered rather by the decisions in *Zubeda Bibi* v. *Sheo Charan* (2) and *Hamid Ali Shah* v. *Wilayat Ali* (3), than by the decision in *Narain Singh* v. *Gobind Ram* (1) and I hold, therefore, that the plaintiff is entitled to maintain the present suit. On the last occasion when this case was remanded, the Subordinate Judge was directed to determine the remaining issues. Had he done so, I might have disposed of the case now. He has determined only the question of jurisdiction. I set aside the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal to its original number and dispose of it according to law. Costs here and in the lower Appellate Court will be the costs in the cause.

Case remanded.

(1) 8 A. L. J. 431; 33 A. 523; 9 Ind. Cas. 1022.

(2) 22 A. 83.

(3) 22 A. 93.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NOS. 7-B, 13-B AND 16-B OF 1911.

March 31, 1911.

Present:—Mr. Justice Twomey.

SAN PAW AUNG AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 25—Confession to Police Officers—Admission amounting to confession—Admissibility—Admissions made by a person before he was accused of an offence—Admissibility against co-accused.

A. was convicted on the evidence of two Excise Sub-Inspectors, who stated that he offered them Rs. 10 per ball of opium as a bribe to let him land unmolested a large quantity of illicit opium from the steamer *Katoria*. These Excise Officers had been also enrolled as Police Officers:

Held, that the alleged offer by the accused amounted to an admission that he had a large quantity of contraband opium in his possession and, being an admission of an offence under the Opium Act, amounted to a confession and was thus inadmissible under section 25 of the Evidence Act.

The test which has to be applied in deciding whether section 25, Evidence Act, applies is the position of the person at the time when it is proposed to prove the admission, not his position at the time when he is alleged to have made it.

A confession, therefore, made to a Police Officer by a person when he is not accused of any offence is inadmissible in evidence against him when he is accused of an offence.

A confession made by an accused person to a Police Officer might be admissible *in favour of* a co-accused but not *against* him.

Revision of the order of dismissal passed by the Sessions Judge, Arakan, in the appeal laid against the order of the First Class Sub-Divisional Magistrate of Akyab, dated the 19th day of November 1910, passed in Criminal Trial No. 57 of 1910, convicting the accused of an offence under section 9 (*c*), Opium Act and 114, Indian Penal Code.

Messrs. *Patkar* and *Glanville*, for the Petitioners.

JUDGMENT.—It is convenient to deal in one order with the three applications in Criminal Revision Cases Nos. 7-B, 13-B, and 16-B. of 1911. There is no reason to interfere in the case of the three sampan rowers. They must have known that the commodity that was lowered into their boat in the small hours of the morning from a porthole of the *Katoria* was contraband opium. The furtive circumstances and the smell that would be emitted from such a large quantity of opium (106½ balls) negative the suggestion that the sampan-wallahs thought that they were receiving a load of mangoes. It may be that some of the Excise Subordinates were concerned in the importation and that the sampan was really hired by one of them. But even if this fact were clearly established, it would not materially alter the case against the sampan-wallahs. They must have known in any case that the enterprise in hand was the importation of a large quantity of illicit opium whether with or without the connivance of the Excise Subordinates. Looking to the magnitude of the seizure, I do not think that the sentences on the sampan-men are excessive.

San Paw Aung has been convicted of abetting the illegal possession of the opium on board the *Katoria* in Akyab harbour. The principal evidence against him is that of the Excise Sub-Inspectors, Shwe Tun and Tha Do Paw, who were on duty on board the *Katoria*. Each of these witnesses say that San Paw Aung offered him Rs. 10 a ball as a bribe to let him land the opium unmolested. Shwe Tun says that "to catch him" he agreed. But Tha Do Pru says he refused the offer. Other witnesses were produced to prove by way of corroboration that San Paw Aung went on board the *Katoria* on the night in question. But it is on the evidence of Shwe Tun and Tha Do Pru that the conviction really rests.

I think this evidence is inadmissible under section 25, Evidence Act. Shwe Tun and Tha Do Pru as Excise Sub-Inspectors have been enrolled as Police Officers. What San Paw Aung is alleged to have stated to them amounts to an admission that he had a large quantity of contraband opium in his possession. This was an admission of an offence under the Opium Act, and was, therefore, a confession. Mr. Ruthledge argues in support of the convictions that section 25, Evidence Act, does not apply because San Paw Aung made the confession before he was accused of any offence. As pointed out in the Upper Burma case, *Queen-Empress* v. *Nga Thet* (1), the test which has to be applied is the position of the person at the time when it is proposed to

(1) U. B. R. (1897-1901, Vol. I, 156.

prove the admission, not his position at the time when he is alleged to have made it. No authority has been cited in support of the construction suggested by Mr. Ruthledge and I must hold that it is erroneous.

There are substantial reasons for doubting the veracity of the two Sub-Inspectors. But in the circumstances it is not necessary to deal with these reasons. The confessions being set aside as inadmissible, there is no sufficient evidence that San Paw Aung was in any way privy to the importation or possession of the opium.

The rejection of San Paw Aung's confessions materially affects the case against the Serang Amir Ali also. He was charged with importing the opium, and the principal evidence against him was that of the two Sub-Inspectors who stated San Paw Aung before offering the bribes to them talked to the serang aside. Shwe Tun says that after San Paw Aung offered him the bribe, San Paw Aung went and talked for about ten minutes to the serang who had been waiting not far off. Then the serang lit a safety lamp and waved it as a signal to the shore. Ten or 15 minutes later, the Sampan came alongside and the opium was put into it, through the porthole. The evidence of Tha Do Pru is much to the same effect though there are some discrepancies. Mr. Foster, Sub-Inspector of Police, corroborates the Excise Officers as to the waving of the lamp by Amir Ali. It appears, however, that Ramsingh, the Excise peon, who says he saw the waving of the lamp, at first said the man who waved it was a lascar whose name he did not know but whom he could recognise. He admitted at the trial that he had known Amir Ali by name for seven or eight months. In estimating the value of this evidence as to the waving of the lamp, it must also be remembered that the two Excise Sub-Inspectors made no charge at all against either San Paw Aung or Amir Ali when they gave their first information on the morning of the seizure and that these two accused were not arrested until nine days later when the *Katoria* returned from Rangoon. I am unable to treat the telegram, Exhibit P. as implicating Amir Ali. It is not proved that it was sent by him and there is only a suspicion that *Maung Sein master*, to whom it is addressed, is San Paw Aung's father, Tha Zan. Even if it were proved to have been sent by Amir Ali to Tha Zan, it could have very little weight apart from San Paw Aung's confessions.

I think the alleged confessions are inadmissible not only against San Paw Aung but also against the co-accused Amir Ali. A confession made by an accused person to a Police officer might be admissible *in favour of* a co-accused but I think it is clear from the language of section 25 that it is not admissible *as against* a co-accused. If the alleged confessions are set aside, the case against Amir Ali falls to the ground. It is only the confessions which give colour and meaning to the alleged visit of San Paw Aung to the *Katoria* on the night in question, to his alleged conversations with the serang, and to the alleged waving of the lamp.

The applications of Wahid Ali, Gona Meah and Abdul Aziz are dismissed.

The convictions and sentences of Amir Ali and San Paw Aung are set aside. These two applicants are acquitted and their bail bonds will be cancelled.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 34 OF 1912.

February 14, 1912.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Sankaran Niar and Mr. Justice Ayling.

THE HONOURABLE THE ADVOCATE GENERAL—PETITIONER

versus

GOVINDASAWMI *alias* KRISTNASAWMY—ACCUSED.

Sentence—Concurrent sentences—Criminal Procedure Code (Act V of 1898), s. 397—Different trials.

It is an error in law to direct that a sentence of imprisonment passed by a Judge on a person in a subsequent trial should run concurrently with the sentence of imprisonment which had been passed on him in a former trial.

Petition, under section 26 of the Letters Patent, praying that, in the circumstances stated there and in the certificate dated 2nd February 1912 filed therewith, the High Court will be pleased to consider the legality of the sentence passed by the Presiding

Judge in respect of the second count in Case No.12 of the Fourth Criminal Sessions of the High Court of Madras for the year 1911, and to alter the sentence or to pass such other sentence as the High Court may deem right.

ORDER.—We are of opinion that the learned Judge erred in law in directing that the sentence of imprisonment, passed by him on Govindasawmy in respect of the second count in Case No. 12 of the Fourth Criminal Sessions of this Court for the year 1911, should run concurrently with the sentence of imprisonment which had been passed on the said Govindasawmi in respect of the second count in Case No. 16 of the Third Criminal Sessions of this Court for the year 1911.

We set aside the sentence and direction, and in lieu thereof, we sentence the said Govindasawmi to one day's rigorous imprisonment to commence at the expiration of the period of imprisonment to which he was sentenced in Case No. 16 of the Third Criminal Sessions for the year 1911

Sentence set aside.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 1476 OF 1910.
February 11, 1911.
Present:—Mr. Justice Johnstone.
SHANKAR SINGH AND ANOTHER—ACCUSED—PETITIONERS
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Tout—Declaration without legal proof—Legal Practitioners Act (XVIII of 1879), s. 36.

Section 36 of the Legal Practitioners Act, requires proof by evidence of general repute or otherwise before a man can be declared a tout. Such evidence should be taken in the ordinary manner and brought on the record and where this is not done, the order of declaration cannot be maintained.

Petition for revision of the order of the District Magistrate, Ambala, dated the 23rd August 1910, declaring accused to be touts.

FACTS of the case are fully given in the order of the District Magistrate given below:—

ORDER.—"I have had the benefit of a consultation with the leading members of the local Bar, and from information given to me by them, I am credibly informed and have reason to believe that the following persons, namely, Shankar Singh, his son Dewat Singh, Nagina Singh and Hussain Bakhsh, come to the Courts not only in connection with their own cases, but in connection with other people's cases, and that they make a living in this way and have grown wealthy by these means, that they foster litigation, and that their conduct falls within the purview of section 36 of the Legal Practitioners Act, and in short that they are habitual touts.

"This information is also confirmed by information received from the Police Officials whose duties bring them constantly to the Court. And I accordingly order that the names of Shankar Singh, Dewat Singh, Nagina Singh and Hussain Bakhsh be entered (as regards to this Court and all Courts subordinate to it) in the list of touts and that they be precluded from the precincts of such Courts.

"No further action will, at present, be taken, in regard to the other persons referred to in my order of the 3rd August."

Mr. *Nand Lal*, for the Petitioners.

JUDGMENT.—The District Magistrate seems hardly to have appreciated the law as to touts or the nature of the information received by him. The law requires "proof," by evidence of general repute or otherwise, before a man can be dubbed a tout—Section 36 of the Act. Further, the S. V. O's note of 21st July 1910, which seems to have started the thing, says nothing about accused being touts but charges them with being false witnesses and getting together false witnesses and so forth. The consultation with the leading members of the Bar is not reproduced on the record and thus there is nothing whatever to go upon.

I set aside the order.

Revision allowed.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 540 OF 1911.
February 19, 1912.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Sadasiva Aiyar.
THE PUBLIC PROSECUTOR—APPELLANT
versus
BALA NAGI REDDI AND OTHERS—ACCUSED.

Dying declaration—Deposition of witnesses who heard it—Written statement by deceased—Incomplete record of deposition—Re-trail—Evidence Act (I of 1872), ss. 32, 33.

It is of the utmost importance that evidence as to a dying declaration should be as exact and full as possible. Where such a declaration was heard by witnesses who spoke to it but was apparently much fuller than what the record of their depositions showed,—the Sessions Judge not having recorded all they said on the point: *Held*, that there must be a re-trial.

When what is sought to be proved is the verbal statement of a dying person, the proper and legal mode of proving it is by eliciting from the person who heard the deceased make the statement, what the deceased said. If the statement was taken down in writing by the witness or by some one in presence of the witness, the witness would be entitled to refresh his memory by referring to it; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused. Where the deceased dictated his statement and it was taken down and he signed the writing after being satisfied as to its accuracy, such writing may be regarded as a statement of the deceased in writing and would be admissible under section 32 of the Evidence Act. But even if what was stated was taken down by some one in writing and signed by the deceased, that would not debar a witness who heard the statement from proving it independently of the writing. And, ordinarily, it would be desirabe to have on record what the witness is able to reproduce from memory, in addition to the writing.

Appeal under section 417 of the Criminal Procedure Code against the judgment of acquittal passed on the accused, in the Sessions Case No. 11 of 1911, by the Sessions Judge of Cuddappah.

Mr. *C. Sidney Smith*, for the Appellant.

Messrs. *L. A. Govindaraghava Iyer*, *T. Ananthachari* and *E. R. Osborne*, for the Accused.

JUDGMENT.—In this case the six accused persons were tried by the Sessions Judge of Cuddappah with the aid of the assessors. The first accused was charged under sections 302 and 109 of the Indian Penal Code; and the remaining five accused were charged under section 302 with reference to the death of one Kristna Reddi. The assessors found all the accused not guilty of the offences charged against them, and the Sessions Judge agreeing with them has acquitted them. This appeal has been preferred by the Government against the order of acquittal. As against the 1st accused, there is parctically no evidence to connect him with the murder of Kristna Reddi.

* * * * *

We must, therefore, hold that the acquittal of the 1st accused is right, and the appeal against him will be dismissed.

As regards the case of the other accused, we have come to the conclusion that they must be re-tried. To begin with, the manner in which the learned Sessions Judge has recorded evidence in this case cannot be said to be satisfactory. Besides the evidence of Prosecution witness No. 1, the alleged eye-witness of the occurrence, and of Prosecution witness No. 2, who is said to have seen accused Nos. 2 to 6 run away immediately after the assault, the most important evidence against these accused consists of dying declarations of the deceased. It was sought to prove the dying declarations by the evidence of men who heard the deceased making the statements and were in a position to state what they heard and by proving the document in which the statement was taken down and signed by the deceased. Now Prosecution witness No. 5 is one of the witnesses who deposes to what the deceased stated. His deposition on this point is recorded thus:—

"I asked him (meaning the deceased) and he said that the five accused beat him." The witness could not have used the words 'the five accused', as what he heard the deceased utter; not only the deceased's assailants were not accused at the time of assault, but the persons under trial were six in number and this witness's evidence as recorded does not indicate which five of the six accused the deceased said had assaulted him. Similarly, the 2nd Prosecution witness's evidence as to the dying declaration made by the deceased is recorded in this way: "He said accused Nos. 2 to 6 beat him and wept." It is of the utmost importance that evidence as to the dying declaration should be as exact and full as possible. We should have on record everything which a witness heard the deceased say, as to the transaction which resulted in his death. The dying statement of the deceased as heard by the witnesses who speak to it was apparently, if one is to judge

from Exhibit A, much fuller than what the record of their depositions would show and it seems that the Sessions Judge has not recorded all that they said on the point.

Further we would point out that, when what is sought to be proved is the verbal statement of a dying person, the proper and legal mode of proving it is by eliciting from the person who heard the deceased make the statement, what the deceased said. If the statement was taken down in writing by the witness or by some one in presence of the witness, the witness would be entitled to refresh his memory, if he so wanted, by referring to such writing, otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused.

Where the deceased dictated his statement and it was taken down and he then signed the writing after being satisfied as to its accuracy, such writing may be regarded as a statement of the deceased in writing, and would be admissible under section 32 of the Indian Evidence Act. Exhibit A in this case would stand on this footing. But even if what was stated was taken down by some one in writing and signed by the deceased, that would not debar a witness who heard the statement from proving it independently of the writing. And, ordinarily, it would be desirable to have on record what the witness is able to reproduce from memory what he heard the deceased stated in addition to the writing in which the statement was taken down.

Further, it appears that accused Nos. 2 to 6, who examined witnesses in support of their defence before the Committing Magistrate, did not examine any witnesses for the defence in the Sessions Court.

Mr. Osborne, the learned Counsel who appears for them in support of the order of acquittal, states that the learned Sessions Judge, at a very early stage of the case, either after the examination of the 1st or 2nd Prosecution witness, expressed a decided opinion that if that was all the important evidence in the case besides the dying declaration of the deceased, the case for the prosecution was not a strong one. Mr. Osborne says that he was led by that expression of opinion by the Sessions Judge to refrain from examining defence witnesses. We have no reason to doubt that that is probably what occurred in this connection. In these circumstances, we set aside the acquittal and order a re-trial of the case against accused Nos. 2 to 6.

Re-trial ordered.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 187 OF 1912.

March 16, 1912.

Present:—Mr. Justice Robertson.

NUNA—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 354, 376, 511—Assault upon a girl—Rape—Attempt.

The accused took off a girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her nor did he do anything more to her:

Held, that the accused committed an offence under section 354, Penal Code, and was not guilty of an attempt to commit rape.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Jhelam Division, dated 14th November 1911, upholding the order passed by the District Magistrate, Gujrat, dated 16th October 1911, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—The evidence of the girl upon whom the assault was committed is to this effect. The accused took off her clothes, threw her on to the ground and then sat down beside her She says: "He said nothing to me, sat down beside me. He did not do anything more to me." This being so, can it be said that the accused actually attempted rape? I think not. He undoubtedly committed an offence under section 354, Indian Penal Code, and may have intended to commit rape, but I do not think it can be said that he actually attempted to commit it, on the girl's evidence. I should have convicted and sentenced him to two years' rigorous imprisonment under section 354, if I had tried the case originally myself. He has, however, been whipped, and in consideration of that I shall remit one year out of the two.

I alter the conviction to one under section 354, Indian Penal Code, and sentence the accused to one year's rigorous imprisonment.

Sentence reduced to one year.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 494 OF 1911.
February 22, 1912.
Present:—Mr. Justice Miller.
VEERANA NADAN AND OTHERS—
PRISONERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Private defence—Onus *of proof*—*No allegation as defence.*

It is for the person who relies on the right of private defence to prove that he is within the exception, though the right is not alleged as a defence.

Appeal against the order of the Court of Sessions of the Ramnad Division, in Case No. 35 of the Calendar for 1911.

Dr. *S. Swaminathan*, for the Appellants.

Mr. *M. D. Devadoss*, for the Public Prosecutor, for the Crown.

JUDGMENT.—The appellants have been convicted of rioting by the Sessions Judge concurring generally with the assessors.

The case is a difficult one in some respects. There is no doubt that there was an affray between the Nadars and Thevars and that all the appellants were members of the assembly of Nadars, which formed one party to the affray, and there is no reason to doubt that the affray arose out of the interference by the Thevars with a number of Nadars engaged in demolishing a house, the title to which was in dispute between the two castes.

The Sessions Judge finds it impossible to accept as true either the account put before him of the occurrence, and it is clear that the prosecution witnesses cannot be telling the whole truth when they deny that their party inflicted injuries on the Nadars. If what appears to be the case for the Crown is the true case, that is to say, that the Police officers were not present when the affray commenced, then, the prosecution evidence is untrue also on the important questions of the origin of the riot. On this point, the observations of the Sessions Judge, in paragraph 13 of his judgment, seem to me to be entirely justified.

On the other hand, the story told by the accused is equally incredible as pointed out by the Sessions Judge, and is not supported in this case by any evidence of great value.

In these circumstances, the Sessions Judge has declined to accept the direct evidence as to details and has decided the case generally on the undoubted circumstances and it is difficult to say that he is wrong. I have been taken through all the evidence, and it is clearly open to all objections taken to it by him. He finds on the circumstantial evidence that,

(1) the Nadars, more than five in number, were engaged peaceably in demolishing a house, the title to which was in dispute, but possession of which was with their tenants, at that time they were not an unlawful assembly;

(2) they were interrupted by the Thevars, who endeavoured to prevent them from continuing the demolition of the house and who probably attacked them;

(3) they used force to the Thevars in order to enable themselves to continue their work in the house

Counsel for the appellants accepts the finding and argues on them that the Nadars should have been acquitted as having used force only in repelling an attack upon themselves, that is to say, they are protected by the Law of Private Defence.

The Sessions Judge, it is contended with some reason, states the law incorrectly when he says that no right of private defence exists. If Nadars were not an unlawful assembly when demolishing the house, they would be entitled to a right of private defence, if attacked. The Sessions Judge is not clear on the question when the Nadars became an unlawful assembly. On the statements that the house was in disrepair and required to be pulled down, statements which are uncontradicted by any prosecution evidence, I think it must be held that they were not an unlawful assembly before the Thevars came up.

Then rejecting the prosecution evidence that the Nadars then attacked the Thevars at the instigation of the Police, it may be right to hold that the Thevars were the aggressors in the sense that they first used the force. In that case, all that is clear is, that force was repelled by force on the part of the Nadars and injuries were suffered on both sides. Now the story of the Nadars is, that they did not use force at all, but the Thevars fought some of their own caste employed by them (the Nadars) but this is improbable, and I am not asked to accept it as true.

It is not then their case anywhere that they used force in their own defence, and there is no evidence to show that force was necessary to repel the attack. It is for the person who relies on the right of private defence to prove that he is within the exception, though the right was not alleged as a defence. I should still, if the circumstances made it clear that the Nadars did not use more force than was necessary to defend themselves, be prepared to acquit them on that ground but so far as I can see there are no circumstances in the case which should warrant me in taking this view of the appellant's conduct. I, therefore, confirm the conviction and sentences, and dismiss this appeal.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 352 OF 1911.

October 25, 1911.

Present:—Mr. Eales, J. C.

NGA BA GYAW—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 322, 325—Grievous hurt—Intent to cause—Nature of injury and circumstances of case—Drunkenness—Question of intent or motive.

An intent to cause grievous hurt may be inferred from the circumstances of the case and the nature of the injury caused.

When a man hits another over the head with a stick hard enough to fracture his skull and endanger his life, he must, in the circumstances, have either intended to cause grievous hurt or known that he was likely to cause it.

Drunkenness may be taken into consideration when dealing with the intention or motive to commit an offence in a state of drunkenness.

Mr. *S. Mukerjee*, for the Applicant.

JUDGMENT.—This is an application to revise the conviction and sentence of 6 months' rigorous imprisonment passed by the first Class Sub-Divisional Magistrate, Yamethin, on the petitioner, Ba Gyaw, under section 325, Indian Penal Code.

The petitioner appealed to the Sessions Judge, Meiktila, who dismissed the appeal.

On reading the grounds of application and examining the judgment, I admitted the application. When the case was called, I heard Mr. S. Mukerjee on behalf of the applicant.

The grounds of application are (1) that the lower Appellate Court did not apply its mind to the facts of the case, (2) that the evidence for the prosecution as regards the identification is untrustworthy and inadequate because the blow was struck through a half open door and, therefore, the blow might have been struck without the striker being seen; that it was dark and difficult to distinguish faces; (3) that Tun Tha was the man who struck the blow and not Ba Gyaw, and as Tun Tha ran away, and Ba Gyaw did not run away, the probability is that Tun Tha was the striker, and not Ba Gyaw; (4) that in any case the presumption could not be raised that the striker intended to cause hurt, and the lower Courts have disregarded section 322, Indian Penal Code. (5) Lastly, that though drunkenness is no excuse, yet it must be taken into consideration when the question of intention arises and is weighed by the Court, and that Ba Gyaw being drunk could not have intended to cause grievous hurt. The learned Counsel for the applicant quoted the following rulings and books of reference:—*Ram Lal Singh* v. *Hari Charan Ahir* (1) and *Jamait Mullick* v. *Emperor* (2) and also Sohoni on the Duties of an Appellate Court, section 424, Criminal Procedure Code. These rulings and Sohoni's Notes under section 424 deal with the question of the admission of the application for revision under section 439, Criminal Procedure Code, by the Court. As I have already admitted the application after reading the somewhat laconic judgment of the Appellate Court, I need not consider these rulings any further, because I admitted the application and have considered the case on its merits.

The facts of the case are set out in the Sub-Divisional Magistrate's judgment. The accused is a well-known man, a man of some importance, as he is the son of the Township Officer. He is a man of 25 years of age and is, therefore, a man of some mark and locality. It is not likely, therefore, that he would be easily mistaken for someone else. Moreover, he had been drinking in the Chinaman's shop, and the grounds of application would tend to show

(1) 37 C. 194; 5 Ind. Cas. 999; 11 C. L. J. 410; 11 Cr. L. J. 348.

(2) 35 C. 138; 12 C. W. N. 134; 6 Cr. L. J. 427.

that he had been drinking freely there. The Chinaman had already turned him out for brawling in his shop, and he would have had a good opportunity of seeing him. There was a light in the shop and the witnesses for the defence who were outside the shop admit this. The learned Counsel for the applicant wishes me to believe that the blow might have been struck from outside the shop through the half open door without the striker being clearly seen. Now on this point it seems to me to be quite clear that it is much easier to see through a half open door than to strike a really severe blow through it. The medical evidence shows that the complainant received a very heavy blow and the shop door must have been wide open to allow such a blow to come home. The Chinaman says that the accused, Ba Gyaw, had one foot inside the door when the blow was struck. He was not struck from behind, and had every opportunity to see his assailant. He said distinctly that Tun Tha, when trying to strike him, struck the number on the door way. If a man is close enough to strike such an effective blow as that which felled compainant, the man struck could see clearly who the striker was; the light inside the shop streaming through the door way would clearly show who the assailant was. So much for the possibility of mistake on the part of the witnesses for the prosecution.

As regards Tun Tha's absconding and Ba Gyaw braving it out, I attach little weight to this, because Ba Gyaw, being the son of a well-known local officer, would have been mad to have run away. He was evidently able to call a large number of witnesses to prove an *alibi*.

I will now turn to the evidence for the defence. It is impossible to read the evidence and the half-hearted way in which the *alibi* is set up, without distrusting the witnesses for the defence. I think the Magistrate is quite right in believing that Ba Gyaw was the man who struck the blow that felled the complainant and fractured his skull.

There can be no doubt from the medical evidence that grievous hurt was caused. The question is whether under section 322, Indian Penal Code, Ba Gyaw intended to cause or knew himself likely to cause grievous hurt when he struck the blow. It seems to me that there can be no doubt but that when a man hits another over the head with a stick hard enough to fracture his skull and endanger his life, that, in the circumstances of the present case, he must have either intended to cause grievous hurt or known that he was likely to cause it. All the circumstances point to the fact that Ba Gyaw was much enraged at being turned out of the shop and intended to revenge himself on the man who turned him out. It is idle to suppose that he did not intend to cause grievous hurt. He evidently did not strike in sport or fun, and I think that he must be presumed to have intended the consequences of his savage blow.

The last point is that he was drunk at the time and the learned Advocate quoted the leading case of *J. M.*—v. *King-Emperor* (3). As a matter of fact, the two cases are not on all fours. J. M., in the course of a drunken frolic, committed an act of technical robbery which one would ordinarily believe a man in his position never intended, nor did he know what he was doing. It is one thing to commit a robbery and quite another thing to knock an opponent down in a drunken brawl. The former is a more complex act and the motive for committing robbery may be absent as they were in *J. M.*—'s case (3), but a man may be what is termed "fighting drunk" and may be well held responsible if he chooses to brawl while he is drunk. I accordingly think the sentence under section 325, Indian Penal Code, *viz.*, 6 months' rigorous imprisonment, is not a whit too severe. Indeed, but for the reasons given by the Magistrate for not inflicting a more severe sentence, I should have called upon the applicant to show cause against enhancement. I hesitate, however, to do this as the case has been up on appeal, and obviously this point must have occurred to the learned Sessions Judge when reading the proceedings, though he had not mentioned it in his somewhat laconic judgment.

The application is dismissed.

Application dismissed.

(3) U. B. R. (1910) I, 17; 8 Ind. Cas. 469; 11 Cr. L. J. 659.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 623 OF 1911.
CASE REFERRED No. 126 OE 1911.
October 23, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Spencer.

THE SESSIONS JUDGE OF TANJORE—

versus

THIAGARAJA THEVAN—ACCUSED.

Practice—Trial with assessors—One of them found disqualified to act after the trial was begun—De novo *trial—Criminal Procedure Code (Act V of* 1898), *ss.* 268, 284, 285, 438, 439.

Where it is discovered, after the trial has begun in a case tried with the aid of assessors, that one of them is interested or otherwise unfit to sit as an assessor, the Sessions Judge should refer the case to the High Court to set aside the order by which the incompetent assessor was appointed and all the subsequent proceedings in the trial.

In such cases, the Sessions Judge ought to choose another assessor and proceed with the trial *de novo*.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Tanjore, in his letter, No. 8848 dated the 5th October 1911, referring for orders his proceedings, dated 5th October 1911 in Sessions Case No. 41 of 1911.

GROUNDS.—It was brought to the notice of the Sessions Court by one of the Pleaders for the accused, that the first assessor was not a disinterested person, being the son-in-law of the Village Munsif in connection with whose murder the accused was being arrested, when he is said to have made the attempt to murder a Police officer for which he has now been committed for trial.

The Sessions Judge heard arguments on both sides and passed the following order:—

"After the trial had begun, and while the first prosecution witness was still under examination (in chief), it was brought to the notice of the Court by one of the accused's Pleaders that the first assessor is not a disinterested person being the son-in-law of the same Village Munsif in connection with whose murder the accused was being arrested when he is said to have made the attempt to murder a Police officer for which he is now on his trial. The first assessor, on being questioned, admitted his relationship to the murdered Village Munsif. In the circumstances, it seems to me that the first assessor is so likely to be biassed against the accused as to be absolutely incapacitated from sitting as an assessor at this trial. I should certainly never have choosen him as an assessor had I known, when I did so, that he was a man who must be presumed to have a strong bias against the accused. The question now arises what is the proper procedure to be adopted. It would be manifestly improper to allow the trial to proceed with a person sitting as an assessor who is prejudiced against the accused. Section 285, Criminal Procedure Code, is inapplicable since the first assessor has not absented himself nor been prevented from attending the Court. There is no provision of the Code which would enable me to appoint a new and impartial assessor now in place of the first assessor The suggestion that I should allow the trial to proceed with both the present assessors but, with a predetermination to disregard the opinion of the first assessor altogether as unworthy of consideration, seems to me to be open to this objection, that it would really be tantamount to trying the case with one assessor only (the second,) and this would be illegal as contravening the provision of section 268, Criminal Procedure Code. The question as to what procedure should be adopted is not free from difficulty. The Code does not expressly provide for such a contingency as that which has arisen. But after careful consideration, it seems to me that the correct view of the matter is that in the light of the facts which have now been brought to my notice, my order under section 284, Criminal Procedure Code, appointing the first assessor to sit for the trial of this case, must be held to be an improper order and one that calls for revision by the High Court. The case will, therefore, be referred to the High Court for orders under section 433, Criminal Procedure Code, with a recommendation that the order appointing the first assessor for the trial of this case, and all the subsequent proceedings in the case may be set aside, and that the trial may be ordered to begin *de novo* before a properly constituted tribunal. The case will, in the meanwhile, stand adjourned to 10th November 1911."

The *Public Prosecutor*, in support of the reference.

ORDER.—We accept the opinion of the Sessions Judge that the assessor referred to by

him is not a proper assessor to sit in this case. The Sessions Judge should dispense with his attendance, choose another assessor in his place, and try the case *de novo*.

PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 8 OF 1912.

February 12, 1912.

Present:—Mr. Justice Johnstone.

SITA RAM—ACCUSED—PETITIONER

versus

GOBIND SAHAI—COMPLAINANT

—RESPONDENT.

Transfer of case—Complainant related to a friend of the Magistrate—Increasing of bail during trial—Criminal Procedure Code (Act V of 1898), s. 526.

The fact that a Magistrate is a friend of a remote relative of the complainant is not *per se* a ground for transferring a case to another Court.

A Magistrate is justified in increasing the amount of bail if by further proceedings the case turns out to be more serious than he first imagined.

Petition, under section 526 of the Criminal Procedure Code, for transfer of the case from the Court of the Honorary Magistrate, 1st Class, Rawalpindi, to some other Court.

Mr. *Nanak, Chand*, for the Petitioner.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This is an application for transfer of a criminal case brought by one Gobind Sahai against Sita Ram under sections 466, 468, 420 and 409 of the Indian Penal Code, the case being tried by Lala Ram Chand, Honorary Magistrate, 1st class, Rawalpindi, and, briefly stated, the grounds for the application are:—

(1) that the Magistrate is a friend of R. S. Kirpa Ram, Treasurer of the District;

(2) that R. S. Kirpa Ram is related to the complainant;

(3) that by his dealing with the accused in the matter of trial, the Magistrate has shown bias against the accused, and

(4) that the Magistrate as well as the friends of the complainant have put difficulties in the way of the accused obtaining sureties to go bail for him.

I have heard the arguments, and, in my opinion, there is no sufficient reason to transfer.

With regard to the first ground stated above, the Magistrate frankly admits that he is a friend of Kirpa Ram in the ordinary way in which he is a friend to many other respectable gentlemen. He also admits that on one occasion Kirpa Ram and himself and a party of gentlemen of the city went to Kashmir together. But with reference to the assertion that he stayed with Kirpa Ram at the time of Dehli Durbar, the Magistrate says that they simply had tents somewhere near each other in a public "visitor's camp."

As regards the second ground, it is now stated that the relationship between Kirpa Ram and the complainant is this, that Kirpa Ram's sister is married to one Gopal Das whose sister is married to complainant. I do not think that this relationship is very close. It seems to me that this circumstance in itself is not sufficient reason for supposing that a respectable man like Kirpa Ram would consent to try to influence a respectable Magistrate like Lala Ram Chand to do injustice simply because of the connection aforesaid. It is also noticeable that before the District Magistrate the accused person and his Counsel were unable to say what the relationship between the complainant and Kirpa Ram was, and it may also be remarked that before me complainant's Counsel, Mr. Nand, Lal says that his instructions are that there is no connection whatever between the two men.

The Magistrate has completely refuted the 3rd ground stated above. It is quite natural for the Court in the first instance, at a time when, as very often happens in such cases, the dispute turns out to be one for a Civil Court, to admit to bail at a low figure, namely, Rs. 200; but after examining the complainant at length and coming to understand the case better, the Magistrate saw that the case was more serious than he at first imagined and so very properly raised the bail to Rs. 1,000.

Again, with regard to the allegation that the Magistrate tried to compel the accused to compromise with the complainant, there is absolutely nothing on the record to support it, and the Magistrate denies the allegation *in toto*.

Turning to the 4th ground, the story about Mangal Sain seems to me a mere cock-and-bull story, while as regards Devi Ditta Mal,

that gentleman has actually given bail for the accused, and, therefore, there is no reason whatever to suppose that the charge brought against him has anything to do with the present case at all. In the petition it is plainly stated that the complainant brought a charge against Devi Ditta Mal and this is very good instance of the reckless and extravagant statement that is often made in petitions of this kind. When Mr. Nand Lal denied that the complainant had brought that charge and when it was pointed out to Mr. Nand Lal that the Magistrate also makes a similar denial, it had to be admitted that the charge against Devi Ditta Mal under section 504 of the Indian Penal Code was brought by one Niranjan Das. This Niranjan Das is said to be a servant of one Thakar Das, whose son is said to be betrothed to the complainant's daughter. In my opinion, the above statement shows that these grounds may be wholly rejected.

Looking at the case generally, I see no reason to suppose that Lala Ram Chand will do anything more or less than his duty. If he wrongly convicts the accused, the accused always has the Appellate Court open to him.

For these reasons, I reject the application.

Petition rejected.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 499 OF 1911.

CRIMINAL REVISION PETITION NO. 373 OF 1911.

February 1, 1912.

Present:—Mr. Justice Miller.

In re VELLAI OCHA THEVAN—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), s. 411—Theft of currency notes—Possession of accused after 18 months—No presumption of guilty knowledge.

Where 18 months after a theft of currency notes, a few of them were found in the possession of the accused, and no other suspicious circumstances were found against him:

Held, that there was no presumption of guilty knowledge on his part in the absence of an explanation and consequently the fact that he had given a false explanation of his possession was not sufficient to warrant his conviction for dishonest retention of stolen property.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Dindigul, in Criminal Appeal No. 73 of 1911, preferred against the conviction and sentence passed by the Stationary Second Class Magistrate of Dindigul, in Calendar Case No. 234 of 1911.

Mr. *C. Madhavan Nair*, for the Petitioner.

Mr. *D. Devadoss*, for the Public Prosecutor, for the Crown.

ORDER.—The evidence in this case is that 18 months after a theft of 29 currency notes, each of the value of Rs. 100, four of the stolen notes were found in the possession of the accused. He did not explain the possession but denied that he had ever had the notes with him.

The question is whether, under these circumstances, the Magistrates were right in convicting him of dishonest retention of stolen property.

There is no circumstance to suggest that he was the thief and in the case of currency notes, at any rate of those not of large value, it seems to me impossible to hold that possession, a year and a half after the theft, of a few of the stolen notes is by itself evidence pointing to guilty knowledge on the part of the possessor. I do not find in the jugdment of the Courts below anything to suggest that the accused is not a person who is likely to have had dealings to the amount of Rs. 400 in a single transaction, so as to render suspicious his possession of four notes of Rs. 100, which were all stolen on the same occasion, or any other suspicious circumstance against him.

I find then no circumstances stated in the judgment of either Court below which would justify a presumption of guilty knowledge in this case in the absence of an explanation, and consequently the fact that the accused has given a false explanation of his possession is not sufficient to warrant his conviction.

I must set aside the conviction. The sentence of imprisonment has already expired. The fine must be refunded, if paid.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 1340 OF 1911.

November 20, 1911.

Present:—Mr. Justice Kensington.

RADHA KISHAN AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 143—Persons passing by the village of their enemies—Attack by the villagers—Revision—Power to quash conviction of persons not applying for revision—Criminal Procedure Code (Act V of 1898), ss. 439, 562.

Persons by simply passing close to the village of their enemies cannot be convicted under section 143, Indian Penal Code.

The High Court has power on revision to quash the conviction of the accused who have been dealt with by an Appellate Court under section 562, Criminal Procedure Code, 1898, even if the convicts have not moved the High Court to exercise that power.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Rawalpindi Division, dated the 9th September 1911, affirming that of the Additional District Magistrate, exercising enhanced powers under section 30, Criminal Procedure Code, Rawalpindi, dated the 26th August 1911, convicting the petitioners.

Mr. *Vaughan*, for the Petitioners.

JUDGMENT.—The two Revisions Nos. 1340 and 1398 may be dealt with by one order. They cover the cases of four *Brahmans*, aged 40 to 70 of the village Mohra Bhattan, who have been convicted under section 143, Indian Penal Code, and sentenced to six months' imprisonment, their appeal being rejected by the learned Sessions Judge. Two other men, named Natha Singh and Diwan Chand, sons of accused Prem Singh aged 70, were also convicted and similarly sentenced by the Magistrate, but in their case the Sessions Court has applied the provisions of section 562 of the Criminal Procedure Code, and they are, therefore, not included in either of the petitions for revision. At the same time, their case stands on exactly the same footing and I propose to deal with them also on revision.

It appears to me quite impossible to accept the theory upon which all these petitioners have been convicted, under section 143, Indian Penal Code. There was, no doubt, bad feeling between the *Brahmans* concerned and the Muhammadan residents of the village *Jamat* and it is possible that some dispute about a woman may be at the bottom of the trouble. The theory that the present petitioner, Ishar Das, is intriguing with this woman is, however, very improbable. His age is given by the Magistrate at different places in the record at 40 or 45, but in the judgment he is described as a rather frail old man between 50 and 60. He is present before me and certainly looks well over 50 and so far as can be ascertained from him, he has had no previous direct connection with the village *Jamat* and has never lived there as stated by the Magistrate. I do not overlook the fact that in his evidence he alluded to an intrigue between him and *Musammat* Saido, but there is great doubt whether the evidence on the point is correct and at any rate the intrigue, if there ever was one, must have been a matter of a long time ago.

The broad facts of the case which there is no getting over are, that an attack was made on the petitioners on the 7th July as they were passing the village *Jamat*. Ishar Das and his elder brother Gharib Singh were singled out for attack. Gharib Singh was struck once on the head and killed on the spot and Ishar Das was very severely beaten on the head, back and arms, the ulna-bone of one arm being broken. There is no evidence whatever that anyone else was injured on either side and there can hardly have been a general fight, or if there was, the resistance offered by the petitioners to it was of the feeblest description. The Magistrate has in separate cases punished certain men of *Jamat*, and as regards the latter the proceedings are not now before me. It appears, indeed, that the principal offender, Ditta, has not even appealed to the Sessions Judge.

The lower Courts have found that the petitioners went out of their way to pass the village *Jamat* with demonstrations likely to cause a breach of the peace. It is nowhere definitely explained how section 143, Indian Penal Code, is applied, but apparently it is assumed that the intention of the petitioners was to commit an offence under section 504, Indian Penal Code. A conclusive reply to this assumed version of the facts is that if the petitioners were intending to bring on a fight, they would hardly, being in comparatively small numbers, have ventured to challenge the whole village *Jamat*. Moreover, it is quite clear that the petitioners themselves

did not fight and nothing actually happened except that some men from *Jamat* came out and mercilessly attacked Gharib Singh and Ishar Das without meeting with any resistance from any of the other petitioners.

Under these circumstances, I cannot follow the lower Courts. It seems certain that the attack on Gharib Singh and Ishar Das was almost entirely unprovoked and that it was a sequel to previous fighting between the villages a few days before. Even if it is assumed that the petitioners went out of their way to pass *Jamat* in an aggressive manner, it is quite unreasonable to jump to the conclusion, without any evidence to support it, that their intention was to begin fighting. The lower Courts appear to me to have gone out of their way in holding that any of the petitioners was actively responsible for the sudden and violent attack made upon Gharib Singh and Ishar Das. The evidence as to insult offered by the petitioners is quite untrustworthy and should be disregarded seeing that none of the *Jamat* men were even injured in the smallest degree. The most that can be said is that the petitioners were incautious in passing close to the village of their enemies, but to treat this as a case of wanton trespass upon the *Jamat* lands is to take a very exaggerated view of the petitioners' conduct.

I cannot see that any of the petitioners are seriously to blame for what actually happened, least of all the old man Ishar Das who was himself so badly hurt, and I do not think that any offence has been proved against them. Both the petitions are allowed and I also take up on revision the case of Natha Singh and Diwan Chand who were similarly convicted without real cause. All six men, namely, Ishar Das, Prem Singh, Radha Kishan, Teja Mal, Natha Singh and Diwan Chand are acquitted. Ishar Das and Prem Singh are discharged from the bail to which they have been admitted by this Court and Natha Singh and Diwan Chand are released from the security demanded of them by the lower Appellate Court, under section 562 of the Code of Criminal Procedure. Radha Kishan and Teja Mal who are still in jail will be now released.

Revision allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 248 OF 1911.
CRIMINAL REVISION PETITION No. 191 OF 1911.
February 9, 1912.

Present:—Mr. Justice Abdur Rahim.

AMAVASAYA CHINNA KRISHNA REDDY AND OTHERS—ACCUSED—PETITIONERS

versus

MARRI POLIAH OF CHILAMANUR—COMPLAINANT.

Penal Code (Act XLV of 1860), s. 447—Entry in order to assert a right on land—Criminal trespass—Intention to intimidate, etc., must be found.

An entry on land in another man's possession, solely in order to assert a right in the land, does not constitute 'criminal trespass' within section 447, Indian Penal Code. The intention to intimidate, insult or annoy, or to commit an offence must be distinctly found.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Joint Magistrate of Gudur, in Criminal Appeal No. 2 of 1911, presented against the judgment of the Second Class Magistrate of Venkatagiri, in C. C. No. 294 of 1910.

Mr. *K. P. M. Menon*, for the Accused.

ORDER.—The conviction under section 447, Indian Penal Code, cannot be sustained. None of the Magistrates find that the intention of the accused in entering upon the land in dispute was to intimidate, annoy or insult the Prosecution witness No. 1 or to commit any offence. The only inference to be drawn from the facts, as disclosed in the evidence, is that the accused entered the land in order to assert the right which they claimed in the land, but that is not sufficient to bring the conduct within the definition of criminal trespass as given in section 441, Indian Penal Code. I set aside the convictions of all the accused under section 447 and also the sentences against the accused Nos. 1 to 4. The fines, if paid, by the accused Nos. 1 to 4 will be refunded to them. The conviction of the fifth accused under section 323, Indian Penal Code, is supported by evidence and will stand. But as he has been sentenced by the Joint Magistrate under sections 323 and 447, Indian Penal Code, to a fine of Rs. 15, I reduce the fine against the fifth accused to Rs. 12.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 523 OF 1911.

November 11, 1911.

Present:—Mr. Justice Johnstone.

SUNDAR SINGH—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 304—Death by strangulation—Sentence.

The accused had been appointed a *rakha* to watch certain crops of gram. The deceased came to the field and began to steal the stuff. Thereupon the accused and the deceased quarrelled and proceeded to fight. The accused got the deceased down and strangled him to death with his hands:

Held, that the accused was guilty of an offence punishable under the 2nd part of section 304, Indian Penal Code, and that sentence of four years' rigorous imprisonment was quite sufficient to meet the ends of justice in the case.

Appeal from the order of the Sessions Judge, Gujranwala Division, at Lahore, dated the 25th July 1911, convicting the appellant.

Mr. *Nand Lal*, for the Appellant.

Mr. *Broadway*, for the Respondent.

JUDGMENT.—The accused, Sundar Singh, was committed for trial to the Sessions Court under section 302, Indian Penal Code, for the murder of one Kalu, *chuhra*. The story is a very simple one. Sundar had been appointed as a *rakha* to watch certain crops of gram. When he saw Kalu come there and begin to steal the stuff, he remonstrated with him, and the two quarrelled and proceeded to fight. Sundar Singh, being the stronger of the two, got Kalu down and strangled him with his hands and then went off to the village and informed the *Lambardar* that he had had a fight with Kalu and had injured him and that Kalu was dead or about to die.

The above is briefly the story of the prosecution. There is no doubt that Kalu did die at the time. When his body was examined later on by the Assistant Surgeon, that officer's opinion was that the cause of death was strangulation. On the left side of the neck were found marks as of fingers and the tissues underneath the skin under those marks were found bruised, while the lungs and other organs were in a condition indicating suffocation. On the right side of the neck, there was a wound half an inch deep, and it seems that a great deal of blood poured out of that wound, but it is quite clear that that wound was not the cause of death. It does not appear to have injured any vital blood vessel, and there is not the slightest reason to suppose that such an injury could have caused the death of an able-bodied man.

The accused, no doubt, denies having strangled Kalu, and there is no direct evidence on this point. Two witnesses for the prosecution alone seem to have seen the fight between the two men and all they can say is that they saw Sundar Singh throw down Kalu and get on the top of him. Nevertheless, in my opinion, that evidence given by witnesses evidently inclined to favour the accused is quite sufficient, coupled with the medical evidence, to prove the theory of the prosecution.

It is part of the case for the prosecution that the wound on the right side of the neck was probably caused after death in order to divert attention from the strangulation and to support the accused's story that in the course of his fight with Kalu, he threw Kalu down and that Kalu in falling struck his neck upon a sickle lying on the ground, but there is no need to make suppositions of this kind. What is most likely correct is that Kalu had a sickle with him for the purpose of cutting the gram which he wished to steal, and that in the struggle, somehow or other, he got wounded with that sickle.

According to the prosecution, he was at once strangled, and the learned Counsel for the accused person argues that this cannot be so because in a dead body the blood ceases very quickly to be fluid, and, therefore, upon the above supposition it would be impossible that a large quantity of blood, as has been alleged, should have been effused all over the place. But a reference to the standard works on Medical Jurisprudence shows that even in ordinary cases of death blood does not coagulate until about 4 hours after death, and see Taylor's Medical Jurisprudence, Sixth Edition, Volume I, page 622, showing that in cases of suffocation, the blood remains fluid for a very much longer time. There seems, therefore, nothing in the above objection.

One slight discrepancy in the case for the prosecution should prehaps be noticed. In the first report, the *Lambardar* said that the accused had told him that he had beaten him with a *dang*, whereas in Court there is no mention by any body of the accused having a *dang* at all. The *Lumbardar*, however,

sufficiently explains this by saying that it was one Mani who suggested the idea of *dang* to him and that accused never said that he had used such a weapon.

I am convinced, then, that the accused really did kill Kalu intentionally and that the conviction is correct: but it is doubtful whether seven years' rigorous imprisonment is not too severe a sentence. Sundar Singh was doing his duty in preventing Kalu from stealing gram and this circumstance, coupled with the fact that Kalu, who also seems to be a man of considerable physical strength, started a desperate struggle with him, affords some slight excuse for Sundar Singh's proceeding to extremities. I, therefore, accept the appeal, uphold the conviction, and reduce the sentence to four years' rigorous imprisonment.

Appeal accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 195 OF 1912.

May 6, 1912.

Present:—Mr. Justice Karamat Husain.

GANESHI LAL—APPLICANT

versus

NAND KISHORE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 179—"*Consequence*", *meaning of—Penal Code (Act XLV of* 1860), *s.* 408—*Criminal breach of trust committed at the branch office of a firm—Whether the Court at the Head office of the firm can try—Jurisdiction.*

The word "consequence" in section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offenders as to form no part of that offence.

Babu Lal v. *Ghansham Das*, 5 A. L. J. 333, A. W. N. (1908) 115; 7 Cr. L. J. 394, referred to.

If an offence under section 408 is committed in a branch of a firm, the Court at the Head office of the firm has no jurisdiction to try it.

Colville v. *Krishto Kishore Bose*, 26 C. 746; 3 C.W.N. 598; *Queen Empress* v. *O'Brien*, 19 A. 111, referred to.

Revision against an order of the Sessions Judge of Cawnpore.

Mr. *Satya Chandra Mukerjee*, for the Applicant.

Mr. *R. Alston*, for the Respondent.

ORDER.—In this case, Nand Kishore lodged a complaint against Ganeshi Lal. The substance of the complaint is as follows:—The head office of the complainant is at Cawnpore. A branch of the firm was opened at Gauriganj, District Sultanpur, in *Sambat* 1964. The accused was appointed a *gumashta* and his share was fixed at four annas in the rupee. He worked till *Sambat* 1963 and was asked to come to Cawnpore. The accused seemed to have been guilty of criminal breach of trust. The complainant directed him to close the shop at Gauriganj and not to re-open it until the complainant had gone there and had checked the account. The complainant went to his home at Bhiwani in the Hissar District. When he returned in 1907, it came to his knowledge that the accused had opened the shop and misappropriated the money realized by him which he had to send to Cawnpore. A sum of about Rs. 1,583-14 6, has been misappropriated by him. When the complainant was examined, he distinctly stated that the accused misappropriated the money belonging to the branch of the Firm at Gauriganj. The Magistrate to whom the complaint was made came to the conclusion that he had no jurisdiction inasmuch as the offence appeared to have been committed in Gauriganj. In revision, the learned Judge was of opinion that the Court at Cawnpore had jurisdiction. In his order, he says: "The facts alleged constitute an even stronger case for jurisdiction in the Cownpore Courts than did the facts in a previous case, *Queen Empress* v. *O'Brien* (1) or in *Colville* v *Kristo Kishore Bose* (2). Having regard to section 179 and to the above rulings in explanation thereof, I find that the Magistrate had jurisdiction to proceed with the case." An application in revision is made to this Court and it is urged on behalf of the applicant that the order of the Joint Magistrate is right. Section 179 of the Code of Criminal Procedure runs as follows:—"When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." The word "consequence" in this section, in my opinion, means a consequence

(1) 19 A. 111.
(2) 26 C. 746; 3 C. W. N. 598.

which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence. In *Babu Lal* v. *Ghansham Dass*(3), it is remarked: "It is contended that section 179 by reason of the words contained in it, 'and of any consequence which has ensued, 'gives the Magistrate at Aligarh in this case jurisdiction. But the only reasonable interpretation which can be put upon these words is that they are intended to embrace only such consequences as modify or complete the act alleged to be an offence." The above remarks support the view I take. The loss to the principal firm at Cawnpore is, therefore, not a consequence of the act of the accused committed at the branch of the firm within the meaning of section 179, Criminal Procedure Code. In the case of *Colville* v. *Kristo Kishore Bose* (2), I find the following passage: "He seems to have thrown out in the course of his judgment, that he has no jurisdiction to take cognizance of the complaint, because the offence, if any, was committed at Shalimar within the jurisdiction of the District Magistrate of Howrah. But it appears to us that the monies having been received from the complainant's firm at Calcutta and false accounts, as stated by the complainants, having been rendered in Calcutta, the Presidency Magistrate has jurisdiction to take cognizance of the complaint in question." The above facts are very different from the facts of the case before me and the case is no authority for the proposition that if an offence under section 403 is committed in a branch of a firm, the Courts at the head office of the firm will have jurisdiction. In the case of *Queen-Empress* v. *O'Brien*(1), the facts were also different, and the loss to a branch of the firm was not held to be a loss to the principal firm at another place. For the above reasons, I hold that the Courts at Cawnpore have no jurisdiction to proceed with the case, and set aside the order of the learned Sessions Judge. Let the record be returned.

Order set aside.

(3) 5 A. L. J. 333; A. W. N. (1908) 115; 7 Cr. L. J. 394.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 570 OF 1911.
(CRIMINAL REVISION PETITION No. 413 OF 1911.)

April 30, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

BHIMARAJA VENKATESWARULU—PETITIONER

versus

MOOVA BAPULU—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 195—*Penal Code* (*Act XLV of* 1860), *s.* 211—*False information given to Police—Order of Magistrate to remove case from Police file—Sanction.*

Where the information given to the Police was reported to be false and the Magistrate, in consequence, ordered the Police to remove the case from their file:

Held, that in order to initiate proceedings under section 211, Indian Penal Code, against the informant, the sanction of the Magistrate was not necessary.

Ramasami v. *Queen-Empress*, 7 M. 292, referred to.

Petition, under sections 435 and 439 Criminal Procedure Code, praying the High Court to revise the proceedings of the District Magistrate of Guntur, dated 30th June 1911, dismissing the petition presented to him by petitioner against the proceedings of the 2nd Class Magistrate of Bapatla, dated 30th March 1911, in Miscellaneous Case No. 5 of 1910.

Mr *T. Prakasam*, for the Petitioner.

Mr. *J. L. Rozario*, the Public Prosecutor, for the Crown.

Mr. *V. Ramadoss*, for the Respondent.

ORDER.—In this case, information was given to the Village Magistrate and to the Station House Officer, and the latter referred the case as false to the Stationary Sub-Magistrate, who issued an order to the Police to remove the case from the file as a false one. In these circumstances, the sanction of the Magistrate for proceedings under section 211, Indian Penal Code, is not required by section 195, Criminal Procedure Code. [*Ramasami* v. *Queen-Empress* (1)], and, consequently, the sanction which the Sub-Magistrate has accorded, and which the District Magistrate has confirmed, is a sanction not contemplated by the Code of Criminal Procedure. On this ground, we revoke it.

Sanction revoked.

(1) 7 M. 292.

LAL BEHARI LAL *v.* RAM DIAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 8 OF 1912.

May 3, 1912.

Present:—Mr. Lindsay, J. C.

LAL BEHARI LAL, MINOR UNDER THE GUARDIANSHIP OF KANHAI LAL, HIS UNCLE AND NEXT FRIEND—PLAINTIFF —APPELLANT

versus

RAM DIAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Whole muqaddama *referred—Power to arbitrator to award money or impose other conditions when asked to divide property—Duty of Court in dealing with award when fairly made.*

Where parties apply to the Court to refer their *muqaddama* to the arbitration of a particular person, the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties ask for the settling of all their disputes through arbitration.

Where an arbitrator divides property in a particular manner or in dividing it lays down certain directions or awards certain amounts to one party, his act is well within his jurisdiction and the Court is not competent to interfere with the award on its merits.

Where parties agree to refer their dispute to the decision of an arbitrator, they ought not be allowed to resile from the position which they took up at the time of the reference and objections which are merely technical and not objections of substance should not be allowed to prevail so as to disturb an award, which has been fairly made and which, when the real nature of the dispute between the parties is looked to, might reasonably be considered as directed to a decision on the matters which were in dispute.

Appeals against an order of the Subordinate Judge, Tahsil Biswan, Sitapur, dated 28th October 1911.

The Hon'ble Rai *Sri Ram* and Babu *Chhote Lal*, for the Appellant.

Babu *Basudeo Lal*, Pandit *Gokaran Nath Misra* and Babu *Chhail Behari Lal*, for the Respondents Nos. 1 & 3.

JUDGMENT.—Both these appeals arise out of a suit which was instituted in the Court of the Subordinate Judge of Tahsil Biswan in the District of Sitapur by one Lal Behari Lal, a minor, in which he sued for partition and claimed that he was entitled to a third share in certain joint family property described in lists which were attached to his plaint. The three defendants in the case were his brothers, Ram Dyal and Kunj Behari Lal, defendants Nos. 1 and 2 respectively, and *Musammat* Sant Koer, defendant No. 3, who is the widow of the plaintiff's deceased brother one Oudh Behari Lal. It appears that the plaintiff and his two brothers (defendants) are the sons of one Maharaj Ganga Din, who died in the year 1902. At the time of Ganga Din's decease, the other brother, Oudh Behari Lal, was still alive. He is proved to have died in March or April 1908. The case which the plaintiff Lal Behari Lal set up was that the family continued joint after the decease of his father Ganga Din and that the property was still joint at the time the suit was filed; and he alleged that as his brother Oudh Bihari Lal had died, he was entitled to a one-third share in the joint property. In paragraph 4 of his plaint, Lal Behari Lal referred to a certain circumstance which was pointed to as furnishing the occasion for this suit. He stated there that in certain mutation proceedings, which were taken after the death of Oudh Behari Lal, the first defendant Ram Dyal falsely stated that there had been a partition previous to Oudh Behari Lal's death in this way, namely, that Ram Dyal and Oudh Behari Lal had separated themselves from the plaintiff and his other brother, Kunj Behari Lal, Ram Dyal and Oudh Behari ramaining joint as amongst themselves. It was further stated that in these mutation proceedings, Kunj Behari at first objected to mutation being made with respect to Oudh Behari Lal's share in the name of the defendant Ram Dyal and that these objections were afterwards withdrawn on the understanding that the property was to be entered in the name of Oudh Behari's widow, *Musammat* Sant Kuar. In paragraph 6 of the plaint, it was represented that the plaintiff had an apprehension that his interest would suffer if he did not apply for partition of the property and in paragraph 7 he denied that any partition had ever taken place or that if any so-called partition had been made it was not in any way binding upon him. The principal defence was set up by the first defendant, Ram Dyal. According to him, a partition was effected between the brothers in the year 1906 in which certain property, mostly moveable, was divided between the parties while as regards the immoveable property it was agreed between the parties that the income should be divided without an actual division by metes and bounds of the estate. It was further alleged that after the death of Oudh Behari in April 1908, the parties decided to divide the property which had

hitherto remained joint and that for that purpose an arbitrator, one Hardeo Baksh, had been called in who had divided off the shares in all the property with the exception of certain small items. It was further stated that in pursuance of the division made by Hardeo Baksh, an award was drawn up in the shape of a partition deed but that the parties in order to avoid expense had not had the document stamped so as to make it a binding document in law. Ram Dyal alleged that the suit was a collusive one which the plaintiff had been put up to bring in order to obtain a larger share of the family property than that to which he was properly entitled. *Musammat* Sant Koer, the widow of Oudh Behari Lal, made common cause with the defendant Ram Dyal with whom it appears she is still living. Kunj Behari supported the case of the plaintiff. In his written statement, he explained how he came to withdraw his objections in the mutation case which was filed after the death of Oudh Behari. He stated that when Oudh Behari died, his widow was pregnant and that it was agreed between him and Ram Dyal that in the event of the widow not giving birth to a son, Ram Dyal was to pay Rs. 20,000 to Kunj Behari in order to buy off his claim against any share possessed by Oudh Behari. It is shown from the evidence that a promissory-note for Rs. 20,000 was executed by Ram Dyal in favour of Kunj Behari on the 1st September 1908. Four issues were raised on these pleadings by the Subordinate Judge, the 3rd of which related to a question of Court-fee payable on the plaint. This issue was decided as a preliminary issue in favour of the plaintiff. The three issues which remained were as follows:—

(1) Was there any partition of the joint family property in 1906 and 1908 as alleged by Ram Dyal?

(2) If so was the plaintiff not bound by that partition?

(3). Is all the property in suit joint property?

If not, how much of it is?

These issues were framed on the 13th April 1911 and on the 18th of the same month, the plaintiff by a petition asked that another issue might be framed, namely, whether the alleged partition was or was not valid, whether it was fair or whether it was prejudicial to the interest of the plaintiff. The Subordinate Judge, however, declined to frame a new issue, saying in his order on the petition that the matter then raised was already included in one of the issues which had been already framed. After this, certain evidence was produced but before the evidence was completed on either side, a petition was filed before the Subordinate Judge on the 1st September 1911 by the parties in which they stated that they agreed to refer the case to arbitration. The Subordinate Judge sanctioned the reference and the case was made over to Hardeo Baksh the arbitrator who was nominated by the parties. In due time, the arbitrator filed his award and both sides took objection, to certain items of it which are now in dispute in this appeal. One of the items with which we are now concerned related to a certain piece of property which is described as a *muafi* of *Mouzah* Raipur.

According to the award, this *muafi* area in Raipur was held as *shankalap* land by the parties. The arbitrator stated that in the partition proceedings, which he had carried out in the years 1908-1909, this area had been allotted for the support of the parties' mother. The arbitrator decided that the income of this property was to be made over to the plaintiff for his education until he should come of age in the year 1327 *Fasli* and that after that date, the parties were to divide the property in equal shares. The other item about which there is a dispute is a sum of Rs. 5,000, which the arbitrator declared should be paid to the plaintiff Lal Behari by the defendant Ram Dyal. The objection taken in the Court below with respect to these items was that the award was invalid as being made beyond the authority of the arbitrator. The learned Subordinate Judge upheld these objections and corrected the award accordingly. Lal Behari, who is the appellant in First Civil Appeal No. 8 of 1912, now asks this Court to hold that the order of the Subordinate Judge was wrong. It is contended in his behalf that both these items of the award should be allowed to stand and that the arbitrator had authority to deal with them. The sole question, therefore, which has to be decided in this appeal is what was the scope of the reference made to the arbitrator Hardeo Baksh. This must be determined by the language of the agreement which the

parties put into Court on the 1st September 1911 and in interpreting the language of this document, it is permissible to refer to the circumstances in which the agreement came to be filed. Broadly put, the argument for the appellant is that the matter before the arbitrator was in substance the claim of Lal Behari to a one-third share in the joint family property. On the other hand, for the respondents, it is contended that the only points in difference with which the arbitrator had to deal were those which were formulated in the three issues which the Court had still left undecided at the time the reference was made. To turn now to the language of the petition for leave to refer, we find that it was stated there that the parties had agreed that the case (*muqaddama*) should be made over for decision to the arbitrator or Hardeo Baksh. The petition also set out that three other matters were to be referred for the arbitrator's decision, namely, (1) the promissory-note dated the 1st September 1908 for Rs. 20,000, which Ram Dyal had executed in favour of Kunj Behari Lal, (2) the disposal of the property of the mother of the parties who died in 1909, and (3) the disposal of certain debts which were said to be due to the estate by one Basant Singh and which were said to have been recovered by the defendant Ram Dyal. It was mentioned that as regards these debts, the dispnte was in this way, namely, that Ram Dyal contended that he had paid these debts to Kunj Behari. Kunj Behari, on the other hand, denied that he ever received them. The arbitrator was given authority to take evidence or not as he thought fit and he was empowered to decide the case in any way he chose. The question of costs was to be reserved for the decision of the Court. In dealing with the question of interpretation of an agreement to refer, it may, I think, be laid down as a correct proposition that such agreements should be construed as far as possible in favour of the authority of the arbitrator. The petition for leave to refer is couched in very general language and I do not think it would be proper to construe it in the narrow sense suggested on behalf of the respondents, namely, that the arbitrator was called on to decide the formal issues upon which the Court had passed no judgment. It seems to me that the expression "*muqaddama*", which is used in the petition, indicates that the parties were desirous of having the whole dispute settled through the intervention of Hardeo Baksh, who on a previous occasion had already been called in to arrange the division of the family property. Substantially, the case between the parties was this,—namely, that Lal Behari was claiming a one-third share of the family property, while on the other hand, Ram Dyal was contending that Lal Behari had already received his share, namely one-fourth and was not entitled to the share he was claiming. The language used in the written statement of Ram Dyal, with reference to the partition proceedings which he stated had taken place in 1908-1909, goes to show that there was at least some doubt as to whether those proceedings were valid in law for, as has already been observed, he pointed out that in order to save expense the parties had not drawn up a stamped and formally executed deed of partition. Again, it seems to me important to notice that the arbitrator was also called upon to decide with reference to the promissory note for Rs. 20,000 which Ram Dyal executed in Kunj Behari's favour on the 1st September 1903. There seems to me no doubt that this document was executed in the manner and for the reason alleged by Kunj Behari in his written statement, that is to say, Ram Dyal had agreed to buy off any claim which Kunj Behari and his minor brother Lal Behari who was living with him, might have to the property left by Oudh Behari Lal at the time of his death. It is admitted that after Oudh Behari's death, the name of his widow was entered with respect to certain share in the property and this fact is not altogether consistent with the story which Ram Dyal put forward, namely, that he and Oudh Behari were living as members of a joint family after the alleged partition in 1906. Had that been the case, the property would have come to Ram Dyal by right of survivorship. Another fact is also to be taken into consideration, namely, that the more or less formal partition which Hardeo Baksh is said to have made in the year 1908-1909 was made after and not before the death of Oudh Behari Lal. As regards the item consisting of the effects left by the mother of the parties after her decease, that, of course, could not have been dealt

with in the alleged partition of 1908-09 at a time when the mother was still alive; but as regards the other item, namely, the debts due by Basant Singh to the estate, it is at least curious that the arbitrator was called to decide upon a question of this kind which one would naturally expect to have been dealt with in the proceedings said to have been taken in 1908 09. There can be no doubt whatever that Hardeo Baksh did as alleged make a partition in 1908-09. Hardeo Baksh does not refer to any partition previous to this date although he admits that Ram Dyal and his brother Oudh Behari left the family house in or about 1906 and came to live in Kamalpur. Taking into account all these circumstances, it appears to me that what was in the mind of the parties when they applied for arbitration on the 1st September 1911 was that although an attempt had been made in 1908-09 to divide the family property, that attempt had not been successful and satisfactory; and it was for this reason that the parties were willing that the whole question should be dealt with again by Hardeo Baksh who had been called in to settle the dispute on a previous occasion. With regard to the promissory note for Rs. 20,000, it is quite clear that Ram Dyal never paid off this money to Kunj Behari and his brother before the present suit was instituted although the money was already due; and it may be taken, therefore, that it was felt even by the defendant Ram Dyal that the claims of Lal Behari and his brother Kunj Behari with respect to the share of Oudh Behari had not been disposed of. I have come, therefore, to the conclusion that the contention advanced on behalf of the appellant as to the construction which should be placed upon the agreement for reference is substantially correct, that is to say, the arbitrator was to decide what share of the joint family property was to be allotted to Lal Behari and whether any proceedings by way of partition which had previously taken place had given Lal Behari the full share to which he was entitled. Adopting this construction of the agreement for reference, I hold that the Subordinate Judge was in error in laying down that with regard to the two items in dispute in this appeal, the arbitrator had exceeded the authority which was given to him by the agreement to refer. With regard to the Raipur property, the Subordinate Judge remarked that the arbitrator had not been called upon to come to any decision as to provision being made for the education of Lal Behari. That, however, appears to me to be an erroneous view of the matter. The arbitrator found that this property situated in *mouzah* Raipur was still undivided and his award lays down how the property is to be dealt with. He decided that the income of it should be reserved for the use of Lal Behari up to the year 1327 *Fasli* and after that date, the parties should divide the property in equal shares. It does not appear to me to matter in the least that the arbitrator laid down that the income of the property should be applied in a particular manner. Substantially, his decision is that the property is to belong to Lal Behari until he comes of age and that afterwards it is to be divided. I regard this as purely and simply an order for the division in a particular manner of property which was admittedly undivided at the time the reference to arbitartion was made. As regards the other item that consists of a sum of Rs. 5,000, which the arbitrator has declared that Ram Dyal shall pay to Lal Behari in order to satisfy any claim he may have as to the property, which had once stood recorded in the name of his deceased brother, Oudh Behari Lal, it may be noted here that Lal Behari himself objected to the arbitrator's decision on this point on the ground that the award purported to interfere with Lal Behari's right to make claims to Oudh Bihari's share after the death of Oudh Bihari's widow. In this Court, however, Babu Sri Ram, who appears on behalf of the appellant, has given up the objection which was taken in the Court below and has stated that his client is willing to accept the sum of Rs. 5,000 in satisfaction of any claims he may have to the property which once stood in the name of Oudh Behari Lal. I do not think the respondents can successfully contend that the award of this item was altogether outside the authority conferred upon the arbitrator. I have already pointed out that the dispute as to the *rukka* of Rs. 20,000, which Ram Dyal has executed in favour of Kunj Bihari, was a matter which was expressly made over to the arbitrator for decision; and it appears to me that this item of Rs. 5,000, which Ram

Dyal has been directed to pay to Lal Behari, is closely connected with this matter of the debt of Rs. 20,000 due by Ram Dyal on the promissory-note in question. As I have already stated, this promissory-note was executed in order to buy off the claims of Kunj Behari and Lal Behari against the share in the possession of their deceased brother, Oudh Behari and I have come to the conclusion that the arbitrator was really given authority to decide how the claims of Kunj Behari and Lal Behari with respect to this property should be satisfied. It is obvious that they had not been satisfied at the date when the reference was made, for it was admitted that the debt due on the promissory-note had not been paid although over-due. In cases like the present where parties have agreed to refer their dispute to the decision of an arbitrator, they should not be allowed to resile from the position which they took up at the time of the reference and objections which are merely technical and not objections of substance should not be allowed to prevail so as to disturb an award which is fairly made and which, when the real nature of the dispute between the parties is looked to, may reasonably be considered as directed to a decision on the matters which are in dispute. I hold, therefore, that the lower Court was wrong in disturbing the award made by the arbitrator Hardeo Baksh and I allow the appeal of Kunj Behari and direct that the decree of the Court below, so far as Lal Behari's case is concerned, be set aside and that there be substituted in place of it a decree in accordance with the terms of the award. Lal Behari will get the costs of this appeal from the respondents.

The other appeal with which we are concerned is No. 9 of 1912, in which the appellant is Kunj Behari who was one of the defendants in the Court below. This appeal relates exclusively to a question of costs. The question arises in this way. In the Court below, Ram Dyal put forward what purported to be a partition deed executed in 1906. This document is marked Exhibit A1. At the time the document was filed, there was no stamp on it and Ram Dyal who presented it was made to pay Rs. 445 stamp duty and a penalty of Rs. 4,450. The Subordinate Judge came to the conclusion that Kunj Behari Lal was liable to pay one half of this penalty in stamp duty which had been realized from the defendant Ram Dyal and he made an order accordingly which purports to be one under section 44 of the Stamp Act. The Subordinate Judge was of opinion that Kunj Behari Lal was equally liable with Ram Dyal for payment of the stamp on this document. It is contended on behalf of Kunj Behari Lal that the order of the Court below was wrong inasmuch as it has not been proved that Kunj Behari was a party to the deed in question; and it seems quite clear that if Kunj Behari was not one of the executants of the deed, he cannot be held liable for the default in payment of stamp duty. Kunj Behari denied on oath that he was a party to the deed and there is no evidence on the record to show that as a matter of fact Kunj Behari was one of the executants. The Subordinate Judge stated in his judgment that it was not necessary to prove formal execution of this deed as against Kunj Behari. This, in my opinion, is altogether erroneous. I am not at present concerned with any question as to whether or not the deed in question was liable to pay stamp duty but unless and until it is proved that Kunj Behari was liable for a share of the stamp duty, the order of the Court below cannot be supported It was suggested on behalf of the appellant that an issue should be remitted to the Court below in order to decide the question of fact as to whether or not Kunj Behari was a party to this deed. For the respondents it is argued that this course should not be followed but it appears to me that in the circumstances, no other course is open to me. It has already been pointed out that the case was broken off in the middle in order that a reference might be made to the arbitration of Hardeo Baksh. The witnesses, whom it was intended to produce in Court, were not all summoned and it may well be that either Ram Dyal would have been able to prove that Kunj Behari was one of the executants of the document in question or on the other hand that Kunj Behari might have been able to show that he was not a party to the deed and, therefore, not liable to pay any share of the stamp duty. Under Order XLI, rule 25, I direct that the following issue be remitted for trial to the Court below, namely—

"Was Kunj Behari a party to the deed of partition (Exhibit A1) said to have been executed in the year 1906? If so, was he

liable to pay a share of the stamp duty? And if so, what share of the stamp duty and penalty levied from Ram Dyal is Kunj Bihari now liable to pay?"

The lower Court will receive any evidence which the parties may desire to produce on this issue and will return its finding to this Court within three months from the date of receipt of this order of remand, 15 days, to count from the date of the lower Court's finding, will be allowed to the parties to file objections, if any, in this Court. Costs will abide the result.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 933 OF 1910.

May 1, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Ayling.

PICHAMMAL—APPELLANT

versus

A. PONNAMBALA BHATTER AND OTHERS —RESPONDENTS.

Evidence Act (I of 1872), ss. 92, 115—Oral evidence varying terms of document—Estoppel.

Section 92 of the Indian Evidence Act should not be read subject to section 115 of the Act.

Where, in a suit for possession of property on the basis of a sale-deed, the defendant pleaded an oral agreement whereby plaintiff had agreed to return the sale-deed to defendant and to relinquish his claim to the property:

Held, (1) that evidence of the oral agreement was inadmissible under section 92 of the Evidence Act;

(2) that, as the oral evidence itself was inadmissible, there was no question of the plaintiff being estopped from prosecuting his suit by reason of such agreement.

Kurri Veerareddi v. *Kurri Bapireddi*, 29 M. 336; 1 M. L. T. 153; 16 M.L.J. 395 and *Jagadbanhdu Saha* v. *Radha Krishna Pal*, 36 C. 920; 4 Ind. Cas. 414, referred to.

Second appeal against the decree of the Subordinate Judge of Tuticorin, in A. S. No. 21 of 1909, presented against the decree of the District Munsif of Srivaikuntam, in O. S. No. 629 of 1907.

Mr. *P. Kundu Panikar* and Hon'ble *T. V. Seshagiri Aiyar*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the 1st Respondent.

FACTS.—Suit for recovery of suit property from defendants. The plaint alleged that 1st defendant executed a sale-deed for Rs. 800, out of which plaintiff had paid him Rs. 750, and was willing to pay the balance of Rs. 50, that as 1st defendant refused to give possession to plaintiff, plaintiff filed this suit. Second defendant was impleaded as he got a subsequent sale-deed from 1st defendant with knowledge of sale to plaintiff. Third defendant was impleaded as he was the tenant in posession.

First defendant pleaded that the consideration for the sale was not paid to him and that plaintiff agreed verbally to return to him the sale-deed, on the latter paying plaintiff the value of the stamp paper. The Munsif upheld defendant's plea and dismissed the suit. On appeal, the Subordinate Judge decreed plaintiff's claim, disbelieving the plea of failure of consideration and holding the oral agreement not provable under section 92 of the Indian Evidence Act.

The 2nd defendant appealed to the High Court, which passed the following

JUDGMENT.—In our opinion, the Subordinate Judge has rightly held that the defendants were precluded, by section 92 of the Indian Evidence Act, from proving the oral agreement set up by the 1st defendant, whereby the plaintiff is said to have agreed in substance to return the sale-deed, Exhibit A, and to relinquish his rights thereunder. The learned Vakil for the appellant argues that, in spite of this provision of law, the plaintiff is estopped, under section 115 of the Indian Evidence Act, from prosecuting the present suit. But, in order to set up any plea of estoppel, the party raising it must first prove the declaration, act or omissionon which it is based, and, in the present case, section 92 stands in his way. We cannot accede to the suggestion that section 92 must be read subject to section 115.

We may also observe that, to allow appellant's contention would be to run counter to the spirit of the rulings in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and *Jagadbandhu Saha* v. *Radha Krishna Pal* (2). It is true that, at the time of the alleged oral agreement, the plaintiff's document had not been registered, but it had been executed, and plaintiff had thereby acquired a right to get it registered, whenever he chose. We do not think the cases quoted can be sufficiently distinguished on this ground

(1) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395.

(2) 36 C. 920; 4 Ind. Cas. 414.

The second appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1562 OF 1910.

June 13, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Chapman.

PRASANNA KUMAR ADHIKARY—PLAINTIFF—APPELLANT

versus

RACHIMUDDIN HOWLADAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 104A to 104F 104J, 104H, 113—Record of Rights, final publication of—No suit brought to alter rent entered in Record of Rights—Bar of claim in excess of rent entered therein.

The meaning of section 104J of the Bengal Tenancy Act is, that unless an entry in the record of rights, settling a rent in accordance with the provisions of sections 104A to 104F, has been altered by means of a suit brought as contemplated by section 104H, the entry shall prevail.

The defendant executed a *kabulyat* in favour of the plaintiff agreeing to occupy 96 *bighas* of land at a rental of Rs. 220 and to pay for any excess land which he may be found to occupy. Subsequently, settlement proceedings were under-taken and a Record of Rights was finally published according to which the defendant then held 117 *bighas* of land, but the rent fixed for that area was Rs. 220. The plaintiff brought this suit for arrears of rent at the rate of Rs. 268 per annum:

Held, (1)that section 113 of the Bengal Tenancy Act was not applicable and was, therefore, no bar to the plaintiff's claim;

(2) that section 104J rendered the entry in the Record of Rights conclusive in this case and barred the plaintiff's claim beyond Rs. 220 per annum.

Ambika Charan Chakravarti v. *Joy Chandra Ghosh*, 4 Ind. Cas. 470; 13 C. W. N. 210, relied upon.

Appeal from the decree of the District Judge of Noakhali, dated January 31st, 1910, reversing that of the Munsif of Lakhmipur, dated April 28th, 1909.

Babus *Akshoy Kumar Banerji* and *Romesh Chandra Sen*, for the Appellant.

Babu *Hari Bhushan Mukherji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the recovery of arrears of rent, and, for present purposes, the facts may be thus briefly stated.

In February 1904, the defendant executed a *kabulyat* in favour of the plaintiff, agreeing to occupy 96 *bighas* of land at a rental of Rs. 220 per annum, and further stipulating that, should he be found at any time to be occupying more land than that specified, he would be liable to pay rent for the excess land at the same rate. The defendant now holds 117 *bighas* of land, and the suit was brought to recover from him rent for the years 1906 and 1907 at the rate of Rs. 268 per annum.

After the execution of the *kabulyat*, Settlement proceedings were undertaken, and fair and equitable rents were settled under sections 104 to 104F of the Bengal Tenancy Act, 1885, as it now stands after amendment. A Record of Rights was finally published on the 5th April 1906, and, according to it, the defendant then held 117 *bighas* of land, and the rent fixed for that area was Rs. 220. The lower Appellate Court has come to the conclusion that, in these circumstances, section 113 of the Tenancy Act was a bar to the recovery by the plaintiff of anything beyond the rate of Rs. 220, and it rejected the plaintiff's claim for additional rent in respect of the alleged excess area.

We are unable to agree with the learned District Judge in thinking that section 113 of the Tenancy Act bars any application. But we are of opinion that the claim was not maintainable on another ground, namely, on the ground that section 104J of the Tenancy Act renders the entry in the Record of Rights conclusive in this case.

The section just referred to provides that, subject to the provisions of section 104H, all rents settled under sectione 104A to 104F, as entered in a Record of Rights finally published under section 103A, shall be deemed to have been correctly settled and to be fair and equitable rents. It seems to us that the meaning of this is that unless an entry in the Record of Rights, settiing a rent in accordance with the provisions of sections 104A to 104F, has been altered by means of a suit brought as contemplated by section 104H, the entry shall prevail. In this instance, a suit was brought under section 104H in respect of the description of the defendant in the Record of Rights, and the description was altered from that of an occupancy-*ryot* to that of an under-*ryot*; but no attempt was made, under the provisions of section 104 to 104F, to alter the entries as to the rental and the area. The latter entries are, therefore, in the view we take of the section, conclusive, and this

we may remark, was the view taken by Stephen and Doss, JJ., in *Ambika Charan Chakravarti* v. *Joy Chandra Ghosh* (1). In the result, then the suit was rightly dismissed by the Court of appeal below, and this appeal must be dismissed with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 470; 13 C. W. N. 210.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1451 AND 1452 OF 1910.

April 26, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

RAVULA VENGALA REDDI, HAVING DIED, HIS HEIR AND WIDOW, RAVULA VENGAMMA—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Madras Revenue Recovery Act (II of 1864), s. 59—Demand by Government—Madras Irrigation Cess Act (Mad. Act VII of 1865)—Tirvajasti *levied under the Act, suit for refund of—Limitation Act (XV of 1877), Sch. II, Art.* 16.

A mere demand by Government purporting to be made under the Madras Revenue Recovery Act will not make section 59 of the Act applicable as amounting to a proceeding under the Act.

A suit for the refund of *tirvajasti*, levied under the provisions of the Irrigation Cess Act, is governed by Article 16 of Schedule II of the Limitation Act (XV of 1877), and not by section 59 of the Madras Revenue Recovery Act.

Second appeal against the decree of the District Court of Nellore, in A. S. Nos. 129 of 1909 and 114 of 1909, presented against the decrees of the District Munsif of Kavali, in O. S. Nos. 1129 of 1907 and 1130 of 1907 respectively.

FACTS.—Suit to establish plaintiff's right of irrigating the plaintiff's lands with the water of the stream that flowed through plaintiff's *shrotriem*, to recover Rs. 101-12-8 being the amount with interest of *tirvajasti* collected for such irrigation of the dry land, to obtain a permanent injunction restraining the defendant for ever from levying such cess for irrigation.

Defendant pleaded, *inter alia*, that the suit was barred by limitation.

The Munsif held that section 59 of the Madras Revenue Recovery Act did not apply to the case, but only Article 16 of Schedule II of the Limitation Act, 1877.

On appeal, the District Judge held *contra* and reversed the Munsif's finding.

The plaintiff appealed to the High Court.

Mr. *B. Narasimha Row*, for Mr. *P. Nagabhushanam*, for the Appellant.

Mr *J. L. Rozario*, Government Pleader, for the Respondent.

JUDGMENT.—In this case, judgment of the lower Appellate Court must be reversed on the question of limitation. The District Judge held that section 59 of the Revenue Recovery Act applied and not Article 16 of the second Schedule of the Limitation Act.

In Second Appeals Nos. 838 and 844 of 1910 and 240 to 244 of 1911, we went into the question fully and we came to the conclusion that where there is a mere demand by the Government purporting to be made under the Revenue Recovery Act, such a demand will not makes section 59 of that Act applicable as amounting to a proceeding under the Act. The judgment of the District Judge must, therefore, be reversed on this point and that of the District Munsif restored with costs in this and the lower Appellate Court.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 60 OF 1910.

November 30, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

BIPIN BIHARI DAS BAIRAGI—PLAINTIFF—APPELLANT

versus

ATUL KRISHNA DAS BAIRAGI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Presumption—Marriage—Man and woman cohabiting continuously—Recognition of children as legitimate—Presumption of marriage not to be displaced by unsatisfactory evidence of marriage held many years ago, but only by conclusive evidence.

The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously.

Sastry v. *Sembecutty*, 6 App. Cas. 364, 50 L. J. P. C. 28; 44 L. T. 895, relied upon.

This presumption of law is not lightly to be repelled. It is not to be broken in or shaken by mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

BIPIN BEHARI DAS *v.* ATUL KRISHNA DAS.

It can be repelled only by conclusive evidence, and can not be displaced merely because direct evidence of the marriage which took place many years ago is not satisfactory.

Piers v. *Piers*, 2 H.L.C. 331; 13 Jur. 569, 81 R.R. 180; *Morris* v. *Davies*, 5 Cl. & F. 163, at p. 265; 1 Jur. 911; 3 Russ. 318, 8 L. J. Ch. 120, 47 R.R. 50; *Imambandi* v. *Matasuddi*, 13 Ind. Cas. 678; 15 C. L. J. 621; *Mouji Lal* v. *Chandrabati Kumari*, 11 Ind. Cas. 502; 38 C. 701; 14 C. L. J. 72; 15 C. W. N. 790; (1911) 2 M. W. N. 391; 13 Bom. L. R. 534; 10 M. L. T. 53; 21 M. L. J. 933, relied upon.

The mother of the plaintiff and the father of the defendants lived as husband and wife for a long series of years. The defendants treated the plaintiff as their legitimate brother. The plaintiff's mother described herself in a document executed by her as the wife of the defendants' father who was a witness to the document:

Held, that the presumption of law was that the plaintiff's mother and the defendants' father were married lawfully, and the presumption was not repelled though the evidence of marriage which took place long ago was not satisfactory.

Appeal from the decree of the District Judge of the 24-Pergannahs, dated December 7th, 1909, reversing that of the First Munsif of Sealdah, dated September 8th, 1909.

Babus *Boidya Nath Dutt* and *Tarini Das Banerjee*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Sarat Chandra Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for declaration of title to, for recovery of possession and for partition of, property claimed by him as the property of his father inherited equally by himself along with his brothers, the two defendants. The defendants denied that the plaintiff was the legitimate son of their father. The cardinal point in the case, therefore, was, whether or not the legitimacy of the plaintiff had been established. Upon this question, the Courts below have arrived at divergent decisions. The primary Court came to the conclusion that the legitimacy of the plaintiff was established while the learned District Judge was of opinion it had not been proved to his satisfaction.

On behalf of the plaintiff, it has been contended before us that the decision of the District Judge is open to attack inasmuch as he has not considered the question from the right point of view and has overlooked well-established principles of law applicable to cases of this description.

It may be conceded that at first sight the decision of the District Judge does appear to be unassailable in second appeal, as contended on behalf of the respondent. But upon a close examination, it appears that there is considerable force in the argument for the appellant. The Court of first instance in dealing with the question referred not merely to the direct evidence of marriage but also to circumstances from which the legitimacy of the plaintiff might be inferred. The Munsif referred to the fact that according to the evidence on the side of the defendants themselves, their father and the mother of the plaintiff lived as husband and wife for a long series of years. He also relied on the fact that the defendants had treated the plaintiff as their legitimate brother, that the first defendant in particular, on the occasion of the marriage of the plaintiff in an admittedly Bairagi family, had acted as *bara-karta*, and that the marriage feast had taken place in his house. The first Court also laid stress on the fact that so far back as the 20th February 1893, the mother of the plaintiff asserted in a mortgage deed executed by her that she was the wife of the father of the defendants and the alleged husband attested the deed and identified her before the Registering Officer. This, in the opinion of the Court, involved an admission by the father of the defendants that the mother of the plaintiff was his wife; at any rate, it implied an acquiescence in her assertion that she was his wife. In view of all these circumstances, the Court came to the conclusion that the plaintiff was legitimate. The learned District Judge has taken the contrary view. He has not attached any weight to the circumstance that the father of the defendants and the mother of the plaintiff lived as husband and wife for many years. But, as was pointed out by their Lordships of the Judicial Committee in *Sastry* v. *Sembecutty* (1), the law is jealous for the honour and reputation of the home and the family and it presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously. This presumption is made both for their own sake and for the sake of their children. It was further pointed out by the House of Lords, in the case of *Piers* v. *Piers* (2), that this presumption of law was not lightly to be repelled. It was not to be broken in or shaken by mere balance of probability. The

(1) 6 A. C. 364; 50 L. J. P. C. 28; 44 L. T. 895.
(2) (1849) 2 H. L. C. 331; 13 Jur. 569, 81 R. R. 180.

ovidence for the purpose of repelling it, must be strong, distinct, satisfactory and conclusive. In our opinion, the judgment of the District Judge is open to successful attack on the ground that he has rested his conclusion upon a mere balance of probabilities. It is proved conclusively that the mother of the plaintiff and the father of the defendants lived as husband and wife for many years. And the plaintiff himself has been always recognised as their legitimate child. The presumption of law is that the parties were lawfully married and that presumption can be repelled only by "conclusive evidence", to use the language of Lord Lyndhurst in *Morris* v. *Davies* (3). The presumption is not displaced merely because the direct evidence of marriage which took place many years ago is not satisfactory. [*Imambandi* v. *Matasuddi* (4), *Mouji Lal* v. *Chandrabati Kumari* (5)].

The result is that this appeal must be allowed, the decree of the District Judge set aside and the case remanded to him in order that he may consider the case from the point of view explained in this judgment. The costs of this appeal will abide the result.

Appeal allowed.

(3) (1837) 5 Cl. and Fin. 163 at p. 265; 1 Jur. 911; 3 Russ. 318; 8 L. J. Ch. 120; 47 R. R. 50.

(4) 13 Ind. Cas. 678; 15 C. L. J. 621.

(5) 38 C. 701; 11 Ind. Cas. 502; 14 C. L. J. 72; 15 C. W. N. 790; (1911) 2 M. W. N. 391; 13 Bom. L. R. 534; 10 M. L. T. 53; 21 M. L. J. 933.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2071 OF 1910.

April 26, 1912.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

VELUCHOORI PARASANNA AND OTHERS —APPELLANTS

versus

VELUCHURI SOMU NAIDU— RESPONDENT.

Joint tenants—Relinquishment by one tenant of his share to landlord—Whether extinguishes the tenancy.

Where one of two joint tenants relinquishes his share in the demised property to the landlord, the latter is entitled to possession of the share of the releasor, the relinquishment being operative at least as to a moiety of the lands.

Quære:—Whether the relinquishment of one puts an end to the tenancy of both tenants?

Sri Rajah Simhadri Appa Rao v. *Prattipati Ramayya*, 29 M. 29 and *Mohima Chunder Sein* v. *Pitambar Shaha*, 9 W. R. 147, referred to.

Second appeal against the decree of the Temporary Subordinate Judge of Vizagapatam, in A. S. No. 202 of 1909, presented against the decree of the District Munsif of Yellamanchili, in O. S. No. 191 of 1908.

Mr. *K. V. L. Narasimham*, and *V. Ramesam*, for the Appellants.

Mr. *S. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—The 2nd defendant and one Achaya were joint tenants of the plaintiff of certain lands. Achaya executed a document by which he purported to relinquish the lands in question to the plaintiff. The plaintiff sued to recover possession of the lands. The Munsif held that the relinquishment did not bind the 2nd defendant and dismissed the suit.

The Subordinate Judge held that the relinquishment was effective as regards Achaya's interest and gave the plaintiff a decree for a moiety of the lands. The plaintiff has not appealed, and consequently we have not to consider the question, whether the effect of the relinquishment by Achaya puts an end to the tenancy of both joint tenants. See *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya* (1). The appellant asks us to restore the decree of the Munsif and dismiss the suit altogether, and referred us to *Mohima Chunder Sein* v. *Pitambar Shaha* (2). We are not prepared to do this. It seems to us that, assuming the 2nd defendant can say that the relation of landlord and tenant continued between him and the plaintiff after the relinquishment by Achaya, the 2nd defendant's interest in the demised premises did not extend to more than a moiety. This second appeal is dismissed with costs.

Appeal dismissed.

(1) 29 M. 29.

(2) 9 W. R. 147.

RAJENDRA NARAIN SAHA *v.* SATISH CHANDRA PAL.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2323 OF 1910.
June 19, 1912.
Present:—Mr. Justice Carnduff and
Mr. Justice Chapman.
RAJENDRA NARAIN SAHA—DEFENDANT—APPELLANT
versus
SATISH CHANDRA PAL—PLAINTIFF—RESPONDENT.

Partition—Occupancy-holding—Suit for partition of occupancy-holding, if maintainable—Landlord, whether bound.

Any property held for the time being jointly can be partitioned between joint holders. Therefore, a suit for the partition of an occupancy-holding is maintainable.

But the division, unless made with the landlord's permission, would not be binding on him.

Appeal from the decree of the Sub-Judge of Pabna and Bogra, dated May 4th, 1910, confirming that of the Munsif of Pabna, dated August 14th, 1909.

Babu *Shib Chandra Palit*, for the Appellant.

Babu *Brojo Lal Chakravarti*, for the Respondent.

JUDGMENT.—The appellant in this second appeal is admittedly the sole proprietor of the land in suit. The respondent and his brother Abhoy jointly held the land under him as occupancy-*ryots*. Abhoy's half share was transferred to the appellant, who, according to the respondent, thereupon proceeded to interfere with the latter's peaceful enjoyment of the property. The respondent, therefore, brought this suit against his landlord for a partition of the occupancy-holding. Both the Courts below have concurred in decreeing the suit, and the landlord has presented this second appeal.

In support of the appeal, it has been contended, in the first place, that only permanent rights in property can be partitioned, and that, as an occupancy right is not a permanent right, there can be no suit for the partition of an occupancy-holding.

As regards this, we are unaware of any authority in support of the proposition. So far as we know, any property held for the time being jointly can be partitioned between joint holders. It seems quite clear, for instance, that one of two joint lessees under a lease for a term of years might sue for a partition of the lease-hold property during the continuance of the lease. If it were not so, the position might become, as seems to be the case here, absolutely intolerable. Before the transfer of half of the joint holding in suit, the respondent might certainly have sued his brother for a partition of the holding, and his right to obtain a partition now is distinctly saved by the provisions of section 22 of the Bengal Tenancy Act of 1885. We are of opinion, therefore, that there is no bar whatever on this ground to the relief sought for by the respondent.

We may add, of course, that in the case of a partition of a holding, the division, unless made with the landlord's permission, would not be binding on him and his position would be unaffected.

The next contention is that, as it has recently been held in *Agarjan Bibi* v. *Panaullah* (1) that the right of occupancy is a purely personal right and cannot be transferred, a suit for the partition of such a right is not maintainable.

Now, the decision referred to raises a question of considerable difficulty, and it is understood that it is likely to form the subject of a reference to a Full Bench, if, indeed, the reference has not already been made. It is suggested that we should await the result of such a reference; but we think it hardly necessary to do so. What the respondent has sought in this case is simply a division of the land in suit in order that he may be able to enjoy his share of it peacefully and without disturbance. We cannot, as we have already indicated, conceive that there is any legal objection to his being so relieved.

Two other points have been taken by the learned Vakil for the appellant, namely, that the lower Appellate Court has omitted to deal with the question of limitation, which was decided by the Court of first instance, and has similarly ignored a question as to the determination of the occupancy-right claimed.

It appears, however, that these points were not pressed before the lower Appellate Court; for the learned Subordinate Judge begins his judgment by remarking that "the points urged and requiring decision are whether the plaintiff has got a right to claim partition and whether he can obtain it". If the learned Subordinate Judge was inaccurate in making this statement, we think he ought to

(1) 6 Ind. Cas. 452; 12 C. L. J. 169; 14 C. W. N. 779; 37 C. 687.

have been corrected by an application for review. We must take it here and now that these were the only points urged before him.

The result is that this appeal must be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2121, 3092 AND 3093 OF 1910.

June 13, 1912.

Present:—Mr. Justice Coxe and Mr. Justice N. Chatterjea.

AKBAR ALI MIAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat HIRA BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 52, 109A—Decision fixing area of holding, whether decision settling rent—Appeal, bar of—Additional rent for additional area, when landlord is entitled to.

A decision fixing the area for which the tenant must pay rent, is not a decision settling a rent from which an appeal is barred by section 109A of the Bengal Tenancy Act.

Mathura Mohun Lahiri v. *Uma Sundari Debi*, 25 C. 34; *Raj Kumar Pratap Sahay* v. *Ram Lal Singh*, 5 C. L.J. 538 and *Pirthi Chand Lal Chawdhuri* v. *Sheikh Bhasarat Ali*, 3 Ind. Cas. 449; 13 C. W. N. 1149; 10 C. L. J. 343; 37 C. 30, relied upon.

Rameswar Singh v. *Bhooneswar Jha*, 4 C. L. J. 138; 33 C. 837, not followed.

If the landlord originally intended to let and the tenant intended to take such and such a piece of land, be the number of *bighas* in it what they may, the fact that the area proves to be larger than what was originally stated would not entitle the landlord to additional rent. If, however, he intended to let and the tenant intended to take so many *bighas*, be the actual piece of land what it may, the landlord would be entitled to additional rent when the tenant was proved to hold more *bighas* than were originally let to him.

Gouri Pattra v. *Reily*, 20 C. 579; *Rajendra Lal Goswami* v. *Chandra Bhusan Goswami*, 6 C. W. N. 318; *Ratan Lal Biswas* v. *Jadu Halsana*, 10 C. W. N. 46 and *Raj Kumar Pratap Sahay* v. *Ram Lal Singh*, 5 C. L. J. 538, relied upon.

Appeal from the decree of the Special Judge of Bhagalpore, dated April 2nd, 1910, modifying that of the Assistant Settlement Officer at Camp Khaira, dated September 20th, 1909.

Babu *Upendra Nath Chatterjee*, for the Appellant.

Babu *Chandra Sekhar Prasad Singh*, for the Respondents.

JUDGMENT.

COXE, J.—These appeals arise out of proceedings under section 105 of the Bengal Tenancy Act and the only points that arise for decision are, *firstly*, whether an appeal lies and *secondly*, whether under the circumstances of this case, the landlords-respondents are entitled to additional rent under section 52 of the Act.

The facts found appear to be as follows:—The land was measured by the landlords in 1301 but the measurement was very badly done with the somewhat unusual result that the area put down as in the occupation of each tenant was far below the real area of his holding. The rates of rent were the same then as now but, as the area was understated, the rent also was understated. Now that the land has been properly measured, the landlords claim that they are entitled to rent at the same rates on what has been found to be the real area. This view has been accepted by the Special Judge and the tenants appeal.

As to the preliminary objection that no appeal lies, I think that it is now sufficiently well settled that a decision fixing the area for which the tenant must pay rent is not a decision settling a rent from which an appeal is barred by section 109 A of the Act. This was clearly held in the case of *Mathura Mohun Lahiri* v. *Umasundari Debi* (1) under the Act before its amendment and this decision was followed after the amendment of the Act in *Raj Kumar Pratap Sahay* v. *Ram Lal Singh* (2). The opposite view was taken in *Rameswar Singh* v. *Bhooneswar Jha* (3), in which no reference was made to *Mathura Mohan Lahiri* v. *Umasundari Debi* (1). But in the Full Bench of *Pirthi Chand Lal Chowdhuri* v. *Shiekh Basarat Ali* (4), both that case and *Raj Kumar Pratap Sahay* v. *Ram Lal Singh* (2) were cited apparently with approval and I think, therefore, that the balance of authority must be regarded as in favour of the view taken in those cases and against that taken in *Rameswar Singh* v. *Bhooneswar Jha* (3).

(1) 25 C. 34.
(2) 5 C. L. J. 538.
(3) 4 C. L. J. 138, 33 C. 837.
(4) 3 Ind. Cas. 449, 13 C. W. N. 1149, 10 C. L. J. 343, 37 C. 30.

As to the second question, I think that the current of decisions is in favour of the view taken by the learned Special Judge. The question turns on the proper meaning to be attached to the words "the area for which rent has been previously paid" in section 52 of the Act. In *Gouri Pattra* v. *Reily* (5), it was held that in claiming additional rent under section 52, a landlord would have to show that the lands held by the tenants "were in excess of the lands originally let to them in consequence of some encroachment or some alluvial increment, or that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure, it has been found that he is entitled to receive additional rent which by carelessness, or neglect or some other reason he had hitherto lost." In *Rajendra Lal Goswami* v. *Chundra Bhuson Goswami* (6), it was held that the landlord has to show what the area of the tenure was when first created and that the rent originally fixed was not intended to cover the excess area. The words "the area for which rent has been previously paid" was construed as meaning "the area with reference to which the rent previously paid had been assessed or adjusted." These two decisions were followed in *Ratan Lall Biswas* v. *Jadu Halsana* (7) and in *Raj Kumar Pratap Sahay* v. *Ram Lall Singh* (2) already cited where the learned Judges say: "If it is established that the original letting was not with reference to area at all, but was a letting at a consolidated rent for lands within specified boundaries, no additional rent can be claimed, unless it is shown that the tenant is in occupation of land situated outside the boundaries prescribed. If, however, it is proved that the original rent was settled with reference to the quantity of land let out, in order to entitle the landlord to claim additional rent, he must, in the first place, prove what the original area was.....If it is found that the tenant is in occupation of a larger area according to the same measurement, the tenant would be bound to pay additional rent in respect of the excess area in his possession."

(5) 20 C. 579.
(6) 6 C. W. N. 318.
(7) 10 C. W. N. 46.

It appears to me that the whole question is one of the intention of the parties applicable to the tenancy before the final measurement. If the landlord originally intended to let and the tenant intended to take such and such a piece of land or such and such holding, be the number of *bighas* in it what they may, the fact that the area proves to be larger than what was originally stated would not entitle the landlord to additional rent. If, however, he intended to let and the tenant intended to take so many *bighas*, be the actual piece of land what it may, the landlord would be entitled to additional rent when the tenant was proved to hold more *bighas* than were originally let to him. No doubt, when a piece of land with definite boundaries is leased, there is plenty of authority for holding that the description of the boundaries will prevail over the statement of the area, and the landlord would in all cases have the burden of proving that the settlement was with reference to area alone. But in the present case where the learned Special Judge holds as a fact, which we cannot question in second appeal, that the former rents were adjusted according to measurement, the landlord is, in my opinion, entitled to additional rent.

The cross-appeal relates to an allowance made by the Special Judge for the inaccuracy of the former measurement. I do not quite understand how this portion of the learned Special Judge's judgment is consistent with the rest, but it relates not to the area for which rent is to be paid, but to the rent that ought to be assessed upon it. From this part of the decision, therefore, I think that no appeal lies.

The appeals and the cross-appeals are dismissed. The cross-appeals being of little importance, the respondents will be entitled to their costs.

N. CHATTERJEA, J.—I agree.

Appeals dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 950 OF 1912.

May 20, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Richardson.

TASSADUK HOSSAIN KHAN AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

ABTAB HOSSAIN KHAN AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Vendor and purchaser—Condition that if any one lays claim and dispossess purchaser, purchase-money would be refunded—Attachment of property by third party in execution of decree against vendor—Claim by purchaser--Dismissal of claim—Suit for purchase-money—Cause of action.

In a sale-deed there was a condition that if in future any one would lay claim to the property and dispossess the purchaser, then the vendor would refund the purchase-money with interest. A third party attached the property in execution of a money-decree obtained against the vendor. Thereupon, the purchaser laid a claim which was dismissed. He did not bring a suit to establish his title but brought this suit against the vendor to recover the purchase-money under the proviso in the sale-deed.

Held, that the condition provided for in the deed did not arise and the suit should be dismissed.

Rule against the decree of the Sub-Judge of Rangpur, exercising the powers of a Court of Small Causes, dated November 25th, 1911.

Babu *Akhil Bandhu Guha* for Babu *Krishna Kamal Mitra*, for the Petitioners.

Babu *Probodh Kumar Das*, for the Opposite Party.

JUDGMENT.—This was a Rule calling on the opposite party to show cause why the judgment and decree of the Small Cause Court of Rangpore should not be set aside.

The plaintiff in that Court purchased a certain property from the defendant for a sum of Rs. 400. He purchased it on conditions, one of which was that if the vendor could not let the purchaser into possession of the property sold, or if in future any one would lay claim to the property and dispossess the purchaser of it, then the vendor would refund the purchase-money with interest. Whether the purchaser did or did not get into possession of the property is not certain as far as the findings in this case go. But what did happen is that a third party attached the property in execution of a money-decree obtained against the vendor. Thereupon the purchaser laid a claim which was eventually dismissed. He did not avail himself of his remedy under the law to bring a suit to establish his title to the property in question; but brought this suit in order to recover Rs. 400 under the proviso in his agreement. The lower Court, in the first place, expressed a doubt as to whether there was any consideration for the original sale. In the second place, it has been held that the condition provided for in the purchase-deed did not arise. In this, it seems to us, he was correct. The property was attached, but it does not follow that the purchaser was thereby dispossessed.

The result is that the judgment of the lower Court appears to us to be correct and this Rule is discharged with costs. We assess the hearing fee at two gold *mohurs*.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2123 OF 1910.

April 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

TITALI VENKATA SEETHARAMAYA—APPELLANT

versus

VEDVLA VENKATARAMAYA AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 85, 91—Attachment of mortgaged property by holder of a money-decree—Suit on mortgage—Decree—Attaching creditor not made party, effect of.

Where mortgaged property was attached by a person holding only a money-decree, and after attachment the mortgagee brought a suit on his mortgage and obtained a decree for sale, without impleading the attaching creditor as a party:

Held, that the order for sale obtained by the mortgagee was not binding on the attaching creditor, who was entitled to bring the property to sale under his attachment.

Ghulam Husain v. *Dina Nath*, 23 A. 467, referred to and explained.

Second appeal against the decree of the Suborinate Judge of Ellore, in A. S. No. 384 of 1909, presented against the decree of the Principal District Munsif of Tanuku, in O. S. No. 259 of 1908.

Mr. *P. Narayanamurti*, for the Appellants.

Mr. *P. Nagabhushanam*, for the Respondents.

JUDGMENT.—In this case, the plaintiff is a person holding a mortgage from the 3rd defendant over some property belonging to him; the 1st and 2nd defendants obtained a

money-decree against the 3rd defendant and attached the mortgaged property. After the attachment, the plaintiff instituted a suit for sale on his mortgage, but impleaded only the 3rd defendant as a party and obtained a decree for sale. The defendants Nos. 1 and 2 then made an application to bring the property to sale in pursuance of their attachment. The plaintiff then put in a claim petition stating that the 3rd defendant had no longer any saleable interest in the property as he had brought it to sale in pursuance of his mortgage decree. The claim was disallowed and he instituted the present suit for a declaration that the 1st and 2nd defendants are no longer entitled to bring the property to sale. An attaching creditor is one of the class of persons that are entitled to redeem a mortgage under section 91 of the Transfer of Property Act. A private alienation by the mortgagor after attachment would admittedly be invalid as against an attaching creditor's claims to bring the property to sale in pursuance of his attachment. Section 85 of the Transfer of Property Act requires all parties interested in the property to be made parties to a suit for sale. Section 91 recognises an attaching creditor as one who, by virtue of his interest in the property, is entitled to redeem the mortgage. There can be no doubt that the plaintiff ought to have made the attaching creditors, defendants Nos. 1 and 2, parties to his suit for sale, and, as he failed to do so, the sale is not binding on them, and they are entitled to bring the properties to sale under their attachment. The decision in *Ghulam Husain* v. *Dina Nath* (1) is in accordance with this view. The fact that there was an order for sale in that case made no difference in the rights of the attaching creditor. A mere order for sale does not increase the interest in the property which the attaching creditor has by virtue of his attachment.

The second appeal must be dismissed with costs.

Appeal dismissed.

(1) 23 A. 467.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1309 OF 1911.

June 14, 1912.

Present:—Mr. Justice Piggott.

H. B. KINLOCK—DEFENDANT—APPELLANT

versus

TOTA RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Property mortgaged different from property described—Transferee of mortgaged property not bound by the mortgage—Priority.

In 1876, one *B.* purported to hypothecate four plots of land situated in *mouza* Nagala Salendi. As a matter of fact, the name of Nagala Salendi was inserted in the mortgage-deed by mistake, the property was situated in *mouza* Arazi Zabti. The heirs of *B.* sold their proprietary right in *mouza* Arazi Zabti to one *K.* in 1910 free of all charges. In a suit brought on the basis of the mortgage of 1876, *held*, that *K.* was not bound by that mortgage.

Baij Nath Tewari v. *Sheo Sahoy Bhagut*, 18 C. 556, *Narasamma* v. *Subbarayadu*, 18 M. 364, *Joginee Mohan Chateerji* v. *Bhoot Nath Ghoshal*, 29 C. 654, referred to.

Second appeal from the decision of the District Judge of Mainpuri, dated the 13th of July 1911.

Mr. *Hamilton*, for the Appellant.

Mr. *J. N. Mukerji*, for the Respondents.

JUDGMENT.—The plaintiff in this case sued upon a registered mortgage-deed for Rs. 25, dated the 25th of July 1876, by which Bhoop Singh purported to hypothecate four plots of land, the areas of which are specified, situated in *mauza* Nagla Salendi. It has been found by the lower Appellate Court, and I am bound by that finding, that the name of *mauza* Nagala Salendi was inserted in the mortgage-deed by mistake and that the parties intended to mortgage four plots of land of corresponding areas and bearing the fields numbers specified, but situated in *mauza* Arazi Zabti. The heirs of Bhoop Singh sold their proprietary rights in *mauza* Arazi Zabti, or at any rate a share in the proprietary rights including the said rights in the plots to which this mortgage relates, to the defendant-appellant, Mr. H. B. Kinlock, under a registered deed of sale, dated the 16th of February 1910. The plaintiff came into Court without producing the original mortgage-deed, and the explanation offered in paragraph 4 of the plaint is not in itself an explanation sufficient, if believed, to entitle the plaintiff to produce secondary evidence. What the plaintiff said was that the mortgage contract was entered into by his uncle Khaman

Singh as the plaintiff's guardian, during the minority of the latter, and, therefore, the plaintiff says he has not got the mortgage-deed. This is mere trifling of the Court. The plaintiff does not say whether Khaman Singh is alive or dead, and whether he has made any attempt to obtain this title-deed from Khaman Singh or his heirs. At a time when the Courts were being flooded with more or less doubtful claims, on the basis of nasty old deeds hunted up by reason of section 31 of Act IX of 1903, I think it a little surprising that a claim like the present should have been permitted, apparently as a matter of course, to be brought upon a copy obtained from the Registration Department, without the plaintiff being required to offer, much less to prove, any adequate explanation of his inability to produce the original. In any case, I hold that Mr. Kinlock is not bound by this mortgage-deed. The land in question was conveyed to him by his vendors under a registered deed as free from all charges. The deed in suit did not contain a description of the property actually mortgaged sufficient to indentify the same. On the contrary, it contained a misleading description which did actually mislead Mr. Kinlock. There is authority for the proposition that the registration of such a document is a nullity, *vide*, *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (1) and *Narasamma* v. *Subbarayudu* (2), while the later Calcutta case of *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal* (3) would be authority for the proposition that in any case the deed thus registered could not take effect as a mortgage-bond. It has been pressed upon me in argument that this mortgage-deed for Rs. 25 was not, under the law in force at the time, one the registration of which was compulsory. If it could be treated as an unregistered document, the question would arise whether it can take effect against Mr. Kinlock's deed of sale. I have no desire, however, to decide this question upon any technicality. The result of the decree of the lower Appellate Court is simply to make Mr. Kinlock the victim of a fraud perpetrated by the heirs of Bhoop Singh, and facilitated by the blunder committed when the property mortgaged was wrongly described in the deed in suit. If any person is to suffer under such circumstances, it is not the innocent purchaser. The plaintiff, even if innocent of fraud, is responsible for the blunder which made the fraud possible. I accept this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance dismissing the suit. The defendant-appellant will get his costs throughout.

Appeal accepted.

(1) 18 C. 556.
(2) 18 M. 364.
(3) 29 C. 654.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 711 OF 1911.
June 14, 1912.
Present:—Sir Henry Richards, KT., K. C., Chief Justice and Mr. Justice Tudball.
SHEO PARTAB SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
BRIJ KISHORE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 85—Mutual open and current account.

There was a contract between plaintiffs and defendants that the former should purchase grain for the latter and store it in their godown, that the defendants should pay interest on the outlay, make a deposit to cover losses and that the defendants should be entitled to any profits that were made upon the re-sale of the grain by the plaintiffs:

Held, that the transaction was a mutual open and current account and the limitation began to run at the close of the year in which the last item was entered in the account.

Second appeal from the decision of the District Judge of Mainpuri, dated the 25th of April 1911.

Dr. *Tej Bahadur Sapru*, for the Appellants.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Gokul Prashad*), for the Respondents

JUDGMENT.—This appeal arises out of a suit to recover money. The plaintiffs allege that there was a contract between themselves and the defendants that the plaintiffs should purchase grain for the defendants and store it in their godown, that the defendants should pay interest on the outlay, make a deposit to cover losses and that the defendants should be entitled to any profits that were

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made upon the re-sale of the grain by the plaintiffs. The transactions between the parties commenced in the year 1902 and the last transaction was a sale on the 4th of February 1906, when there was a balance against the defendants. The suit was instituted on the 8th of February 1909. The only question argued in the appeal is whether or not the suit is barred by limitation.

The defendants contend that Article 61 applies and the suit was barred after three years from the time that the plaintiffs made the last purchase on their behalf. The plaintiffs, on the other hand, contend that Article 120 applies and that they have six years from the settlement of the accounts.

Having regard to the findings of the lower Appellate Court as to the terms of the contract between the parties, we are clearly of opinion that Article 61 does not apply. It is quite clear that the plaintiffs could not have sued the defendants until after they had re sold the grain. It seems to us that Article 85 is the Article applicable to the present case. There was an account between the parties extending over a number of years. The plaintiffs were always liable to account to the defendants for any profits that were made in the purchase and re-sale of grain and they were also liable to account for the deposit. On the other hand, the defendants were liable to the plaintiffs to pay interest on any moneys advanced by the plaintiffs and to make good any loss which might take place which was not covered by the deposit. There was, therefore, a mutual, open and current account and there was reciprocal demand between the parties. According to Article 85 of the Limitation Act, limitation begins at the close of the year in which the last item admitted or proved is entered in the account. The last item was on the 4th of February 1906; therefore, whatever year was taken the suit was well within time. Of course, if Article 85 does not apply and no other Article is applicable to the case, then the plaintiffs are entitled to fall back upon Article 120 in which case they would have six years The appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 130 OF 1912.

June 10, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

ALI HUSAIN—APPELLANT

versus

AMIN ULLAH—RESPONDENT.

Pre-emption—Deposit of decretal amount — Costs taken out of the amount deposited, effect of.

In a pre-emption suit, *A.* got a decree and was ordered by the Court of first instance to pay Rs. 6,800. He deposited this sum but subsequently attached Rs. 314 on account of his costs in the suit which had been awarded by the first Court. On appeal to the High Court, he was ordered to pay Rs. 10,000 and hence he deposited another sum of Rs. 3,200:

Held, that this was a proper deposit in spite of the fact that he had taken out Rs. 314 towards costs.

Execution first appeal from the decision of the Subordinate Judge of Cawnpore, dated 18th September 1911.

Dr. *Tej Bahadur Sapru*, for the Appellant.

The Hon'ble Dr. *Sunder Lal*, for the Respondent.

JUDGMENT.—The pre-emptor succeeded in his suit for pre-emption. The first Court ordered him to deposit Rs. 6,800. He carried out the order of the Court. Subsequently, in execution of his own decree for costs he attached and got a sum of Rs. 314-8 out of the sum deposited by him. There was an appeal in the pre emption suit to this Court, and this Court modified the decree of the first Court by ordering the pre emptor to pay a sum of Rs. 10,000 instead of Rs. 6,800. He deposited, in compliance with the order of this Court, an extra sum of Rs. 3,200. This deposit was made in time. The judgment-debtor took objection to this deposit on the ground that it was not a compliance with the order of the High Court inasmuch as the decree-holder has taken out the sum of Rs. 314-8 out of the sum previously deposited by him. The Court below disallowed the objection. Hence this appeal. There is a series of decisions of this Court. See *Ishri* v. *Gopal Saran* (1), *Balmukand* v. *Pancham* (2), *Permanand Raot* v. *Gobardhan Sahai* (3) and *Bechai Singh* v. *Shaminath* (4). In all these cases,

(1) 6 A. 351.
(2) 10 A. 400.
(3) 28 A. 676; 3 A. L. J. 804; A. W. N. (1906) 198.
(4) 8 A. L. J. 27 *note*; 10 Ind. Cas. 454.

it has been ruled that such a deposit as was made by the pre-emptor in this case was a complete compliance with the order of the Court. Mr. Justice Tyrrell in *Parmanand Raot* v. *Gobardhan Sahai* (3), no doubt, took a different view. But we are bound to follow the other rulings of this Court with which we ourselves agree. The appeal fails and is dismissed with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1234 OF 1911.
June 6, 1912.
Present:—Mr. Justice Banerji.
ANROOP MISIR—DEFENDANT—APPELLANT
versus
KEDAR PANDE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Trees planted in zemindar's *land with permission—Non-payment of rent—No denial of title—*Zemindar's *title not extinguished.*

Defendants planted trees in the plaintiff's land with his permission. They, however, paid no rent or customary dues to the plaintiff for a very long time. Non-payment was not coupled with denial of title of the plaintiff:

Held, that non payment of rent was not sufficient to extinguish the plaintiff's right as *zemindar*.

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated 3rd July 1911.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

The Hon'ble Nawab *Abdul Majid*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by two plaintiffs, Kedar Pandey and Shimbu Pandey, for a declaration that the trees standing on plots Nos. 446 and 573 were in the possession of the defendant subject to the proprietary rights of the plaintiffs, that the defendant was liable to deliver to the plaintiffs half of the produce as *zemindari* due and that the defendant had no proprietary right in the trees, that he had only the right of a person who had planted them, and that the plaintiffs were entitled to receive half of the fruit and timber from the defendant. Trees standing on a third plot were also included in the claim but so far as those trees are concerned, the claim was withdrawn in the Court of first instance.

It appears that the parties or their predecessors-in-title were co-sharers in the village in which the trees exist. A partition took place between them in the year 1857 under which two *mahals* were formed, one of 14 annas and the other of 2 annas. The plaintiffs are proprietors of the 14 annas *mahal* and the defendant owns a share in the 2-annas *mahal*. The two plots in question appertain to the plaintiffs' 14-annas *mahal*.

It has been found by the Court below that the trees were planted by the defendant's father 24 or 25 years ago. The defendant contends that he is the owner of the trees, that he never delivered any share of the produce of the trees to the plaintiffs and that the claim of the plaintiffs was time-barred. The lower Appellate Court holds that it must be presumed that the trees were planted by the defendant or his predecessor with the permission of the *zemindar* of the 14-annas *mahal*, and that they were planted subject to the customary right of the *zemindars* to receive one-half of the produce. This right is recognized in the *wajib-ul arz* of the village. The Court was further of opinion that mere non-payment of rent or non-delivery of dues for a number of years unless coupled with a denial of the plaintiffs' right could not extinguish such right, and that the claim was not time-barred. It accordingly made a decree declaring that the plaintiffs are the *zemindars* of the trees and entitled to receive from the defendants a half share of the produce.

The defendant has preferred this appeal and the first contention urged on his behalf by his learned Counsel is that the matter is *res judicata* in consequence of a decision of the Revenue Court passed on the 27th of March 1907. As to this it appears that a suit was brought by the plaintiffs against the defendant in the Revenue Court to recover the plaintiffs' share of the produce of the trees for certain years. In that case the Revenue Court held that the plaintiffs were not entitled to the amount claimed inasmuch as the defendant also was a *zemindar* and not a tenant. In that suit, there was no question of proprietary title to the land and no decision was given by the Revenue Court in respect of such title. There-

fore, the decision relied on cannot operate as *res judicata*.

In view of the finding of the Court below that the trees in question were planted after the partition of 1857, it must be presumed that they were so planted by the defendant not as proprietor (because the defendant was not a proprietor in the 14 annas *mahal*) but as a person who did so with the leave and license of the *zemindar*. Therefore, under the terms of the *wajib ul-arz*, the defendant is liable to deliver to the plaintiffs the customary dues of the *zemindars*, namely, one-half of the produce. The Court below has rightly held that mere non-payment or non-delivery of such dues is not sufficient to extinguish the title of the *zemindar*. It has been found that this non-payment was not coupled with a denial of right and that the plaintiffs' right was not denied until the institution of the suit in which the decision of the Revenue Court referred to above was passed. The decree of the Court below is, therefore, right.

Lastly, it is contended on behalf of the appellant that Shimbhu Pandey, one of the plaintiffs to the suit, had died before the decision of the appeal by the lower Appellate Court, and that that Court ought to have declared the appeal before it to have abated so far as Shimbhu Pandey was concerned. It does not appear that it was ever brought to the notice of the Court below that Shimbhu Pandey was dead. The representatives of Shimbhu Pandey have not been made parties to this appeal under Chapter II, rule 3 of the rules of this Court, in fact Shimbhu Pandey himself who was at the time dead was described in the memorandum of appeal as a respondent. In the absence of the legal representatives of Shimbhu Pandey, it cannot be held in this appeal that he died before the decision of the appeal. It may be that he died between the date of the hearing of the appeal and that of the delivery of judgment. In that case, under Order XXII, rule 6, there would be no abatement of the appeal. It is too late, therefore, for the appellant to contend that the appeal in the Court below abated.

The result is that I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 2 OF 1912.

June 12, 1912.

Present:—Mr. Justice Banerji.

BHAIA SHEORAJ SINGH—PLAINTIFF—APPELLANT

versus

SAMPAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 110, 112, 233 (k)—Perfect partition—Mahal *formed in the name of a* benamidar—*No objection by real owner—Subsequent suit for declaration not barred.*

At a perfect partition, a *mahal* was formed in the name of a *benamidar*. No objection as to the title of the *benamidar* was taken at the time of partition by the real owner who also happened to be a co-sharer in the village:

Held, that a subsequent suit by the real owner, after the completion of the partition, for a declaration of his title was not barred by section 233 (*k*) of the U. P. Land Revenue Act, 1901.

Second appeal from the decision of the Additional Judge, Gorakhpur, dated 5th August 1911.

Mr. *Kalindi Proshad*, for the Appellant.

Mr. *Parmeshwor Dyal* for Mr. *Iswar Saran* (with him Mr. *Vishnu Ram Mehta* for Hon'ble Dr. *Sunder Lal*), for the Respondents.

JUDGMENT.—The plaintiff-appellant brought the suit out of which this appeal has arisen for a declaration of his title to a one-anna share of *zemindari* which under partition has now been declared to be a sixteen-anna *mahal* and a house. This property stood recorded in the names of *Musammat* Marjodi and Sri Govind Singh and the *mahal* was formed in the name of Sri Govind Singh. The plaintiff is one of the two grandsons of Raghubans Singh, who was one of the sons of Asman Singh. It is common ground that after the death of Asman Singh a partition took place, between his sons, of the four-annas share which belonged to him. The plaintiff states that he and his brother Ram Jewan Singh were joint with their father, that Ram Jewan Singh predeceased his father so that the whole property which belonged to the father passed to the plaintiff alone by right of survivorship, that he caused the name of *Musammat* Marjodi, the widow of Ram Jewan Singh, to be entered in the revenue papers, for her consolation that she had a daughter *Musammat* Sukhraji whose son was Sri Govind Singh, that Sri Govind Singh's name was entered nominally in respect of the property in

question, that the plaintiff was in fact in possession and that he was solely in possession. He states that *Musammat* Marjodi died some three years before the institution of the suit, that Sri Govind Singh was a born leper and was, therefore, not entitled to inherit, that she had no title in respect of the property and that he had no power to mortgage it to the second defendant as he did and that the mortgage is ineffectual as against the plaintiff. The plaintiff thus bases his claim on two grounds, *first*, that he was originally the owner of the property and, *secondly*, that even if Marjodi became the owner, upon her death, it could not pass to her daughter's son by reason of his being a born leper and that he is entitled to the property. In the alternative, the plaintiff claims a decree for possession. The Court of first instance decreed the claim finding on the merits that Ram Jewan Singh predeceased his father, that the property belonged to the plaintiff and that Marjodi's name was entered merely for consolation. Upon appeal, the learned Judge did not consider the case on its merits. He was of opinion that as a partition took place in 1894, under which the property in dispute was formed into a *mahal* in the name of Sri Govind Singh, the present suit was not maintainable. He does not state under what ground the suit is not maintainable but he apparently refers to the provisions of section 233, clause (k). In my judgment, having regard to the circumstances of this case, that clause has no application. The suit is not one with respect to the partition or union of *mahals*. The plaintiff has not questioned the correctness or validity of the partition. What he asserts is that he is the person who is the owner of the *mahal* which was formed under the partition and that the person in whose name the *mahal* was formed, *viz.*, Sri Govind Singh, was only *benamidar* for him. If the defendant's case is true that Ram Jewan survived his father and was separate from his brother, *Musammat* Marjodi, his widow, was the person entitled to his estate during her life-time. She died only three years ago. Therefore at the time of partition, she was the person entitled to the *mahal* which was formed by partition. Sri Govind Singh's name was clearly entered as a nominal transaction and as *benamidar* either for *Musammat* Marjodi or for the plaintiff. It is true that the plaintiff raised no objection at the time of partition but he alleges, as I have already said, that the person in whose name the *mahal* was formed was only a *benamidar*. The suit in no way affects the partition. It only raises the question whether the property which was partitioned (and according to the plaintiff was rightly partitioned) belongs to him or belongs to the defendants. The case, in my opinion, is not one to which section 111 of the Land Revenue Act could have applied and it is not barred under the provisions of section 233, clause (k) of Act III of 1901. The case, in my opinion, ought to have been tried on the merits. I accordingly allow the appeal, set aside the decree of the Court below and remand the case to that Court under Order XLI, rule 23 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and to dispose of it on the merits. Costs here and hitherto will follow the event.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 181 OF 1911.

April 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

PADALA KRISHNA RAO, MINOR, BY VENKATA RATNAMMA—APPELLANT

versus

PADALA KUMARAJAMMA, MINOR, BY T. APPALASAMI NAIDU—RESPONDENT.

Hindu Law—Inheritance—Illegitimate son born of one's concubine who was previously married to another—Right to inherit.

In order that an illegitimate son may be entitled to succeed his father, he must have been born of a woman who was never married to any one before she came under the keeping of the person whose son the claimant is.

Annayyan v. *Chinnan*, 33 M. 366; 5 Ind. Cas. 84; 7 M. L. T. 140; 20 M. L. J. 355, referred to.

Second appeal against the decree of the District Court of Ganjam, in A. S. No. 332 of 1909, presented against the decree of the District Munsif of Chicacole, in Original Suit No. 590 of 1908.

FAZLAR RAHIM *v.* NABENDRA KISHORE ROY.

Messrs. *H. Sitaramasawmi* and *H. Suryanarayana*, for the Appellant.

Mr. *K. Ramnath Shanai*, for the Respondent.

JUDGMENT.—The question raised for decision in this second appeal is, whether the plaintiff, who is the illegitimate son of one Ragavulu, born of a woman who had been previously married to another person when young and had been subsequently been in the keeping of Ragavulu after her husband's death, is entitled to inherit Ragavulu's property. The case of *Annayyan* v. *Chinnan* (1) is a direct authority against the contention of the appellant that he is entitled to inherit. It was laid down in that case that, in order that an illegitimate son may be entitled to inherit to his father, he must have been born of a woman who was never married to any one before she came under the keeping of the person whose son the claimant is. It is contended that Colebrook's Translation of the Text of Dayabhaga that the illegitimate son must be the son of an unmarried woman is not quite accurate, that the Sanskrit expression really means the son of a woman not married to the person whose son the claimant is and not "not married at all to any one", and a translation of Medathithi's Commentary on the Text of Manu laying down the rule and Gopal Chandra Sircar's Translation of the Dayabhaga Text are cited to us, the translation being "son of a woman not married to the person." No text-writer or commentator has been cited who says definitely that the fact of the previous marriage of a woman to some one else is no bar to her illegitimate son succeeding. One would have expected such a statement to be made at least by the later commentators if it was in accordance with the view entertained by them. We agree with the opinion expressed in *Annayyan* v. *Chinnan* (1) that in the absence of such a pronouncement by any authoritative Hindu writer, it is not desirable to extend the right of inheritance of illegitimate children born of a woman who had been already married to a person.

We dismiss the second appeal with costs.

Appeal dismissed.

(1) 33 M. 366; 5 Ind. Cas. 84; 7 M. L. T. 140; 20 M. L. J. 355.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1266 OF 1910.

June 14, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Chapman.

FAZLAR RAHIM—DEFENDANT—APPELLANT

versus

NABENDRA KISHORE ROY AND OTHERS

PLAINTIFFS—RESPONDENTS.

Thakbust *map—State of things at Permanent Settlement—Presumption—Evidence.*

An entry in a *thakbust* map cannot be said to be insufficient to entitle a Court of fact to hold that the disputed lands were really included in the estate at the time of the Permanent Settlement.

Moizuddi Biswas v. *Ishan Chandra Das Sarkar*, 7 Ind. Cas. 849; 13 C. L. J. 293; 15 C. W. N. 706, followed.

Mohesh Chunder Sen v. *Juggut Chunder Sen*, 5 C. 212, explained.

Abdul Hamid Mian v. *Kiran Chandra Roy*, 7 C. W. N. 849 and *Syama Sunderi Dassya* v. *Jogobundhu Sootar*, 16 C. 186, relied upon.

Appeal from the decree of the Sub-Judge of Noakhali, dated December 9th, 1909, modifying that of the Munsif of Feni, dated March 31st, 1909.

Babu *D. L. Kastgir*, for the Appellant.

Babus *Akshoy Kumar Banerji* and *Ramesh Chandra Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought for the recovery of possession of certain lands claimed by the plaintiffs as appertaining to a *mahal* purchased by them at sale under the Bengal Land Revenue Sales Act of 1859. The plaintiffs having made this purchase proceeded to issue notices for the annulment of encumbrances under section 37 of the said Act, and they were unsuccessful in obtaining possession of the land and had to institute the present suit. They rested their case mainly on the *thakbust* map of 1865. The defendants set up the title of the owners of certain other shares in the *mahal* and relied on their part on certiain *chittas* prepared by the Government in 1843-44 when the *purgana* was measured.

The Court of first instance gave preference to the *chittas* and dismissed the suit on the strength of the evidence afforded by them. The lower Appellate Court, on the other hand, has taken a contrary view, holding that the evidence of the *thakbust* map is superior to that of the *chittas*, and it has decreed the suit.

On second appeal before us, three point

have been taken by the learned Vakil for the defendant.

The first contention is that the Subordinate Judge is wrong in law in saying that the *thakbust* map is very good evidence to show the state of things at the time of the Permanent Settlement. It is argued that the *thakbust* map is evidence of the state of things in 1865, when it was prepared, and that it is not sufficient by itself to prove the state of things at the time of the Permanent Settlement. In support of this contention, reliance is placed cheifly upon *Mohesh Chunder Sen* v. *Juggut Chunder Sen* (1), but, as was pointed out by this Court in *Syam Lal Sahu* v. *Luchman Chowdhury* (2), what was held in the former was that the *thakbust* map by itself was not in that case sufficient evidence of title, and Norris and Beverley, JJ., who decided the later appeal, declared that they were prepared to say that in no case is the evidence of survey maps sufficient evidence of title. We are, indeed, unable to find any authority for the broad proposition stated by the learned Vakil. In *Abdul Hamid Mian* v. *Kiran Chandra Roy* (3), it was held that it was open to a Court to find on the strength of entries in a *thakbust* map, that the same state of things existed at the time of the Permanent Settlement, and the late Chief Justice and Mr. Justice Geidt came to the conclusion that it could not be said that a District Judge in drawing such a conclusion had committed any error of law. Again, in the recent case of *Moizuddi Biswas* v. *Ishan Chandra Das Sarkar* (4), in which most of the authorities are referred to, it was distinctly held that an entry in a *thakbust* map could not be said to be insufficient to entitle a Court of fact to hold that the disputed lands were really included in the estate at the time of the Permanent Settlement. We may also point out that in *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (5), it was observed by Petheram, C. J., and Tottenham, J., that a *thakbust* map is not only evidence, but is very good evidence, as to what the boundary of a particular property was at the time of the Permanent Settlement. The finding of the learned Subordinate Judge, therefore, based upon the entries in the *thakbust* map, cannot be questioned before us as being based on no evidence.

The second contention raised is that the Subordinate Judge was wrong in saying that the *chitta* did not raise any presumption of correctness. The *chittas* in question were prepared by the Government as *zemindar*; but in this case a part of the *parganna* measured had escheated to the Government on account of the rebellion of the former owner, and it is suggested that the Government must, in these circumstances, be held to have measured it in its sovereign capacity. We are unable to draw any distinction between the position of the Government as owner of land which has been escheated, and its position as owner of land acquired in any other way; and it is well settled that a *chitta* prepared by the Government, when interested as a proprietor of the estate concerned, cannot be said to be a public document. That being so, it is impossible to say that the learned Judge was wrong in holding that no special presumption attached to these *chittas*.

The third contention is that there has been no finding by either of the Courts below on an important issue, namely, the 12th issue, as to whether any tanks, buildings and so forth had been made on the disputed land.

The first Court found it unnecessary to come to any decision on this issue, and the lower Appellate Court clearly omitted to do so. It is conceded by the learned Vakil for the respondent that the contention that the case must be remanded for a finding on that issue cannot be denied.

The result, therefore, is that the case will be remanded to the lower Appellate Court for a finding on the 12th issue and the disposal of the case on that finding. So far as the findings impeached before us are concerned, they are held to be conclusive.

We make no order as to costs of this appeal.

Case remanded.

(1) 5 C. 212.
(2) 15 C. 353 at p. 356.
(3) 7 C. W. N. 849.
(4) 7 Ind. Cas. 849; 15 C. W. N. 706; 13 C. L. J. 293.
(5) 16 C. 186.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2044 OF 1910.

May 2, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Iyer.

ARIYAPUTHIRA PADAYACHI AND OTHERS—APPELLANTS

versus

MUTHUKUMARASAWMY PADAYACHI AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *ss.* 54, 118—*Sale—Exchange—Price—Oral sale of equity of redemption to usufructuary mortgagee—Registration—Right of mortgagor to redeem—Adverse possession—Limitation Act (IX of* 1908), *Sch. I, Arts.* 144, 148.

The word "*price*" in section 54 of the Transfer of Property Act is not restricted to money or current coin, but it includes whatever the vendor accepts as tantamount to such price.

If two persons mutually exchange two things and mutually fix the values of the exchanged things in current coin and exchange them as of equal value, they must be held to have effected sales and paid prices and not merely to have effected an exchange or barter.

A conveyance of land in consideration of moneys already due to the vendee by the vendor is either a "sale" under section 54 of the Transfer of Property Act or an "exchange" under section 118 of the said Act.

K. Thiruvengidachariar v. *Ranganatha*, 13 M. L. J. 500, not approved.

Krishna Tanhaji v. *Aba Shetti Patil*, 34 B. 139; 11 Bom. L. R. 1336; 4 Ind. Cas. 833, referred to.

Where a usufructuary mortgagee gave up his right to possession in part of the land mortgaged and the mortgage-money due to him, and in consideration therefor, purchased orally the equity of redemption in another part of the land from the mortgagor:

Held, (1) that the transaction amounted to a 'sale' under section 54 of the Transfer of Property Act, and was invalid for want of registration;

(2) that the mortgagee continued to remain in possession only as mortgagee after the said oral sale, and that the mortgagor was entitled to redeem the property within the statutory period;

(3) that the mortgagee could not assert a title by adverse possession as from the date of the oral sale;

(4) that Article 144 of Schedule II of the Limitation Act could not be invoked by the mortgagee if the mortgagor was not barred by Article 148 from redeeming and recovering possession of the mortgaged property;

Byari v. *Puttana*, 14 M. 38, *Ramunni* v. *Kerala Verma Valia Raja*, 15 M. 166, *Bhagvant Govind* v. *Kondi* valad *Mahadu*, 14 B. 279, *Khiaraj Mal* v. *Daim*, 32 C. 296; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23, referred to.

(5) that oral evidence was not admissible to prove the discharge of the mortgage by an invalid oral sale.

Gaseti Subba Vow v. *Vorigonda Narasimham*, 27 M. 368, *Chamaru Shaha* v. *Sona Koer*, 14 C. L. J. 303 at p. 307; 16 C. W. N. 99; 11 Ind. Cas. 301, referred to.

Second appeal against the decree of the District Court of South Arcot, in A. S. No. 359 of 1909, presented against the decree of the District Munsif of Chidambaram, in O. S. No. 751 of 1908.

Mr. *T. Narasimha Iyengar*, for the Appellants.

Messrs. *C. V. Ananthakrishna Iyer* and *C. Narasimhachariar*, for the Respondents.

JUDGMENT.

MILLER, J.—I think the transaction alleged in this case to have taken place in 1892 may properly be held to be an exchange of property within the meaning of section 118 of the Transfer of Property Act if it is not a sale. By it, the mortgagee gave up his right to possession in part of the land mortgaged and the mortgage-money due to him and received the equity of redemption in another part of the land. Even if this transaction was made by way of a compromise of disputes, it is not suggested that it amounted merely to an acknowledgment or adjustment of existing rights and the operations amounted, I think, to transfers of ownership in immoveable property. The arrangement was, therefore, invalid for want of a registered instrument and could not affect the title.

It is, however, contended that it may be proved as showing the intention of the parties to discharge this mortgage, at that time, and so, as showing change in the nature of the mortgagee's possession, after the date of the arrangement, so as to make it adverse to the mortgagor. The intention to discharge the mortgage involves the intention to make certain transfers and it is impossible to say that if those transfers failed, both parties nevertheless intended to discharge the mortgage. The mortgagor, therefore, had sixty years for his suit under Article 148 of the second Schedule of the Limitation Act, and he has come within that time.

The appeal, therefore, fails and is dismissed with costs.

SADASIVA Iyer, J.—I entirely agree in the conclusion of my learned brother and in the reasons given by him for the said conclusion. But out of respect for the strenuous arguments advanced with great acuteness by the appellant's learned Vakil, I have thought it not improper to pronounce a judgment in my own words.

(2) The facts and pleadings necessary to understand the contentions on both sides are

shortly as follows:—Plaintiff sues for redemption of the plaint A Schedule lands alone, though both A and B Schedule lands were usufructuarily mortgagad in 1885 by a registered instrument for Rs. 380½. The plaintiff's allegation is that the B. Schedule lands were redeemed in 1893 by a payment of Rs. 200 and hence only A Schedule land remained to be redeemed on payment of the balance of Rs. 180½. The contesting defendants (who represent the original mortgagee) pleaded (*a*) that the A Schedule properties were "orally sold" to the mortgagee in consideration of Rs. 1,600 due to the mortgagee under the mortgage document of 1885 and some other documents (the written statement itself using the word "sold"), (*b*) that thus the mortgage document of 1885 was discharged and the mortgagee became full owner of the A Schedule properties by the oral sale, while the mortgagor got back the B Schedule property free of the mortgage charge and, (*c*) that as the mortgagee and his assignees have been enjoying the A Schedule lands as owners by adverse possession from 1892, for more than 12 years before suit, they have got a good title by prescription under Article 144 of the second Schedule of Limitation Act.

(3) The lower Appellate Court held that the mortgage contract created by registered document of 1885 could not be rescinded by the alleged oral agreement or sale of 1892, and that under section 92 of the Indian Evidence Act, oral evidence was inadmissible to prove any such agreement. On this ground, the lower Appellate Court confirmed the Munsif's decree, allowing in plaintiff's favour the redemption of the A Schedule lands. The defendants Nos. 2, 3 and 4 are the special appellants before us.

(4) The contentions of the appellants' learned Vakil were as follows:— (*a*) The oral sale of 1893 in respect of the A Schedule lands set up by the appellants does not come under the definition of "sale" or "exchange" in the Transfer of Property Act, it is a peculiar "transfer" of property not covered by the Transfer of Property Act, section 54, and such a transfer could be effected by oral agreement and does not require a registered instrument to effect it, though the consideration for such a transfer and the value of the transferred property (roughly) have been Rs. 1,600. (*b*) Even if the oral sale of 1892 is invalid to transfer the title to the A Schedule properties to the mortgagee, it operated as a discharge of the mortgage-debt of 1885 charged on both A and B Schedule properties. Hence the mortgagee's possession of the A Schedule properties ceased from 1892 to be the possession of a mortgagee and became the possession of a trespasser, more than 12 years' possession before suit as trespasser has conferred full title as owner on the mortgagee, and his assignees. (*c*) Oral evidence can be given, notwithstanding section 92 of the Evidedce Act, to prove that the allegation of the mortgagor to pay money under the mortgage has been discharged; such oral evidence need not be restricted to the evidence of the payment of money or its equivalent in moveables or choses in action or other personal property. Oral evidence can be given of an invalid sale, (invalid for want of a registered written instrument evidencing it), and such invalid sale could validly operate as a discharge of the mortgage deed, though ineffectual to transfer title.

(5) As regard contention (*a*): I think it very improbable that the Legislature, when enacting by the Transfer of Property Act that a registered instrument is indispensable in the case of a transfer of land by sale (section 54), transfer of land by exchange (118), transfer of land by gift (123), transfer of interests in land by way of lease (section 107), and transfer of interests in land by way of mortgage (section 59), where the interests transferred in any of these modes is a substantial interest, could have intended to exclude any transfers by act of parties of an interest in immoveable property of over Rs. 100 in value from the necessity of being evidenced by a registered instrument, or could have intended to allow such transfer to be effected by oral agreement or by other than a registered instrument. I have very little doubt that all such transfers *inter vivos* were intended to be included in the one or other of the transactions coming under the heads of "sale" (Chapter III), "mortgage" (Chapter IV) "lease" (Chapter V) "exchange" (Chapter VI), and "gifts" (Chapter VII). Any "transfers" made in the way of creation of trusts were provided for in the Trusts Act, section 5, which says "no trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing registered". Section 9 of Act IV of 1882 allowing "transfer of pro-

perty" without writing except where a writing is expressly required by law does not weaken to any appreciable degree the patent conclusion derivable from a study of the Transfer of Property Act as a whole that the Legislature was very anxious that all important transfers of landed property and even *transfers of choses in action* (section 130) and *transfers of intangible* rights (section 54) should be evidenced by registered instruments so as to prevent litigants from letting in oral evidence as to alleged transfers about the truth or falsehood of which oral evidence, it is almost impossible for Courts to come to a satisfactory conclusion in most cases.

(*b*) So far as transfers of land by conveyance (that is, excluding transfers by mortgages and leases) are concerned, I think that if they are not settlements or declarations of trusts, they were intended by the Legislature to come within one of the headings "sale", "exchange" or "gift" in the Transfer of Property Act. "Sale" is defined in section 54 as a transfer of ownership in exchange for a price paid or promised or partly paid and partly promised etc.

The appellants' Vakil ingeniously argued that "price" means tangible money in current coin, it may be currency notes and does not mean any other valuable consideration. Thus, according to this contention, if I sell my land to another in satisfaction of Rs. 300 which I owe to him on a pro-note, the transaction is not a "sale" within the definition of the Transfer of Property Act, because I did not receive nor was I promised in future any current coin as "price". Of course, in ordinary parlance, it is undoubtedly a "sale" and in this very case the appellants in their statements talked of the oral sale of 1893, in consideration of moneys *not paid or promised at time of sale*, but of moneys due on prior debts. However, I find in Bouvier's Law Dictionary that the word "price" signifies that "it consists in money to be paid down or at a future time; for, if it be anything else, it will no longer be a price, nor the contract a sale but exchange or barter" and Shepherd, J., in his commentary on the Transfer of Property Act, says "price" includes money. The startling result of this technical view is that many so-called sales of land, where the consideration is the satisfaction of old debts due to the vendee as creditor, are not 'sales' at all under the Transfer of Property Act. Pushing the matter further, suppose the purchaser hands over Government promissory-notes or a cheque on a Government Bank or on the bank in which both parties have invested their money or currency notes instead of money, can it be said he does not pay "price" for his purchase? I do not think that such was the intention of the Legislature by the mere use of the word "price", if the price is fixed in the conveyance in current coin. I think that the words "price paid" will cover cases where the vendor's claim for the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment. For instance if he says in effect: "Here I owe you three hundred rupees under pro-note and you now owe me three hundred rupees as the price of the land I sell: why should we go through the farce of your paying me Rs. 300 in current coin for the purchase-money and my handing it back to you to re-pay your promisory-note debt?" We shall take it that both processes have taken place. I think that in such a case, we must take it that the price *was* paid and the transaction is a sale though no coins were actually paid by the purchaser. If two persons mutually exchange two things (neither of which is money only) it may be an exchange or barter and not a sale. But if they mutually fix the values of the exchanged things in current coin and exchange them as of equal value, I think they might be held to effect "sales" and to pay prices and not merely to effect an exchange or barter.

(6) Even if I am wrong in holding that a conveyance of land in consideration of the moneys already due to the vendee by the vendor does come under the definition of "sale" in section 54 of Act IV of 1882, I think such transactions ought to be brought under the definition of exchange under section 118 of Act IV of 1882 which makes all the provisions as to the mode of effecting transfer of land by sale, applicable to transfers of land by exchange also. 'Exchange", according to the definition in section 118, is a mutual transfer of ownership of things neither of which is *money only*. It seems to me that if a conveyance of land for a debt due by the vendor to the vendee is not a sale, it is clearly an exchange as the debtor vendor transfers his ownership in land (which is not "money" and *a fortiori not* money only) while the vendee transfers the ownership in his chose in action (the debt due by the vendor) to the debtor vendor so as to merge and extinguish the

debt, the debtor and creditor becoming the same individual by the transfer of the debt to the debtor himself. Here also the chose in action so transferred in its turn is not money only. It is argued that the vendee creditor does not transfer his rights as creditor to the vendor debtor, but only treats the debt as discharged. This seems to be merely a play upon words, for the debt is relinquished in favour of the debtor, and the substance of the transaction is a transfer of the debt to the debtor. In fact, where a testator relinquishes by his Will a debt in favour of the debtor, it is appropriately styled a gift by way of legacy of the debt to the debtor and where a mortgagee relinquishes his mortgage debt he frequently does it by executing a reconveyance of the mortgage interests created under the mortgage deed to the mortgagor.

If such transfers of land do not come under either the head of "sale" or "exchange", the extraordinary result would be that a conveyance of land worth even a lakh of rupees can be legally effected by oral agreement if the purchaser hands the money a few days before the oral conveyance and relinquishes his debt a few days afterwards as consideration for the oral conveyance. I refuse to believe that such a result could have ever been dreamt by the Legislature. I have no doubt that all conveyances of ownership right in lands were intended to be brought under "sales" or "gifts" or "exchanges" and that a conveyance for a lakh of rupees due on a pro-note to the vendee was not intended to be excluded from the necessity of being evidenced by a registered instrument.

(7) Reliance is placed by the appellant's learned Vakil on a case decided by this High Court but not reported in any authorized reports. It is found in *Thiruvengidachariar* v. *Ranganatha* (1), where it was held that when two brothers orally gave their lands to their sister in satisfaction of some claim of hers against them, the transaction was not a gift nor an exchange nor a sale under the Transfer of Property Act. With the greatest respect, I am clear in my mind that it was either a sale or a mutual "exchange" of two things neither of which was money only and I am, therefore, not prepared to follow this case. I know that where a compromise is not intended to create or effect merely a transfer of title but is only an acknowledgment of existing rights in lands, it is not a sale or exchange [see *Krishna Tanhaji* v. *Aba Shetti Patil* (2)] and need not comply with the provisions of section 54 of Act IV of 1882 in order to be treated as valid. But neither the present case nor that in *Thiruvengidachariar* v. *Ranganatha* (1) is such a case of compromise. I, therefore, overrule the appellants' contention that a registered writing was not necessary to validate the alleged sale of 1892. I might here be permitted to express the wish that the British Indian Legislature would pass an enactment making a registered writing indispensable for the validity of all settlements, partition, agreements and Wills and authorities to adopt throughout British India, making very few exceptions in special cases (such as Soldiers' and Sailors' Will). So that the flood of intricate and uncertain litigations on such questions might be brought within bounds, and the perjury in connection with Wills executed out of the Presidency towns and with partitions and adoptions might be put down to some extent.

(8) The next contention of the appellants' Vakil based on the Limitation Act is not sustainable, as, if the original mortgagee continued to hold possession as mortgagee, owing to the alleged sale of 1893 being invalid and ineffective to convey to him, the ownership in the equity of redemption in the A Schedule properties, he cannot, by merely asserting possession as owner under the invalid sale convert his possession as mortgagee into possession as owner, even granting that the mortgagor knew and acquiesced in his assertion. The cases in *Byari* v. *Puttanna* (3), *Ramunni* v. *Kerala Verma Vilia Raja* (4), *Bhagvant Govind* v. *Kondi* Valad *Mahadu* (5), *Khairaj Mal* v. *Daim* (6), clearly lay down that Article 144 cannot be invoked in favour of the mortgagee if the mortgagor is not barred by Article 148 from redeeming and recovering possession of the mortgaged property.

(9) The last contention about the inadmissibility of oral evidence to prove the

(1) 13 M. L. J. 500.

(2) 11 Bom. L. R. 1336; 34 B. 139; 4 Ind. Cas. 833.
(3) 14 M. 38.
(4) 15 M. 166.
(5) 14 B. 279.
(6) 32 C. 296; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. R. 23.

alleged discharge of mortgage of 1885 might be disposed of shortly. A mortgage might, even if created by a registered instrument, be proved to have been extinguished by letting in admissible evidence (including oral evidence) of payment of the mortgage amount or by letting in admissible evidence of any other transaction which operates as a mode of payment [see *Chamiru Shaha* v. *Soni Koer* (7).] It has been similarly held, in *Kattika Bapanamma* v. *Kattika Kristnamma* (8), that while a subsequent oral agreement to modify the terms of a registered maintenance deed cannot be proved, the fact that in particular years the obligee was in possession of certain lands of the obligor and paid herself the maintenance amount out of the profits of the lands can be proved; [see also *Karampalli Unni* v. *Thekku Vittil* (9); *Goseti Subba Row* v. *Varigonda Narasimham* (10).] Here the defendants do not seek to prove that by the payment of any money or by the receipt by the mortgagee of profits of other lands of the mortgagor, the claim of the mortgagee was paid up and thus the mortgage was extinguished, but they wished to prove an invalid oral conveyance (of which evidence is legally inadmissible) of the equity of redemption in a portion of the mortgaged property as having had the effect of the payment of the mortgage money. Oral evidence to prove a conveyance as equivalent to payment of money has not been allowed in any of the cases cited and could not be allowed. Receipt of mesne profits by possession of lands and receipt of moneys can be proved by oral evidence, but not an oral sale of lands worth more than Rs. 100, nor can such oral sale be taken as equivalent to the payment of the value of the lands invalidly sold.

(10) In the result, the second appeal fails and is dismissed with costs.

Appeal dismissed.

(7) 14 C. L. J. 303 at p. 307; 16 C. W. N. 99; 11 Ind. Cas. 301.
(8) 17 M. L. J. 30; 30 M. 231.
(9) 26 M. 195.
(10) 27 M. 368.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 203 OF 1911.

March 25, 1912.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

IFTIKHAR ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

THAKAR SINGH—PLAINTIFF AND *Musammat* BHAGWAN DEVI—DEFENDANT—RESPONDENTS.

Pre-emption—Vendee drawing money deposited by pre-emptor in Court—Appeal, right of, if affected by such withdrawal—Pre-emption suit about land—Jurisdiction value less than Rs. 5,000 *under rules—Decree given on payment of more than Rs.* 5,000*—Appeal from such decree, whether lies to the Dirisional Court or to the Chief Court.*

A vendee-appellant in a pre-emption case is not precluded from proceeding with his appeal against the pre-emption decree merely because he withdraws from the Court the purchase-money deposited by the pre-emptor in pursuance of the pre-emption decree.

Sundar Das v. *Dhanpat Rai*, 16 P. R. 1907; 104 P. L. R. 1908; 127 P. W. R. 1907, followed.

In a pre-emption suit relating to land of which the value for purposes of jurisdiction under the Suits Valuation Act is less than Rs. 5,000, but in which a decree has been passed by the Court of first instance on payment of more than Rs. 5,000, an appeal lies to the Divisional Court and not to the Chief Court.

Muhammad Afzal Khan v. *Nand Lal*, 16 P. R. 1908; 146 P. L. R. 1908; 13 P. W. R. 1907; *Maman Mal* v. *Abdul Aziz*, 58 P. R. 1902, referred to.

Second appeal from the order of the Divisional Judge, Amritsar Division, dated the 15th November 1910, modifying that of the Subordinate Judge, Gurdaspur, dated the 23rd August 1909, decreeing plaintiff's claim.

Pandit *Kishori Lal*, for the Appellants.

Khwaja *Zia-ud-Din*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent against the defendants-appellants for possession by pre-emption of the land in dispute which had been sold by one *Musammat* Bhagwan Devi to the defendants for Rs. 7,000 by a registered deed, dated the 28th May 1908. The Subordinate Judge passed a decree in favour of the plaintiff conditional on his paying the full amount of the purchase-money, Rs 7,000, to the defendants-vendees within a certain time. On appeal, the Divisional Judge held that the price of the land had not been paid and fixed in good faith, and he remanded the case for further inquiry and report on the question of the market-value of the land sold. On receipt of a

return to the order of remand, the learned Judge held that the market-value of the land was Rs. 5,300; and he accordingly varied the decree of the Subordinate Judge by reducing the amount payable by the plaintiff to the vendees to that figure.

The vendees have preferred a further appeal to this Court and the case has been fully argued on both sides. The learned Pleader for the plaintiff-respondent has urged as a preliminary objection that since the vendees have drawn out Rs. 5,300 which had been deposited in Court by his client in pursuance of the decree passed by the Divisional Judge, they are precluded from proceeding with their appeal; and in support of this contention he has cited an unpublished decision of this Court *Feroze ud-din* v. *Ghulam Rasul* (1). As pointed out in the judgment of this Court in *Sundar Dass* v. *Dhanpat Rai* (2), the case cited is clearly distinguishable upon its peculiar facts from the case like the present, and we need say here no more than that we accept as a general proposition the law as propounded in the published case just mentioned. The preliminary objection is, therefore, overruled.

The questions for decision in this appeal are,—

(1) Whether the appeal from the decree of the Subordinate Judge lay to the Divisional Court or to this Court;

(2) whether the price entered in the sale-deed, namely, Rs. 7,000, was paid and fixed in good faith, and

(3) whether, if the price was not paid and fixed in good faith, the market-value of the land sold is Rs. 5,300, as held by the Divisional Judge or Rs. 7,000, as found by the Court of first instance.

As regards the first question, it has been contended by the appellants' Pleader that as the Subordinate Judge had passed a decree in favour of the plaintiff-respondent for possession of the land in dispute on payment of Rs. 7,000, the value of the subject-matter of the suit must be held for purposes of jurisdiction to have been Rs. 7,000, and, therefore, the appeal from the decree of the Subordinate Judge lay to this Court and not to the Divisional Court. In support of this contention, he has cited the Full Bench ruling of this Court, *Muhammad Afzal Khan* v. *Nand Lal* (3). The case cited does not, however, deal with the point now before us or lay down the proposition of law contended for by the appellants' Pleader. It was a pre-emption suit instituted in the Court of a Munsif of the first class for recovery of possession of agricultural land. Its value for purposes of jurisdiction, as laid down by the rules in force under the Suits Valuation Act, was Rs. 644. The Munsif, whose jurisdiction was limited to Rs. 1,000, passed a decree in favour of the plaintiff on payment of Rs. 4,098. With reference to an objection that the Munsif had no jurisdiction to pass a decree for possession of land conditional on payment of the said amount, it was held by a Full Bench of this Court that as the sum fixed by the Court to be payable as the actual value of the land in suit was in excess of the pecuniary limits of the Munsif's jurisdiction, he was not competent to pass a decree in the case but should have returned the plaint for presentation to a Court having jurisdiction to pass such a decree. The Full Bench did not consider and decide the question now before us, namely, whether in a pre-emption suit relating to land of which the value for purposes of jurisdiction is, under the Suits Valuation Act, less than Rs. 5,000, but in which a decree has been passed by the Court of first instance on payment of more than Rs. 5,000, the appeal from that decree lies to the Divisional Court or to this Court. The sole question before the Full Bench, which it was called upon to decide and which it did actually decide, was whether in a pre-emption suit relating to land of which the value was less than Rs. 1,000, the Court of first instance, which was that of Munsif of the first class with pecuniary jurisdiction up to Rs. 1,000, had power to pass a decree for possession of that land on payment of more than Rs. 1,000, and that question was answered by the Full Bench in the negative.

With reference to certain observations made by the learned Chief Judge in the course of his judgment in the above mentioned case at pages 92 and 93 of the report, the appellants' Pleader has argued that the value of the present suit which, according to the rules framed under the Suits Valuation Act,

(1) C. A. No. 695 of 1905.

(2) 16 P. R. 1907; 104 P. L. R. 1908; 127 P. W. R. 1907.

(3) 16 P. R. 1908; 146 P.L.R. 1908; 13 P.W.R. 1908.

was Rs. 1,132-6, was merely a tentative value; that as soon as the Subordinate Judge found that the actual value of the land in dispute was Rs. 7,000, and granted the plaintiff-respondent a decree for possession thereof on payment of Rs. 7,000, the real value of the suit became Rs. 7,000 and that that amount must be considered as the value of the subject-matter of the suit for purposes of jurisdiction and of appeal subsequent to the passing of the decree by the Subordinate Judge. In this connection, he has also relied on the decision of this Court in *Maman Mal* v. *Abdul Aziz* (4). In the passage cited to us from his judgment, the learned Chief Judge did not, in our opinion, intend to deal with the question of appeal under section 39 of the Punjab Courts Act or to lay down that the value of the pre-emption suit, which was being dealt with by the Full Bench, as fixed by the rules in force under the Suits Valuation Act, was, for the purposes of that section, a fluctuating one, and that it was increased to Rs. 5,000, as soon as the Munsif held that the amount payable by the pre-emptor to the vendee was Rs. 5,000 which represented the actual market-value of the land All that was actually held was that the value of the suit might well in such cases differ from the actual value of the land in dispute and that the Munsif had no jurisdiction to pass a decree in favour of the pre-emptor on payment of Rs. 5,000 on the general principle of law that a Court cannot pass a decree for payment of a sum beyond the pecuniary limits of its jurisdiction. As observed by another member of the Full Bench, if the actual value of the land, of which possession is claimed by the pre-emptor, "is found by the Court to exceed the value as fixed in the first instance for jurisdictional purposes by the rules, the Court's jurisdiction to grant a decree will depend on whether the amount so found does nor does not exceed the limit of the Court's pecuniary jurisdiction." We consider that the decision of the Full Bench in the case cited must be held to be limited to the actual point before it; and any observations made by any of the learned Judges who were members of it, which were not essential to the determination of the question referred, must be treated as *obiter dicta*.

Maman Mal v. *Abdul Aziz* (4), relied on by the appellants' Pleader, is not in point. That was a suit for dissolution and winding-up of a partnership, rendition of accounts by the defendants and a decree for such sums as the plaintiff might be found entitled to against the proper parties. The plaintiffs valued their suit approximately at Rs. 2,000 but added the usual clause that they would pay the additional court-fee if more was found due. The District Judge passed a decree in favour of the plaintiffs for Rs. 6,410. The defendants appealed to the Divisional Judge who modified the decree. On further appeal to this Court, it was contended that the Divisional Judge had no jurisdiction to hear the appeal; and it was held by this Court that the contention was correct, inasmuch as the value of the suit, which means the value of the subject-matter of the suit, was in that case more than Rs. 5,000 and, therefore, the appeal lay to this Court and not to the Divisional Court. In the course of his judgment, Chatterji J., said:—"Now the plaintiff valued his plaint at Rs. 2,000 but stated that he would make up court-fees for any higher sum found to be due by the Court. The Court found Rs. 6,410-14-1½ due from the defendants, but ordered Court-fees to be levied on Rs. 5,332-13-1½ only. Does not this finding affect the valuation originally fixed by the plaintiff for his suit which he expressly stated was a tentative one? This appears to be the view taken by the Bombay High Court in *Ibrahimji Issaji* v. *Bejanji Jamsedji* (5) * * * Section 8 of the Suits Valuation Act makes the jurisdictional value and the value for Court-fee the same in this class of cases, and section 11 of the Court Fees Act allows the stamp to be made up afterwards. The two sections read together allow the plaintiff to put a tentative valuation on his claim and file the required amount of Court-fees when a higher sum is found due. Thus the payment of Court-fees on Rs. 2,000 is no final test of the value of the suit, as section 8 of the Suits Valuation Act, standing by itself, would possibly lead one to conclude." Again, at page 221, the learned Judge observed: "It is to be borne in mind that the value in suits of the present description is allowed by law to be a fluctuating one, a definite sum being stated

(4) 58 P. R. 1902.

(5) 20 B. 265.

in the plaint as a starting point for inquiry, and is finally fixed when the Court passes its decree."

It will appear from the above passages that the case cited, which was one for dissolution of partnership and rendition of accounts, and which, as regards valuation for purposes of jurisdiction and Court-fee, belongs to a class of suits covered by section 8 of the Suits Valuation Act and section 11 of the Court Fees Act, has no bearing on the present case so far as its jurisdictional value is concerned. In a pre-emption suit relating to revenue paying agricultural land in this Province, the value of the subject-matter of the suit for purposes of jurisdiction is fixed by the rules framed under section 3 of the Suits Valuation Act at thirty times the land revenue, and it is fixed once and for all. The valuation of the suit is also definitely fixed for purposes of Court-fees by section 7, paragraphs V and VI, of Act VII of 1870 at five times the revenue. The plaintiff in such a suit is, therefore, precluded by law from putting a tentative value on his suit either for purposes of Court-fees or for purposes of jurisdiction, the valuation of the suit for these purposes being beyond his power. On the other hand, in a suit for accounts the plaintiff is expressly allowed by law to fix the amount at which he values the relief sought, and that amount in the first instance determines the value of the suit for purposes of Court-fees and also for purposes of jurisdiction (section 7 paragraph IV of Act VII of 1870 and section 8 of Act VII of 1887), such valuation being liable to be altered on the Court holding that a larger amount than that claimed by the plaintiff is really due to him. The first valuation of the suit, which depends upon the approximate amount which the plaintiff originally claims, is not a fixed one; it is fixed, both for purposes of jurisdiction and for purposes of Court-fees, so far as the first Court is concerned, only when that Court holds a certain definite sum to be due to the plaintiff; and as that sum finally determines the value of the suit in the first Court, it also determines it for the purposes of the appeal from the decree of that Court In a pre-emption suit such as the present, these considerations have no application at all. The value of the suit, both for purposes of jurisdiction and of Court-fees, is fixed once and for all by the rules framed under the Suits Valuation Act and by the Court Fees Act, and although, according to the Full Bench decision, *Muhammad Afzal Khan* v. *Nand Lal* (3), the decree which has been passed in this case by the Sub-Judge could not have been passed except by a Court having jurisdiction to pass a decree for more than Rs. 5,000, the value of the suit for purposes of jurisdiction, so far as section 39 of the Punjab Courts Act is concerned, notwithstanding the decree so passed, remained throughout thirty times the land revenue, which is Rs. 1,132-0-6, and, the value for purposes of Court-fees also remained five times the revenue. We hold, therefore, that even after the Sub-Judge passed his decree, the value of the suit before us was less than Rs. 5,000 and it follows that under section 39 (*c*) of the Punjab Courts Act, the appeal from that decree lay to the Divisional Court and not to this Court.

[Their Lordships, after discussing the evidence on the second question, concluded as follows:]

As a result of the above findings, we agree with the Sub-Judge in holding that the price entered in the sale-deed, Rs. 7,000 was paid and fixed in good faith; and it, therefore, becomes unnecessary to consider and decide the question of the market-value of the land. We accept this appeal and modify the decree of the lower Appellate Court so far as to increase the amount payable by the plaintiff-respondent, Thakar Singh, to the defendants-appellants from Rs. 5,300 to Rs. 7,000. The plaintiff-respondent has already paid into Court the sum of Rs. 5,300 and we direct him to pay into Court the balance, Rs. 1,700 on or before the 1st July 1912, failing which his suit shall stand dismissed with costs throughout. If the said amount is duly deposited on or before the said date, the parties shall bear their own costs throughout this litigation.

Decree modified.

MAHOMED SADUT ALI *v.* HARA SUNDARI DEBYA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2591 OF 1910.

June 18, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Chapman.

MAHOMED SADUT ALI MALLIK—DEFENDANT—APPELLANT

versus

HARA SUNDARI DEBYA—PLAINTIFF—RESPONDENT.

Hindu Law—Female heir—Suit for rent accrued due after death of full owner—Decree against female heir—Sale of property—Purchaser, what passes to—Suit for contribution against female heir—Decree and sale—Title of purchaser, absolute or not.

Where a suit for rent in respect of a tenure against a Hindu female heir is brought in respect of arrears, which have accrued due after the death of the last full owner and while she was in enjoyment of the tenure, the liability for rent should be regarded as her personal liability, and ought not to be held to attach to the reversion, unless and until the landlord proceed to bring the tenure itself to sale under the special provisions of the Rent Law.

Braja Lal Sen v. *Jiban Krishna Roy*, 26 C. 285 and the same case on appeal, *Jiban Krishna Roy* v. *Brojo Lal Sen*, 30 C. 550; 5 Bom. L. R. 428; 30 I. A. 81, followed.

Although the original liability is one for arrears of rent, to liquidate which the entire tenure might have been sold, yet a decree for contribution against a Hindu female heir arising directly therefrom cannot be held to have had the same effect and the sale under it passes the limited interest of the female and not the tenure.

Appeal from the decree of the District Judge of Mymensingh, dated August 13th, 1909, affirming that of the Sub-Judge of that place, dated November 30th, 1908.

Babus *Dwarka Nath Chakravarti*, and *Tarak Chandra Chakravarti*, for the Appellant.

Babus *Mohendra Nath Roy* and *Manmotha Nath Roy*, for the Respondents.

JUDGMENT.—The respondent in this second appeal sued as being the reversionary heir of her father after the death in 1898 of her widowed mother, Jagodeshwari Debya, for a declaration of her title to, and the recovery of possession of, a share in *shikmi taluq*. It appears that in 1873 a decree for rent of the *taluq* was obtained against Jagodeshwari and her co-sharers. The latter satisfied the claim, brought a suit for contribution against Jagodeshwari and were given a decree, in execution of which a share of the *taluq* was sold and purchased on the 20th May 1876 by the appellant, a Mahomedan. Both the Courts below have decreed the plaintiff-respondent's suit, and this appeal is preferred by the defendant.

The first of the only two points raised on the appellant's behalf is as to the refusal of the Court of first instance to grant the appellant an adjournment and direct the issue of a commission for the examination of two ladies to prove that the respondent's father had adopted a son and that she had consequently been excluded from the inheritance.

As to this the facts are these:—The issues were first framed on the 17th August 1907, but on the 10th June 1908, an additional issue expressly raising the question of the alleged adoption was added. Witnesses were from time to time summoned, and the case was heard from the 20th to 26th November. Among the appellant's witnesses were two members of the family, called to testify to the adoption, but one of these (Arodhan) would not do more than swear that there had been some talk of an adoption, while the other (Shyam Sundar) failed to appear and no steps were taken to enforce his attendance. But on the 26th November, one Kally Kumar Chuckrabutty, a Pleader connected with the family, who had already been examined by the respondent as a witness in the case, was once more and at the last moment put into the witness-box by the appellant to declare that he had heard his mother and the respondent's sister Rashmoni say that a boy had been adopted; and no sooner was this hearsay statement extracted from him than the appellant applied for an adjournment and the issue of a commission for the examination of the two ladies. In these circumstances, the refusal to accede to the prayer, might, we think, be supported on the merits if this were a regular appeal; it is certainly not arbitrary and incapable of justification; and we are of opinion that it is not open to us, on second appeal, to interfere with the discretion exercised in the matter by the lower Courts.

The second point relates to the finding that, in the suit for contribution brought against her, Jagodeshwari did not represent her late husband's estate, and consequently the reversioners were not bound by the sale in execution of the decree in that suit. The argument, with which we are pressed, that as the original liability was one for the arrears of rent, to liquidate which the entire tenure might have been sold, the decree for contribution arising directly therefrom should be held to have had the same effect, the sale under it passing not the widow's interest

merely, but the *taluq*. The point is not free from difficulty; but on the whole, we are disposed to think that the view taken by the Courts below is correct and should be affirmed. The authorities on the subject were discussed by this Court in *Braja Lal Sen* v. *Jiban Krishna Roy* (1) and on appeal to the Privy Council their Lordships of the Judicial Committee—see *Jiban Krishna Roy* v. *Broio Lall Sen* (2)—expressed concurrence with the view that, when a suit for rent against a Hindu daughter was brought in respect of arrears which had accrued due after her father's death and while she was in enjoyment of the property, the liability for rent should be regarded as her personal liability, and ought not to be held to attach to the reversion unless and until the landlord proceeded to bring the tenure itself to sale under the special provisions of the Rent law. It comes to this, indeed, that it does not follow that, because a liability could be made a charge on the estate, it *ipso facto* ceases to be a personal liability; and thus in *Baijun Doobey* v. *Brij Bhookan Lall* (3) it was held by the Privy Council, that the liability of a Hindu widow to pay maintenance to her mother-in-law, though charged on the estate, was personal to her, so that a sale in execution of a decree therefor against her passed only her interest. Here, moreover, there are further difficulties in the appellant's way; for neither the decree in the rent suit nor the decree in the action for contribution is in, and we are, therefore, in the dark, both as to whether the whole tenure could have been sold in satisfaction of the former, and as to the capacity in which the latter was obtained against Jagodeshwari. All that we have to guide us in the matter is the respondent's sale certificate, and that refers to "the property of the judgment-debtor, Jagodeshwari Debya, widow of Brojo Mohan Mahalnebo," a description which indicates the lady's interest as widow rather than the estate itself. And we cannot help observing in conclusion that the point now taken is really a new one, the nearest approach to it in the Court below being apparently the argument that the circumstances of Jagodeshwari Debya were such that the sale in execution of the decree for contribution against her must be regarded as caused by legal necesssity and, therefore, binding on the reversioners.

For all these reasons, we hold that the contentions raised fail, and the appeal must be dismissed with costs.

Appeal dismissed.

(1) 26 C. 285.
(2) 30 C. 550; 5 Bom. L. R. 428; 30 I. A. 81.
(3) 1 C. 133; 24 W. R. 306; 2 I. A. 275.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 74 OF 1911.

April 24, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

KONDUGARI SUBBIAH—APPELLANT

versus

KAVUPATI VENKATASUBBIAH—RESPONDENT.

Specific performance, suit for—Claim to recover money on fulfilment of a stipulated condition—Suit of a Small Cause nature—Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, cl. 15.

A suit to recover a sum of money on the fulfilment of a condition on which it was stipulated to be paid is not a suit for the specific performance of a contract so as to except it from the jurisdiction of a Small Cause Court.

Veerasalingam v. *Sathapally Sathirasu*, 19 M. L. J. 220; 5 M. L. T. 293; 1 Ind. Cas. 552, distinguished.

Appeal, under section 15 of the Letters Patent, against the judgment and order of the Hon'ble Mr. Justice Munro, dated 12th April 1911 in C. R. P. No. 517 of 1910 (S. C. S. No. 25 of 1910 on the file of the District Court of Nellore).

Mr. *V. N. Kuppa Row*, for the Appellant.

Dr. *S. Swaminathan*, for the Respondent.

JUDGMENT.—We do not think that this suit was a suit for specific performance of a contract. The plaintiff alleged that the defendants had undertaken to pay him Rs. 300, if he should succeed in effecting certain compromises, and that the compromises had been effected by him, and he prayed for the money. We are unable to see any ground on which this can be held to be a suit for specific performance of a contract.

It is not on all fours with the case in *Veerasalingam* v. *Sathapally Sathirasu* (1), so it is not necessary for us to consider whether we could or would not follow the decision in that case.

We allow the appeal and set aside the order of the District Judge, but, as there is now no Small Cause Court in the Nellore District competent to entertain the suit, we must order the plaint to be returned to be presented to the Court of the District Munsif having jurisdiction.

We make no order as to costs.

Appeal allowed.

(1) 19 M. L. J. 220; 1 Ind. Cas. 552; 5 M. L. T. 296

MA YIN ZA *v.* C. NASH.

LOWER BURMA CHIEF COURT.
CIVIL REFERENCE No. 1 OF 1911.
January 31, 1912.
Present:—Sir Charles Fox, Chief Justice,
Mr. Justice Hartnoll and
Mr. Justice Twomey.
MA YIN ZA *alias* MRS. NASH—APPLICANT
versus
C. NASH—OPPOSITE PARTY.

Divorce Act (IV of 1869), s. 7—Desertion need not always be against the actively expressed wish of the party—Living in separate house on account of husband's adultery.

Desertion implies an abandonment against the wish of the person charging it. Such an abandonment need not be one against the actively expressed wish of the party and notwithstanding the resistance and opposition of such party.

Where owing to her husband's adultery, a wife went to live at her mother's house and agreed to receive a certain sum monthly as maintenance and where subsequently the husband got his wife to execute a deed relinquishing all her claims against him:

Held, (1) that the husband had a clear intention to abandon the wife;

(2) that such abandonment was against her wish, although she kept away from him and did not seek a return to co-habitation as long as he continued his *liaison* with his mistress and had her living in the house with him.

Reference made by the Divisional Judge of Tenasserim, under section 17 of the Indian Divorce Act, IV of 1869, for confirmation of the decree for dissolution of marriage on 3rd April 1911.

Messrs. *Lentaigne*, *McDonnel* and *Clifton*, for the Applicant.

JUDGMENT.—The suit was brought by the wife for dissolution of her marriage on the ground of her husband's adultery coupled with desertion, without reasonable excuse for two years and upwards. The husband admitted adultery and the only matter in dispute was the alleged desertion without reasonable excuse.

Desertion in the Indian Divorce Act implies an abandonment against the wish of the person charging it. Under section 7 of the Act, the Courts have to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief.

In some cases that Court has construed abandonment against the wish of the person charging it as meaning contrary to the actively expressed wish of such party and notwithstanding the resistance and opposition of such person; see *Fowle* v. *Fowle* (1). The present case, however, does not appear to me to be one in which such rule should be applied, especially as it is not a universal rule. See *Graves* v. *Graves* (2) and *Pizzala* v. *Pizzala* (3).

The parties were married in 1898. They had co-habited previously and the plaintiff had had two children by the defendant. They lived together at Tavoy until August 1904, when the plaintiff says she was persuaded by the defendant to go to Moulmein. While there, she heard that the defendant was carrying on an illicit intercourse with a woman. She returned to Tavoy with her children towards the end of the year. In January 1905, she says he turned her out of the house, having, while she was there, gone habitually to the place where the woman with whom the defendant admits having committed adultery lived. A witness, who was an interpreter and *quasi* intermediary between them, says that the plaintiff was at this time willing to live apart and she accepted a sum of Rs. 300 to repair her mother's house in Tavoy and went and lived there at first. The defendant brought his mistress to live with him in his house and they have lived together continuously. According to the arrangement then made between them, the defendant was to pay her an allowance of Rs. 27, a month. This he did until some time in 1907 when his payments to her fell into arrears. She took steps to see him again, and the outcome of their interviews was that he paid her Rs. 170 and each signed a document in the following terms:—

"I hereby renounce all rights over Ma Yin Za (Mrs. Nash) as my wife, or any property now in her possession or which may hereafter be possessed by her.

(Sd.) C. NASH."

"I hereby renounce all claims to support from Mr. C. Nash, as my husband and to any property now in his possession or which may hereafter be possessed by him.

(Sd.) MA YIN ZA (In Burmese)."

(1) 4 C. 230; 3 C. L. R. 484.
(2) (1864) 33 L. J. P. & M. 66; 3 Sw. & Tr. 350; 10 Jur (N. S.) 545; 10 L. T. 273; 12 W. R. 1016.
(3) (1896) 12 T. L. R. 451.

She does not know English, but she admits that the document was explained to her in Burmese. She says, however, she was so distressed as to be almost mad at the time and did not understand it. The witness Gallope's memory as to what happened in connection with the document is not clear, but it is clear that she wanted her allowance to continue although she understood that the document she was signing was a letter of divorce. The document was composed and written by the defendant himself and his signature to it was evidently wrung from her. It is scarcely necessary to say that the parties could not dissolve their marriage or their relationship by such a document even if the plaintiff had fully understood the document and had consented to its terms. The conduct of the defendant in asking his wife to sign such a document was shameful and degrading to his nationality. There can be no doubt that he intended to abandon her, and the only question, is whether his subsequent abandonment of her was against her wish.

Gallope said that at a meeting of the parties at his house she said that as scandal was being talked in the town, it would be better for them either to re-unite or have a divorce and separate. Even if she did say this, it must be taken in connection with what had happened before and the circumstances at the time. She undoubtedly resented his adultery from the first, and was justified in keeping away from him and not seeking a return to co-habitation as long as he kept his *liaison* with his mistress and had her living in the house with him. He showed no sign of parting with the mistress, and it would not be reasonable to expect of any woman to express a wish to return to co-habitation with a husband who had so distinctly shown his intention to adhere to his adulterous life. Her want of desire to return to co-habitation was entirely brought about by her husband's gross conduct towards her. Under the circumstances, his adultery and entire abandonment of her since the date of the document entitled her, in my opinion, to a decree for divorce, and I would confirm the decree.

The case will go back to the Divisional Court for determination of the amount of alimony which should be awarded to the plaintiff.

The defendant will pay the plaintiff's costs of the proceeding in this Court, five gold *mohurs* allowed as Advocate's fee.

TWOMEY, J.—I concur.

HARTNOLL, J.—I concur.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1677 OF 1909.

January 24, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Miller.

SRINIVASA SUNDARA THATHACHARIAR—PLAINTIFF—APPELLANT

versus

KRISHNASAMY IYENGAR—DEFENDANT—RESPONDENT.

Hindu Law—Alienation of share in part—Co-parcenary broken up—Subsequent death—Survivorship or inheritance.

When a co-parcener alienates his interest in a co-parcenary property, the joint tenancy in respect thereof is thereby put an end to, and the other co-parceners become tenants-in-common.

Chinnu Pillai v. *Kalimuthu Chetty*, (1911) 2 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246; 35 M. 47; 9 Ind. Cas. 596, referred to.

Quære.—Whether a co-parcener alienating his interest in part of the co-parcenary property takes by survivorship or inheritance the share of another co-parcener, who dies subsequent to the alienation?

Aiyyagari Venkataramayya v. *Aiyyagari Ramayya*, 25 M. 690 at p. 717, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 370 of 1909, presented against the decree of the Court of the District Munsif of Kumbakonam, in Original Suit No. 121 of 1908.

Mr. *T. Narasimha Aiyangar*, for the Appellant.

JUDGMENT.—We think that when Krishnasamy Iyengar alienated his one-third interest in the co-parcenary house in 1880, the joint-tenancy in respect of it was put an end to [See remarks of Krishnasamy Iyer, J., at page 246 of the case of *Chinnu Pillai* v. *Kalimuthu Chetty* (1)] and the plaintiff and his grandfather, who were the only co-parceners at the time, became tenants-in-common, each having one-third of the house as his separate property. When the alienated one-third was purchased by the

(1) (1911) 2 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246; 35 M. 47; 9 Ind. Cas. 596.

grandfather in the plaintiff's name in 1881 under Exhibit C, there being no evidence to show that the funds came from elsewhere, it must be held that the purchase was with the grandfather's funds and for the benefit of his grandson, the plaintiff, in whose name the deed stood. The plaintiff, therefore, was at that time entitled to two-thirds of the house, and the grandfather to one-third, and on the death of the grandfather, Krishnasami, who was his son, became entitled to one-half of that one-third, the other one-half going to the plaintiff. This would be the share accruing to Krishnasami whether he took by inheritance or by virtue of survivorship, assuming that the right of survivorship existed in all respects among the co-parceners at the time of the alienation except with regard to the house, part of which was alienated [See the remarks of Sir Bhashyam Aiyangar, J., at page 717 of the case of *Aiyyagari Venkatramayya* v. *Aiyyagiri Ramayya* (2).]

The result is that in modification of the decree of the Courts below, the plaintiff must have a declaration of his right to five-sixths of the house. He will give and receive proportionate costs in both the Courts below. He will have his costs in this Court.

Decree modified.

(1) 25 M. 690 at 717.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 135 OF 1910.
January 3, 1912.
Present:—Mr. Justice Twomey.
MAUNG PU AND OTHERS, BEING HEIRS AND LEGAL REPRESENTATIVES OF MI MI, DECEASED—DEFENDANTS—APPELLANTS
versus
C. W. NAPEAN AND OTHERS—HEIRS AND LEGAL REPRESENTATIVES OF MA HMWE GAING, DECEASED—PLAINTIFFS—RESPONDENTS.

Will -- Construction — Succession Act (X of 1865), ss. 82, 111—Contingent bequests—Whether a gift over to come into force requires that the death of the donee should take place during testator's life-time —Nature of the gift—Whether absolute or for life only.

Where a testator bequeathed his landed property among his heirs and gave one part to his wife and provided that if her son *A.* outlived his mother, her share should descend to him:

Held, that the interest of the wife was only a life-interest and not an absolute one.

Hayward Creery v. *Lingwood*, 19 Ch. D. 470; 51 L. J. Ch. 513; 45 L. T. 790; 30 W. R. 315, followed.

It is only in those cases where the testator speaks of death, which is certain, as if it were a mere contingency by using such expressions as "if any of them die" or "in case of his decease", that such death to render the divesting clause operative must be deemed to be death within the testator's life-time.

Watson v. *Watson*, L. R. 7 P. D. 12; 51 L. J. P. 13, *Elliot* v. *Smith*, 22 Ch. D. 236; 52 L. J. Ch. 222; 38 L. T. 27; 31 W. R. 336; *Origan* v. *Baines*, 58 Eng. Rep. 752, explained.

Appeal against the judgment and decree of the Divisional Court of Toungoo, in Civil Appeal No. 90 of 1909, dated 23rd February 1910, confirming the judgment and decree of the Sub-Divisional Court of Nyaunglebin.

Mr. *Agabeg*, for the Appellants.

Mr. *Bagram*, for the Respondents.

JUDGMENT.—The plaintiff (1st respondent), C. W. Napean, is the youngest son of John Napean, who died in 1883. The 1st defendant, Ma Hmwe Gaing, was the widow of John Napean. She died after the commencement of the suit and her legal representatives have been brought on to the record. A few months before his death in 1883, J. Napean made a Will of which the part concerned in this suit is as follows:—

"This is the last Will of me, John Napean of Shwegyin, and I bequeath my property as follows:—The free-hold landed estate consisting of 4563 acres more or less in the Nyaunglebin and Yea Hla circles in this district I wish to remain as far as possible one property but it is to be divided into four equal shares, one share I bequeath to my wife, one share to my son, George E. Napean, one share to my daughter, Lucy Moss, one share to my son, Charles W. Napean and if the latter outlives his mother, her share will descend to him and so long as my son Charles W. Napean manages the estate, he is to receive 20 per cent. of the profits for so doing."

Probate of this Will was duly taken out by the widow and executrix, Ma Hmwe Gaing.

On 3rd July 1908, a deed of settlement was executed by the appellant (2nd defendant), Maung Pu, as attorney for the widow, Ma Hmwe Gaing, conveying to Maung Pu, as

trustee for the settlor, the quarter share of the land which was bequeathed to her by the Will.

The plaintiff, C. W. Napean, brought this suit for a declaration that the document of 3rd July 1908 is not binding on him. It is alleged in the plaint, *inter alia*, that the widow got only a life-interest in her share under the Will and that in the event of the plaintiff outliving her, he is entitled to inherit her share. Ma Hmwe Gaing having died, the contingency provided for in the Will has actually come to pass.

The lower Courts have held that Maung Pu exceeded his authority in executing the deed of settlement. Maung Pu and his wife (an adopted daughter of Ma Hmwe Gaing) appealed to this Court on various grounds. At the first hearing of the appeal, it was agreed by the learned Counsel on both sides that it would be convenient for all parties to have the question of the construction of the Will settled by the Court before going on with the appeal. For, if the interest of the late Ma Hmwe Gaing were found to have been only a life-interest, the deed of settlement would be entirely ineffectual and the present appeal must fail. If, on the other, hand, it were found that Ma Hmwe Gaing had an absolute interest in her quarter share the grounds stated in the memo. of appeal could be further considered. The hearing was, therefore, adjourned and on a later date, notice having been given to all parties, the learned Counsel were heard on the question of construction. This question has now to be decided.

The words of the Will "One share I bequeath to my wife" taken by themselves give her an absolute interest. It is clearly laid down in section 82, Indian Succession Act, that where property is bequeathed to any person, he is entitled to the whole interest of the testator therein unless it appears from the Will that only a restricted interest was intended for him. To reduce the gift to a life-estate, there must be clear words cutting down the first estate. It is contended for the respondents that the words "if the latter (C. W. Napean) outlives his mother, her share will descend to him" do operate to reduce the widow's interest to a life-estate in the event of her son C. W. Napean surviving her. This certainly is the plain meaning of the words. But it is argued for the appellants that the divesting clause should be regarded as operative only if Ma Hmwe Gaing pre-deceased the testator. There is a long series of English decisions which support the view that "if there is an immediate gift to *A.* and a gift over in case of death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of *A.*'s death before the testator". See Law of Wills, Theobald, 5th Edition, p. 575. The reason is explained in the extract from Jarman on Wills cited in *Watson* v. *Watson* (1). Jarman says:—"Where a bequest is made to a person with a gift over in case of his death, a question arises whether the testator uses the words 'in the case of' in the sense of 'at' or "from" and thereby as restrictive of the prior bequest to a life-interest, *i.e.*, as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeasance of, or in substitution for, the prior one in the event of the death of the legatee or some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance or association with which it is contingent. That circumstance naturally is the time of its happening; and such time where the bequest is immediate (*i.e.*, in possession) necessarily is the death of the testator, there being no other period to which the words can refer."

The law on this point is further explained as follows by Mr. Justice Fry in *Re Hayward*, *Creey* v. *Lingwood* (2):

There is no doubt that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person *sub modo* (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of the gift over is *prima facie* to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case, there is no reason to confine the meaning of the word 'death' to death during the life-time of the testator or death during the life of the tenant

(1) L. R. 7 P. D. 12; 51 L. J. P. 13.
(2) 19 Ch. D. 470; 51 L. J. Ch. 513; 45 L. T. 790; 30 W. R. 315.

for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death which is certain, as a contingency, but when the testator has spoken of death *sub modo*, that being contingent, there is no need to render it contingent by introducing any limitation."

The case of *Elliot* v. *Smith* (3) is an example of the application of the rule. A testator left legacies to three persons and "if any of them died" their share was to go to the others. One of the legatees and the testator died at the same instant. It was held that "death" must, according to the ordinary rule, mean death in the testator's life-time. Similarly, in *Origan* v. *Baines* (4), where the testatrix bequeathed as follows:—

"I give the legacy to *A.* and in case of his decease, I give the same legacy to his wife and at her decease to their eldest daughter."

It was decided that *A.*, having survived the testatrix, was absolutely entitled to the legacy. In both these cases, and in all other cases where the rule has been applied, the testator speaks of death, which is certain as if it were a mere contingency, ("if any of them die," "in case of his decease" and the like expressions). It is, therefore, considered necessary (as explained in the extract from Jarman on Wills) to link with death some circumstance in association with which it is contingent, and thus it comes about that in such cases as the above, the death in the contemplation of the law is deemed to be death within the testator's life-time.

But the present case is different. Here the testator does not speak of the death of his wife as a contingent event. He speaks of her pre-deceasing her son as a contingency, which, of course, it was. Thus (to borrow the words of Mr. Justice Fry in the case above cited) the testator has spoken of death *sub modo* and there is no need to render it contingent by introducing any limitation (such as that the death of the donee must take place in the testator's life-time).

It appears to me quite clear, therefore, that the bequest of Ma Hmwe Gaing was liable to defeasance in the event which has actually occurred, namely, her death before her son, C. W. Napean, (whether before or after the testator's death). That this was the intention of the testator may also be gathered from the form of the words used *viz.*, "her share will descend to him" which seems to imply that the testator contemplated Ma Hmwe Gaing outliving him. The form of words used does not apply aptly to the case of a bequest which is to be diverted to another person if the legatee primarily designated in the Will should happen to die before the testator.

The interpretation now put on the Will is, moreover, in accordance with the expressed wish of the testator that the estate should "remain as far as possible one property."

I decide, therefore, that Ma Hmwe Gaing's interest was a life-estate and that her legal representatives now have no interest in the property. It follows that the deed of settlement of 3rd July 1908 is of no effect.

The appeal is dismissed with costs.

Appeal dismissed.

(3) 22 Ch. D. 236; 52 L. J. Ch. 222; 48 L. T. 27; 31 W. R. 336.

(4) 58 Eng. Rep. 752.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 37 OF 1911.

January 31, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sundara Aiyar.

RAYI KRISHNAYYA—DEFENDANT—APPELLANT

versus

GANGA BAI—PLAINTIFF—RESPONDENT.

Res judicata—*Alienation by husband—First suit by wife for protecting her right of maintenance—Second suit for recovery of property after husband's death—Judgment—Evidence—Point not in issue.*

A. transferred certain properties to *B.* In a suit by *A.*'s wife, *C.*, it was decided that the transfers in question would not affect *C.*'s right to maintenance out of *A.*'s properties. The only issue in that suit was whether the alienations were binding on *C.* There was no issue as to whether they were nominal or bogus transactions but in one portion of the judgment they were characterised as bogus transactions, while in another portion they were treated as collusive transfers brought about by *A.* and *B.* to defeat *C.*'s right to maintenance.

After *A.*'s death, *C.* sued *B.* to recover the properties on the ground that the transfers were nominal transactions:

Held, (1) that the question whether the transfers were nominal transactions was not *res judicata* by reason of the decision in the previous suit;

(2) that the judgment in the previous suit could not be treated as evidence on the question of the nominal character of the transfers.

MAUNG PO TU *v.* CHAUNG TAIK.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Sankaran Nair, in Second Appeal No. 1590 of 1910, presented against the decree of the District Court of South Canara in Appeal Suit No. 439 of 1908, presented against the decree of the Court of the District Munsif of Mangalore in Original Suit No. 10 of 1908.

Mr. *B. Sitarama Rau*, for the Appellant.

Mr. *H. Balakrishna Rau*, for the Respondent.

JUDGMENT.—We are unable to agree with the learned Judge that the question whether the documents by which the plaintiff's deceased husband transferred his rights in the plaint properties to the defendant were nominal transactions not intended to have any legal operation, is *res judicata* by reason of the decision in Original Suit No. 151 of 1901. In that suit it was decided that the transfers in question would not affect the plaintiff's right to maintenance out of her busband's properties. The issue framed in that suit was whether the alienations were binding on the plaintiff. There was no issue whether they were nominal transactions. No doubt they were characterised as bogus transactions in one portion of the judgment, but in another portion they were treated as collusive transfers brought about by the alienee and by the plaintiff's husband to defeat the plaintiff's right to maintenance. In the latter case, they would be binding on the plaintiff's husband, and on the plaintiff seeking to recover the properties as her heir. The plaintiff's limited right of maintenance being alone in question in the previous suit, the finding that that right was not affected by the transfers cannot entitle the plaintiff to recover the properties as her husband's heir. Our conclusion that there was no issue as to the nominal character of the transfers in the previous suit also makes it necessary that we should hold that the judgment in that suit cannot be treated as evidence on that question. A mere assertion by the plaintiff that the transfers were nominal cannot be treated as legally sufficient to uphold the plaintiff's right. There being no other evidence in support of her claim, we must reverse the decrees of the Courts below and the judgment of Sankaran Nair, J. and dismiss the suit, with costs throughout.

Appeal allowed.

LOWER BURMA CHIEF COURT.

SPECIAL FIRST CIVIL APPEAL No. 172 OF 1910.

January 5, 1912.

Present:—Mr. Justice Twomey.

MAUNG PO TU—DEFENDANT—APPELLANT

versus

C. CHAUNG TAIK—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Restoration of an appeal dismissed for default—Sufficient cause—Advocates must suffer the consequences of keeping careless clerks.

A Court is bound to set aside an order dismissing an appeal for default of prosecution if it is satisfied that there was sufficient cause for non-appearance on the date fixed.

An appeal was duly entered on the printed cause list for the day. The Advocates for appellant were shown as *A.* and *B.* and *B.*'s clerk admitted that when he was sent by *B.* to inspect the cause list, he saw the appeal entered with *A.* and *B.* against it in the list; but as he was under the impression that *A.* and not *B.* was to argue the case, he did not tell *B.* that his attendance was necessary. The appeal was consequently dismissed in default:

Held, that due care and attention were not exercised and the clerk was exceedingly careless in trusting to a defective memory instead of looking up the briefs in the Advocate's office and that there was no sufficient reason for restoring the appeal.

Even if sufficient cause for non-appearance is not shown, it is still open to the Court, to consider, independently of Order IX, rule 9, the question of restoring for just and sufficient cause any appeal which has been dismissed for default.

If it appears that the decree appealed against was unjust or wrong on the merits, that might be a good reason for restoring the appeal on terms.

Appeal from the judgment and decree of the Judge, Small Causes Court, Rangoon.

Messrs. *Agabeg* and *Maung Pu*, for the Appellant.

Mr. *Alexander*, for the Respondent.

JUDGMENT.—This is an application under Order IX, rule 9, to set aside an order dismissing the petitioner's appeal for default of prosecution. I am bound to set aside the order if the petitioner satisfies me

that there was sufficient cause for non-appearance on the date fixed. The appeal was duly entered on the printed cause list for the day. The Advocates for appellant were shown as Agabeg and Maung Pu and Maung Pu's clerk admits that when he was sent by Maung Pu to inspect the cause list, he saw the appeal entered with Agabeg and Maung Pu against it in the list. But as he was under the impression that Mr. Agabeg and not Maung Pu was to argue the case, he did not tell Maung Pu that his attendance was necessary. It cannot be said that due care and attention were exercised. The clerk was exceedingly careless in trusting to a defective memory instead of looking up the briefs in the Advocate's office and Advocates must take the consequences if they employ careless clerks.

At the same time, I agree that even if sufficient cause for non-appearance is not shown, it is still open to the Court to consider, independently of Order IX, rule 9, the question of restoring for just and sufficient cause any appeal which has been dismissed for default. If it appeared that the decree appealed against was unjust or wrong on the merits, that might be a good reason for restoring the appeal on terms. But after examining the lower Court's proceedings in this case, I see no reason to think that the decision is unjust or contrary to law. The issue was a simple one of fact which the learned Judge appears to me to have decided according to the weight of evidence.

Application dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 37 OF 1911.

February 8, 1912.

Present:—Mr. Justice Sundara Aiyar.

GOPISETTI NARAYANASAWY NAIDU GARU, RECEIVER, NIDADAVOLE AND MEDUR ESTATES, ELLORE—PLAINTIFF—PETITIONER

versus

BONDADA CHINA NARSIGADU—DEFENDANT—RESPONDENT.

Poramboke *land in a* zemindari—*No presumption that it is cultivable* poramboke—Onus *on* zemindar *to make out his right to cultivate or let out to tenants.*

There is no presumption that any *poramboke* land in a *zemindari* is of such a character as could lawfully be cultivated or given out by the *zemindar* for purposes of cultivation. Therefore, the *zemindar* must prove that it is such as he is entitled to let out on cultivation or receive *kist* for, if cultivated without his permission.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Court of the District Munsif of Narsapur, in Small Cause Suit No. 579 of 1910.

Mr. P. Nagabhushanam, for the Petitioner.

JUDGMENT.—I am of opinion that on the evidence on record the suit was rightly dismissed. The plaintiff, the Receiver of the estate, admits that the land was *poramboke*. There is no evidence as to the character of the *poramboke*. There is absolutely nothing to show that it is such as the *zemindar* would be entitled to let out on cultivation, or to receive *kist* for, if cultivated without his permission. Mr. Nagabhushanam may be right in his argument that the word "*poramboke*" is a comprehensive one including lands which might be cultivated. But there is no presumption that any *poramboke* land is of such a character as could lawfully be cultivated or given out by the *zemindar* for purposes of cultivation. The only evidence on record is that of the *kurnam* who says that the land is a part of Survey No. 1 of the Ankuvedu village belonging to the estate. Mr. Nagabhushanam says the land that could not be cultivated would have no survey number. He has not shown me any evidence or any authority which supports the assertion. Assuming the evidence of the *kurnam* is credible, the fact that the land is treated as part of the village is not sufficient to show that it is cultivable *poramboke*. I dismiss the petition.

Petition dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 241 OF 1911.

January 30, 1912.

Present:—Mr. Justice Twomey.

MA EIN THU—DEFENDANT—APPELLANT

versus

MAUNG HLA DUN, MINOR BY HIS NEXT FRIEND MAUNG TUN HLAING—PLAINTIFF—RESPONDENT.

Buddhist Law—Inheritance—Status of eldest daughter on death of the eldest child who was a son—Status devolves on the elder of two daughters where there is no other son.

The first born child in a family was a son, who died in infancy; the second child was a daughter *A*. The only other child was a daughter who was born 7 years after *A*.:

Held, (1) that *A*. was the eldest daughter within the meaning of section 163 of the Digest;

(2) that if the eldest child, who died in infancy, were a daughter, the status of eldest daughter would have devolved on *A*. as the next eldest daughter and that the fact that the eldest child was a son made no substantial difference, as no other son was born who could fill the place of the deceased *orasa*

Ma Hnin Gaing v. *Ma Tha Li*, 4 Bur. L. T. 74; 10 Ind. Cas. 778, followed.

Po Sein v. *Po Min*, 3 L. B. R. 45, distinguished.

The texts cited in section 163 of the Digest give the issue of the eldest daughter a share equal to that of the youngest of his aunts and there seems to be no authority for holding that these texts apply exclusively to families consisting of daughters only.

The texts are applicable to a family where the only children arriving at maturity were two daughters and the only other child was a son who died in infancy.

Second appeal against the judgment and decree of the Divisional Court of Prome, in Civil Appeal No. 6 of 1911, dated 20th July, modifying that of the Sub-Divisional Court of Zigon.

Mr. *Nicol*, for the Appellant.

JUDGMENT.—In this case the plaintiff-respondent's mother, Ma Shwe Ma, was the eldest daughter of her parents, but it is contended that she was not technically the "eldest daughter" contemplated in the texts cited in the Digest, section 163, because she was not the first born child, her parents having had before her a child who died in infancy. The only other child was a daughter, the defendant-appellant, who was born seven years after Ma Shwe Ma.

The learned Counsel for appellant relies mainly on the ruling in *Po Sein* v. *Po Min* (1). But in that case the plaintiff's mother had three elder brothers and an elder sister

(1) 3 L. B. R. 45.

who all four predeceased her, and at the time of her mother's death, she had an adult brother living and competent to assume the headship of the family. In the present case, if the eldest child who died in infancy were a daughter, I think it is clear, from the rulings cited in *Ma Hnin Gaing* v. *Ma Tha Li* (2), that the status of the eldest daughter would have devolved on Ma Shwe Ma as the next competent daughter. The fact that the eldest child was a son appears to make no substantial difference. No other son was born who could fill the place of the deceased *orasa*. But the texts cited in section 163 give the issue of the eldest daughter a share equal to that of the youngest of his aunts, and there seems to be no authority for holding that these texts apply exclusively to families consisting of daughters only. At any rate, I see no reason to think that they do not apply to a family where the only children arriving at maturity were two daughters and the only other child a son who died in infancy. It is clear enough I think that Ma Shwe Ma was an eldest daughter as contemplated in section 163 and that the plaintiff-respondent as her son is entitled to a share equal to that of his aunt.

The appeal is dismissed with costs.

Appeal dismissed.

(2) 4 Bur. L. T. 74; 10 Ind. Cas. 778.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1484 OF 1910.

March 5, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Miller.

P. V. GOVINDA VARIER AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PARU AMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Admissibility—Evidence—Evidence to explain decree.

A decree described the lands dealt with as north of a line marked in the plan attached to the decree. A schedule attached to the decree but not referred to in it, however, described the field as Survey No. 265/1;

MAHOMED SULTAN *v.* MOULMEIN MUNICIPAL COMMITTEE.

Held, that evidence was admissible to show that Survey No. 265/1 was not included in the land to the north of the line marked in the plan attached to the decree.

Second appeal against the decree of the Subordinate Judge's Court of South Malabar at Calicut, in Appeal Suit No. 680 of 1909, presented against the decree of the Court of the District Munsif of Alatur, in Original Suit No. 29 of 1908.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellants.

Mr. *J. L. Rosario*, for the Respondents.

JUDGMENT.—The decree in Original Suit No. 33 of 1904 describes the land dealt with as north of a line marked in a plan attached to the decree. The claim now in question relates to Survey No. 265/1, a field so described in a schedule attached to the same decree but not referred to by this number in the decree.

Evidence has been admitted to show that 265/1 was not included in the land to the north of the line marked in the plan attached to the decree and we think that such evidence was rightly admitted.

We must, therefore, dismiss the appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 104 OF 1911.

January 9, 1912.

Present:—Mr. Justice Twomey.

MAHOMED SULTAN—DEFENDANT—APPLICANT

versus

THE MOULMEIN MUNICIPAL COMMITTEE, BY THEIR PRESIDENT J. D. FRASER—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 72—Suit to recover money paid by mistake—Mistake or ignorance of law cannot to be pleaded.

The petitioner was bailiff in the Municipal Office and as such was authorised to draw commission on taxes which the ward headmen failed to collect within 45 days from the date on which tax tickets were issued. In November 1908, the petitioner represented to the Municipal President that, although the ward headmen were bound to submit any tax tickets on which they had failed to collect taxes within 45 days, yet they were retaining some tickets after the prescribed period and making collections on them. He asked expressly that commission on these belated collections by the headman should be paid to him and not to the headmen. The petition was granted by the President and the Committee passed a resolution which was intended to have the same effect as the President's order. The petitioner drew a sum of Rs. 111-6-2 as commission on collections made by ward headmen after the expiry of the prescribed period of 45 days. Afterwards, objection was raised that the bailiff should not receive commission on taxes which he did not collect. The petitioner was called upon to refund and on his refusal this suit was instituted, the basis of the suit being that the bailiff was not entitled to the money, and, therefore, should refund it:

Held, (1) that if the money was recoverable at all, it was recoverable under section 72 of the Contract Act, which provided that a person to whom the money was paid by mistake must re-pay it, but that the payment in this case was a voluntary payment made with full knowledge of the facts;

(2) that to succeed under section 72 of the Contract Act, the Committee should show that there was some mistake as to the existence of the obligation, but that in this case there was none, as the petitioner was an employee of the Committee and the money must be deemed to have been paid in part remuneration of his services;

(3) that even if it be regarded as a mistake of law, section 72 of the Contract Act should be read as subject to the Common Law rule that ignorance of law cannot be pleaded.

Application to revise the judgment and decree dated the 20th July 1911 of the Court of Small Causes, Moulmein, in Civil Regular No. 637 of 1911.

Mr. *Halkar*, for the Applicant.

JUDGMENT.—The respondents in this case are the Municipal Committee of Moulmein. They have not put in an appearance and the petition for revision has been heard *ex parte*.

The petitioner was bailiff in the Municipal office and as such was authorized to draw commission on taxes which the ward headmen failed to collect within 45 days from the date on which tax tickets were issued. In November 1908, the petitioner represented to the Municipal President that, although the ward headmen were bound to submit any tax tickets on which they had failed to collect taxes within 45 days, yet they were retaining some tickets after the prescribed period and making collections on them. He asked expressly that commission on these belated collections by the headmen should be paid to him and not to the headmen. This petition was granted by the President, and the Committee passed a resolution which was clearly intended to have the same effect as the President's order. It was argued at the hearing that the Committee's resolution was intended to apply only to

collections actually made by the bailiff. But this contention is untenable in view of the bailiff's petition on which the resolution was based.

Accordingly, the petitioner drew a sum of Rs. 111-6-2 as commission on collections made by ward headmen after the expiry of the prescribed period of 45 days. Subsequently, the Government Auditor objected to the payment on the ground that the bailiff should not receive commission on taxes which he did not collect. The defendant-appellant was called upon to refund and on his refusal, this suit was instituted, the basis of the suit being that the bailiff was not entitled to the money and, therefore, should refund it. The learned Judge of the lower Court held that as the Municipal Committee paid the money through misapprehension of the rules governing such payments, they are entitled to recover the money from the petitioner.

If the money is recoverable at all, it is recoverable under section 72 of the Contract Act, which provides that a person to whom the money is paid by mistake must re-pay it.

There can be no doubt that the payment in this case was a voluntary payment made with full knowledge of the facts. The bailiff's petition to the Municipal Committee showed clearly that he was claiming commission for collections made by the ward headmen. The only mistake the Committee can plead is the mistake as to their own authority to sanction the payment. They do not actually plead this mistake. They merely say in their plaint that the defendant should refund because he was not entitled to the money. But it does not seem permissible for the Committee to say this in view of their unrescinded resolution under which the defendant-appellant was clearly entitled to the money. The plaint might, therefore, have been rejected as disclosing no cause of action. But, even if the claim were expressly based on section 72 of the Contract Act, I do not think that the Committee could succeed. The Small Cause Court Judge seems to have thought that any money irregularly paid out by a Municipal Committee can be recovered in a civil suit. But there is no authority for this view. To succeed under section 72 of the Contract Act, the Committee should show that there was some mistake as to the existence of the obligation. In this case there was none, for the petitioner was an employee of the Committee and the money must be deemed to have been paid in part remuneration of his services. The mistake as to the Committee's authority was merely a collateral matter concerning the Committee in its relation to the Local Government. Even if it be regarded as a mistake of law, the better opinion seems to be that section 72 of the Contract Act should be read as subject to the Common law rule that ignorance of law cannot be pleaded.

The decree of the lower Court is set aside and the original plaint is dismissed with costs in both Courts.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 716 OF 1909.

February 19, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

VARID SAHAYAM FERNANDEZ—DEFENDANT—APPELLANT

versus

RANCHORDIN KHEKI AND OTHERS—RESPONDENTS.

Mortgage-suit—Mortgagor and mortgagee—Final decree—Accounts—Execution—Legality.

Accounts between a mortgagor and mortgagee should be taken by the Court before passing a final decree. A provision in the judgment for taking accounts between the parties in execution is not in accordance with law.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 29 of 1908, presented against the decree of the Court of the Subordinate Judge of Cochin, in Original Suit No. 23 of 1907.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *K. Govinda Marar*, for the Respondents.

JUDGMENT.—According to Exhibit A, the first defendant is bound to pay the 2nd defendant only Rs. 1,200. There was no stipulation for the payment of any interest for the debt as the mortgage was usufructuary and the land mortgaged was to be enjoyed in lieu of interest. The plaintiff, as sub-mortgagee from the second defendant's mortgagee, cannot recover from the 1st defendant more than the sum of Rs. 1,200,

which the 1st defendant was bound to pay the 2nd defendant. The decree of the lower Appellate Court must be modified accordingly.

We may point out that the provision made in the judgment of the lower Court for taking accounts between the parties in execution is not in accordance with law. Accounts between a mortgagor and a mortgagee should be taken by the Court before passing a final decree. In this case, however, there is no necessity for taking any accounts as the amount payable by the 1st defendant is already certain, *viz.*, Rs. 1,200.

It was also contended for the appellant that there was no proper notice of demand made on the 1st defendant. This contention is clearly unsustainable.

There will be no order for costs in the second appeal. The 1st defendant will pay plaintiff's costs on the amount decreed against him.

Decree varied.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 83 OF 1910.

January 19, 1912.

Present:—M. Justice Hartnoll.

A. P. S. V. FIRM—PLAINTIFF—APPLICANT

versus

SHREE SAFATULLA—DEFENDANT—RESPONEENT.

Composition-deed—Joint promissory-note by insolvent and another person—Creditor joining in composition on the assurance of joint-debtor for payment of balance—Agreement unenforceable—Consideration—Right to sue on pro-note—Limitation Act (IX of 1908), s. 19—Acknowledgment, essentials of.

A. and *B.* borrowed money from *C.* on a joint promissory-note on 7th April 1906. *A.* failed in his business and on the 18th August 1906, entered into a composition-deed with his creditors whereby the creditors agreed to accept 8 annas and 6 pies in the rupee and release *A.* *C.* joined in the composition-deed on the assurance of *B.*'s promise that *B.* would pay whatever balance there might remain due on the promissory-note after due credit had been given for the sum received from *A.* *C.* subsequently sued *A.* for the balance due on the pro-note:

Held, (1) that the agreement with *B.* for payment of the balance due was unenforceable against *B.*, as it was material for the other creditors of *A.* to have known of this agreement and *C.* kept it from their knowledge;

Britten v. *Hughes*, 5 Bing. 460; 3 M. and P. 79; 7 L. J. (o. s.) C. P. 188 and *Edeman* v. *Waller*, 3 Y. V. T. 212, relied upon.

(2) that the agreement was void for want of consideration, as even before entering into the agreement, *C.* was at liberty to sue *B.* if he could not have recovered the whole of his debt from *A.*'s estate;

(3) that as the agreement was void, *C.* could sue on the pro-note if his claim thereon was not time-barred.

For section 19 of the Limitation Act to apply, there must be a distinct acknowledgment of an existing liability or jural relation.

Narbadashankar v. *Rughnath*, 2 B. H. C. R. 330; *Dharma Vithal* v. *Gobind Sadvalkar*, 8 B. 99; *Venkataramanaya* v. *Srinivasa Rau*, 6 M. 182 and *Ramdas* v. *Brij Nundan Das*, 9 C. 616; 12 C. L.R. 284. referred to.

Application for review of the judgment and decree of Mr. Justice Hartnoll, confirming that of the Judge, Small Cause Court, Rangoon.

Messrs. *Burjorjee* and *Dantra*, for the Applicant.

Mr. *Giles*, for the Respondent.

JUDGMENT.—The applicants sued respondent to recover Rs. 1,678-15 under the following circumstances. They say that on the 7th April 1906, they advanced to Abdul Monaf Khan and the respondent Rs. 1,700 on a promissory-note with interest accruing thereon and that the borrowers jointly and severally promised to pay the sum due on the note on demand to the applicants or to their order, that Abdul Monaf Khan failed in business and entered into a composition with his creditors on the 18th August 1906, whereby they agreed to accept 8 annas and 6 pies in the rupee and release the said Abdul Monaf Khan, that applicants at first refused to be a party to such composition-deed as their claim was against Abdul Monaf Khan and the respondent, that they have been informed that a few days after the 18th August, 1906, their then agent, Vyraven Chetty, executed such composition-deed at the inducement and on the promise of the respondent that he will pay whatever balance there might remain owing on the promissory-note after due credit had been given for the sum received from the trustees of Abdul Monaf Khan, that they received Rs. 630 under the terms of the composition-deed, and that the respondent will not pay the balance due. The applicants claim that in the event of the agreement with respondent not being proved, they can still

sue for the balance due, and they claim exemption from limitation by virtue of a letter filed, which they say amounts to an acknowledgment. In reply, the respondent allows executing the note and pleads when Vyraven Chetty entered into the composition deed, no further claim could be made on the note, whether there was a subequent agreement or not, that there was no such agreement and that the applicants cannot sue on the note as there was a novation of contract according to them and that further any claim on the note is barred by limitation. The learned Judge of the Court of Small Causes dismissed the suit, and now this application in revision is made. The law as regards composition-deeds is clearly stated in the case of *Britten* v. *Hughes* (1). There Best, C. J., said :—"The principle is clear that upon a composition-deed all the parties are supposed to stand in the same relation and, if there is any one of them who refuses to do so, he must announce it at the time..... ...No engagement can stand which has been withheld from the knowledge of the whole body of the creditors, and which it would have been material for them to know." The point for consideration in the present case seems to be whether it was material for the creditors to have known of this alleged agreement with the respondent. If they had known of it, would it have influenced their judgment? It seems to me that it may have done so, as they would have known that the applicants were arranging to secure the whole sum due, and they might not have agreed to this. I am, therefore, of opinion that, even if there was this alleged agreement, it cannot now be sued on. In the alternative, the applicants wish to sue on the note. I am unable to allow that they can, as by their pleadings new contracts were subtituted for it. I accordingly dismiss this appeal with costs.

The applicants applied for a review of this judgment and Mr. Justice Hartnoll on hearing the petitioners' Advocate passed the following

ORDER.—Exception is taken to my judgment that I erred in holding that the terms of the composition-deed, in any way, precluded plaintiffs' remedy against the respondent, that the respondent being a joint debtor with Abdul Monaf Khan, there was no engagement in the composition-deed to forego any claim as against the respondent, and that there was an error in law in my judgment that the new contract alleged in any way was void as against the terms of the composition-deed. Now the facts alleged by the plaintiffs are that their agent first refused to be a party to the composition-deed as his claim was against Abdul Monaf Khan and the defendant, and that their agent executed the composition-deed subsequently at the inducement and on the promise of the defendant that he would pay whatever balance remained owing to the promissory-note after due credit had been given for the sum received from the trustees of Abdul Monaf Khan. It would appear that if this story is true, plaintiffs' agent did not then understand the legal position when he entered into such an agreement and did not realize that whatever sum was recovered from Abdul Monaf Khan's trustees, he had the right to sue the defendant for the balance. It would appear that he certainly expected a material advantage to himself from such an agreement, and that it constituted the inducement to him to sign the composition-deed. If he took this view of the matter, was it not incumbent on him to inform the other creditors of the agreement? If the other creditors had known of it, may it not also have influenced their decision? They also like plaintiffs' agent may not have understood the legal position and, not understanding it, may have acted otherwise than they did. It cannot be too clearly insisted on that there must be perfect good faith in a matter of this kind and that everything must be done *bona fide*. It is true that the defendant-respondent was not a creditor of Abdul Monaf Khan and a party to the composition-deed; but if a bargain not disclosed to the other creditor is made by one creditor with a third party, it will not be enforceable against him, and this view is not without authority, as I would refer to the case of *Edeman* v. *Waller* (2). It is true that the legal position being as it was is in favour of the plaintiffs but I would still hold that my decision was right in that if the other creditors had known of the

(1) 5 Bing. 460; 3 M. and P. 79; 7 L. J. (o. s.) C. P. 188

(2) 3 Y. V. T. 212.

alleged agreement their judgment might have been affected. But, be that as it may, the legal position is now understood. If the plaintiffs were unable to recover the whole of their debt from Abdul Monaf Khan, they were at liberty to sue the defendant-respondent for the balance due on the promissory-note. This being so, there was no consideration for the subsequent alleged agreement. Plaintiff's Counsel says that the consideration was extension of time. I cannot see that this was anywhere alleged in the pleadings and it was evidently urged as an afterthought. I must, therefore, hold that the alleged subsequent agreement, even if it was made, is void.

I now come to the fourth and fifth grounds of the review and am of opinion that there are good grounds for them. I erred in seeing that, as by the pleadings new contracts were substituted for the note, the plaintiffs could not sue on the note, as I held that the new alleged contract was void. As I so held, I think that the plaintiffs could sue on the note if it is not time-barred. It was time-barred unless the letter of the 15th February 1908 under section 19 of the Limitation Act creates a new period of limitation. No authorities were placed before me, but I would refer to the cases of *Narbidashankar* v. *Raghnath* (3), *Dharma Vithal* v. *Gobind Sadvalkar* (4), *Venkataramanaya* v *Srinivasa Rau* (5) and *Ramdas* v. *Brijnundan Das* (6). These cases lay down that there must be a distinct acknowledgment of an existing liability or *jural* relation for section 19 to apply. Looking at the letter of the 18th February 1908 in this view, I am of opinion that it is not such an acknowledgment as comes within the meaning of section 19 of the Limitation Act. It may be taken to allow that defendant-respondent signed the note though that is not too clear as such a construction can only be arrived at by implication, but it clearly repudiates liability on the ground that plaintiffs agreed to take 8 annas 6 pies in full discharge of his claim without any reservation on the promissory-note. There was, therefore, no distinct acknowledgment of an existing liability or *juarl* relation. The suit on the note is, therefore, time-barred.

(3) 2 B. 330.
(4) 8 B. 99.
(5) 6 M. 182.
(6) 9 C. 616; 12 C. L. R. 284.

I accordingly dismiss the application for review with costs.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 1406 AND 1424 OF 1910.

February 9, 1912.

Present:—Sir Ralph Benson, Judge and Mr. Justice Bakewell.

SIVAVADEVELU PILLAY—PLAINTIFF—APPELLANT IN BOTH

versus

IN S. A. No. 1406 OF 1910

PONNAMMAL—DEFENDANT—RESPONDENT

IN S. A. No. 1424 OF 1910

GOVINDAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation—Alienation by mother as guardian—Suit by son to declare it invalid—Limitation Act (XV of 1877), Sch. II, Arts. 44, 144.

The period of limitation for a suit for a declaration that a sale of the plaintiff's property by his mother as his guardian is not binding on him is three years from the date of the plaintiff's majority under Article 44 of the Limitation Act.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*, 23 M. 271; 27 I. A. 69; 4 C. W. N. 329; *Madugula Latchiah* v. *Pally Mukhalinga*, 30 M. 393; 17 M. L. J 220; 2 M. L. T. 350, followed.

Unni v. *Kunchi Amma*, 14 M. 26; *Kamakshi Nayakan* v. *Ramaswami Nayakan*, 7 M. L. J. 131, followed.

Second appeal against the decrees of the District Court of Tanjore in Appeal Suits Nos. 604 and 636 of 1909 presented against that of the Court of the District Munsif of Tiruvalur, in Original Suits Nos. 193 and 192 of 1908.

Mr. *M. D. Devadoss*, for the Appellant.

Mr. *T. Natesa Aiyar*, for the Respondent.

JUDGMENT.

IN S. A. No. 1406 OF 1910.

The plaintiff in this case prays for a declaration that a sale of the plaintiff's property by his mother as his guardian is not binding on him, and for possession and mesne profits. Both the lower Courts have held that the plaintiff failed to adduce sufficient proof of his age, and the question for decision is whether the period of limitation is twelve years from the date of alienation in 1904, under Article 144,

or three years from the date of the plaintiff's majority under Article 44, of the Limitation Act, 1877. We are of opinion that the case falls within the decision of the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1), which was followed by this Court in *Madugula Latchiah* v. *Palli Mukhalinga* (2) and that Article 44 applies. In view of these decisions, we are unable to follow the cases in *Unni* v. *Kunchi Amma* (3) and *Kamakshi Nayakan* v. *Ramaswamy Nayakan* (4). We may point out that in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1), the sale by the minor's guardian was held to be void and incapable of passing any title to the purchaser, while the ground of the decision in *Unni* v. *Kunchi Amma* (3) was that such a sale deed may be treated as non-existent, and the remedy of the minor is to sue for possession and not to set aside the sale.

The judgment in *Unni* v. *Kunchi Ammal* (3) was *obiter* as regards a sale by minor's guardian which is the case specifically provided for by Article 44, and no other authority appears to have been considered in the case reported in *Kamakshi Nayakan* v. *Ramaswamy Nayakan* (4).

The second appeal fails and is dismissed with costs.

IN S. A. No. 1424 OF 1910.

Second Appeal No. 1424 of 1910 follows Second Appeal No. 1406 of 1910 and for the like reasons as are recorded in our judgment therein, we dismiss this appeal also with costs.

Appeals dismissed.

(1) 23 M. 271; 27 I. A. 69; 4 C. W. N. 329.
(2) 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350.
(3) 14 M. 26.
(4) 7 M. L. J. 131.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 157 OF 1909.

January 31, 1912.

Present:—Mr. Justice Hartnoll and Mr. Justice Twomey.

MA SEIN HNYIN AND ANOTHER, MINORS, BY THEIR GUARDIAN *ad litem* MA DOE MA, LEGAL REPRESENTATIVES OF U THA MAUNG, DECEASED—DEFENDANTS—APPELLANTS

versus

C. S. LUTCHMAN CHETTY—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 6 (1)—Minors' application asking to be brought on the record as legal representatives—Civil Procedure Code (Act V of 1908), O. XXII, r. 3—All the legal representatives need not apply jointly.

Order XXII, rule 3 should not be construed to mean that no application should be entertained unless it is made by all the legal representatives of the deceased, as this would sometimes be impossible, especially within the prescribed time. Where possible, all the legal representatives should so apply, but an application by a legal representative is sufficient for him to be made a party.

Bhikaji Ramchandra v. *Purshotam*, 10 B. 220, approved.

By virtue of section 6 (1) of the Limitation Act, an application by a minor to be substituted as legal representative of a deceased party is valid if made during the period of his minority.

Phoolbas Koonwar v. *Lalla Jogeshur Sahay*, 1 C. 226, at p. 248; 25 W. R. 285; 3 I. A. 7, followed.

Appeal against the judgment and decree of the District Court, Tharrawaddy.

FACTS.—This appeal was first filed on 21st December 1909. It was admitted and notice was served on the respondent who appeared by an Advocate and so the appeal was transferred to the contested Board on 10th May 1910.

On 25th July 1911, the Advocates for the respondent put in a petition supported by an affidavit praying that as the appellant died on 17th December 1910 and as no steps had been taken to substitute legal representatives in his place, the appeal may be dismissed. On receiving notice of this application, the appellant's Advocate put in a petition praying that Ma Doe Ma, widow of appellant deceased, Ma Sein Hmyin and Maung Po Hla minors by their guardian Ma Doe Ma, may be substituted as appellants in place of Maung Tha Maung who died on 17th December 1910. Both the petitions were considered and a Bench consisting of Justices Ormond and Twomey passed the following order on 14th August 1911:—

VIJAYARAGHAVAREDDI *v.* KOMARAPPA REDDI.

"The appeal abates under Order XXII, rule 3, as no application was made within 6 months of the death of Tha Maung to put his legal representatives on the record.

"It will be open to the legal representatives to apply within 60 days under Order XXII, rule 9 for an order to set aside the abatement."

On 26th August 1911, Ma Hamlyn put in a petition for setting aside the above order and praying that Ma Sein Hnyin and Maung Po Hla minors by their guardian Ma Doe Ma may be substituted as appellants in place of Maung Tha Maung deceased. The following order was passed on this application.

Messrs. *Hamyn* and *Palit*, for the Appellants.

Messrs. *Sen* and *Banerji*, for the Respondent.

ORDER.—The point for decision in this appeal is whether Ma Sein Hnyin and Maung Hpo Hla should be placed on the record as the legal representatives of their deceased father, Maung Tha Maung, and the appeal should be ordered to proceed. Ma Sein Hnyin and Maung Hpo Hla are minors and though Maung Tha Maung died on the 13th December last and more than six months elapsed before any application was made on their behalf to be made parties, they claim that under section 6 (1) of the Limitation Act they are entitled to be made parties. In support of their contention, the case of *Bhikaji Ramchandra* v. *Purshotam* (1) is quoted. Order XXII, rule 3, in our opinion, should not be construed to mean that no application should be entertained unless it is made by all the legal representatives of the deceased. This would sometimes be impossible especially within the prescribed time. Where possible, all the legal representatives should so apply, but an application by a legal representative is sufficient for him to be made a party. In the present instance by virtue of section 6 (1) of the Limitation Act, the minors are within time. It is settled by the case of *Phoolbas Koonwar* v. *Lalla Jogeshur Sahoy* (2) that applications by minors are valid if made during the period of their minority. We accordingly set aside the order of abatement and direct that Ma Sein Hnyin and Maung Hpo Hla be placed on the record as the legal representatives of their deceased father, Maung Tha Maung, and that their mother Ma Doe Ma be appointed as their guardian to represent them in the appeal.

Order set aside.

(1) 10 B. 220.
(2) 1 C. 226 at p. 248; 25 W. R. 285; 3 I. A. 7.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 63 OF 1911 SINCE CONVERTED INTO CIVIL REVISION PETITION No. 78 OF 1912.

February 6, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

VIJAYARAGHAVA REDDI—PLAINTIFF—PETITIONER

versus

KOMARAPPA REDDI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *s.* 162—*Suit adjourned for want of time—No duty on trying Court to direct witnesses to appear—Civil Procedure Code (Act V of* 1908), *O. XLIII, r.* 1, *cl. (a)—Remand order not passed under Order XLI, rule* 23, *not appealable—Appeal against* ex parte *decree—Proper procedure, if Appellate Court is satisfied that the defendant had no opportunity of adducing evidence.*

Where a suit is adjourned by a Court of its own motion for want of time, and not at the request of parties, there is no duty on the Court to direct the witnesses who are present to appear on the adjourned date of hearing. Section 162 of the Civil Procedure Code of 1882 imposes no such duty on the trying Court.

Subbarayadu v. *Chenchuramayya*, 24 M. 200, distinguished.

Order XLIII, rule 1, clause (*a*), Civil Procedure Code, 1908, apparently does not allow an appeal against an order of remand, which is not passed under Order XLI, rule 23.

Quære:—Whether an Appellate Court can, in hearing an appeal against an *ex parte* decree, set aside the decree and remand the case to the Court of first instance, if the defendant was not given sufficient opportunity to adduce his evidence or whether the proper procedure is not to ask the lower Court to take further evidence and submit it to the Appellate Court for disposing of the appeal on the merits?

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of South Arcot, dated 21st November 1910, in Appeal Suit 249 of 1910, setting aside the decree of the Court of the District Munsif of Tindivanam, dated 24th August 1910, in Original Suit No. 96 of 1910 and remanding the original suit to

SHWE WA *v.* SULLIVAN.

the said Court of the District Munsif for re-trial.

The Hon'ble Mr. *L. A. Govindaraghava Aiyar* and Mr. *A. Ramachandra Aiyar*, for the Petitioner.

Mr. *C. Padmanabha Aiyangar*, for the Respondents.

JUDGMENT.—In this case, the decree was passed by the District Munsif *ex parte*. An application was made to set aside the *ex parte* decree and refused, and there was no appeal from the order refusing to set aside the *ex parte* decree. But an appeal was filed gainst the decree itself. The District Judge who heard the appeal holds that the defendants were not prevented by sufficient cause from appearing on the date fixed for hearing and conducting the case, but he has set aside the decree and remanded the case to the District Munsif for disposal after giving the defendants an opportunity to adduce their evidence on the ground that the District Munsif had adjourned the case on the 12th July to the 24th August 1910 not at the request of the parties but for want of time and failed to direct the witnesses who were present to appear on the adjourned date of hearing. We do not propose to pronounce a definite opinion on the question, whether the District Judge could, in hearing an appeal against an *ex parte* decree, set aside the decree and remand the case to the Court of first instance, if a defendant was not given sufficient opportunity to adduce his evidence, or whether the proper procedure is not to ask the lower Court to take further evidence and submit it to the Appellate Court for disposing of the appeal on the merits. In this case, the finding of the District Judge on the point is against the defendants as we read the appeal judgment.

The ground on which the order of remand is based is that the District Munsif ought to have directed the defendants' witnesses to appear at the next day of hearing and failed to do so. But we do not find any such duty was laid on the District Munsif. Section 162 of the Code of Civil Procedure, 1882, does not, as we read the section, impose any such duty on a trying Court, though probably if an application is made by a party to that effect, the Court may in a proper case bind down the witneses to attend at the next date of hearing. The second paragraph of section 162 only deals with the Court's power to detain witnesses. Nor does *Subbarayadu* v. *Chenchuramayya* (1) lay down any general rule to the effect supported by the learned District Judge. We hold, therefore, that the District Judge's order of remand is without jurisdiction. We set aside the order and remit the appeal to the District Judge for disposal according to law. Costs will abide the result.

We may add that we have treated the memorandum of Civil Miscellaneous Appeal as a Revision Petition, as, in our opinion, Order XLIII, rule 1, cl. (*a*), Code of Civil Procedure, 1908, apparently does not give an appeal against an order of remand, which is not passed under Order XLI, rule 23 of the Code of Civil Procedure 1903.

Case remanded.

(1) 24 M. 200.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 178 OF 1911.

February 14, 1912.

Present:—Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

L. SHWE WA—DEFENDANT—APPELLANT

versus

D. O. SULLIVAN, RECEIVER OF THE ESTATE OF MA BA U, INSOLVENT—PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 20—Receiver entering into arrangement without leave of the Court—Sale by officers of Court—Contract Act not applicable.

The purchaser of property belonging to an insolvent cannot impugn the sale on the ground that the Receiver, who sold the property, entered into an arrangement with the purchaser for deferred payment of the purchase-money without the leave of the Court.

The Contract Act has no application to sales by officers of Courts.

Mahomed Kalameah v. *Harperink Smith*, 5 L. B. R. 25; 6 A. L. J. 34; 13 C. W. N. 249; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom L. R. 227; 36 C. 323; 19 M. L. J. 115; 1 Ind. Cas. 122; 36 I. A. 32, referred to.

Second Appeal from the decree of the Divisional Court, Tenasserim, confirming that of the District Court of Amherst.

Mr. *Gaunt*, for the Appellant.

SIVAPRAKASAM *v.* PALANIAPPA MUDALIAR.

JUDGMENT.

Fox, C. J.—This is a second appeal under section 100 of the Code. The first ground of the appeal relates to the Receiver of an insolvent's estate having entered into an arrangement without the leave of the Court for deferred payment of purchase money on selling part of the insolvent's property. It is submitted that on that account the sale was void. Section 20 of the Provincial Insolvency Act contemplates that a Receiver shall obtain the leave of the Court before he makes such an arrangement, and if he does make one without the leave of the Court, he commits a breach of his duty and may be made responsible if any loss occurs to the estate. It does not lie in the mouth of the purchaser, however, to say that the sale is void on account of this breach of duty. No authority has been cited to us supporting the contention that the sale has been void.

The 2nd ground of appeal is in regard to one of the conclusions of fact; on that, the decision of the Divisional Judge is final. The remaining grounds treat the sale as a matter of contract to be dealt with under the provisions of the Contract Act. It was, however, a sale by a minister of the Court, and the judgment of their Lordships of the Privy Council in *Mahomed Kala Meah* v. *Harperink Smith and Company* (1) implies that the Contract Act has no application to sales by ministers of a Court.

In my opinion, none of the grounds of appeal are sustainable, and the appeal should be dismissed.

HARTNOLL, J.—I concur and would add that appellant admitted that he received notice of the intention to re-sell. The consideration for which the appellant paid was not the mortgage but the schooner and paddy land.

Appeal dismissed.

(1) 5 L. B. R. 25; 6 A. L. J. 34; 13 C. W. N. 249; 5 M.L.T. 126; 9 C.L.J. 165; 11 Bom. L. R. 227; 36 C. 323; 19 M. L. J. 115; 1 Ind. Cas. 122; 36 I. A. 32.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 143 OF 1911.

February 8, 1912.

Present:—Mr. Justice Sundara Aiyar.

SIVAPRAKASAM AND OTHERS—RESPONDENTS—PETITIONERS

versus

PALANIAPPA MUDALIAR—PETITIONER—RESPONDENT.

Costs—Abatement of suit—Death of defendant.

If a suit abates on the ground that no representative of a deceased defendant has been brought on the record, the Court cannot award costs to the heirs of the deceased defendant against the plaintiff.

Quære:—Whether the representatives of the deceased defendant can institute a separate suit for the purpose of recovering costs?

Petition, under section 115 of Act V of 1903, praying the High Court to revise the order of the Court of the District Munsif of Mayavaram, dated 27th October 1910, in C. M. P. No. 825 of 1905, in Original Suit No. 243 of 1904.

Mr. *S. Muthiah Mudaliar*, for the Petitioner.

JUDGMENT.—This is an application under section 115, Civil Procedure Code, to revise the order of the District Munsif of Mayavaram, in Miscellaneous Petition No. 825 of 1905 in so far as he refused to award to the petitioners here, the costs which had been incurred by their mother in Original Suit No. 243 of 1904. It is necessary to state the facts briefly to make the point arising for decision clear. Original Suit No. 243 was instituted by Planiappa Mudali against Thayali Anni, the mother of the petitioners, for a declaration that a certain Will, which she had presented for registration, was a forgery. The suit was originally instituted in the Sub-Court of Kumbakonam. That Court, holding that it had no jurisdiction to entertain the suit, returned the plaint for presentation to the proper Court. Subsequently, the plaint was presented in the Munsif's Court of Mayavaram. Thavali Anni died subsequently. After her death the plaintiff applied to the Munsif for permission to withdraw his suit with leave to sue again, and permission was granted. The order giving permission was subsequently set aside by this Court in Letters Patent Appeal No. 146 of 1909, presented by the present petitioners, the sons of Thayali Anni. They had previously asked the Munsif to review his order granting leave to sue again but failed. This Court, in setting aside the order granting leave, remitted the plaintiff's petition to

withdraw his suit with leave to sue again, for fresh disposal. The District Munsif's Court, on re-hearing, dismissed the plaintiff's petition and granted to the present petitioners their costs incurred previously in this Court and also their costs incurred in the plaintiff's petition in the Munsif's Court. This revision petition relates to the refusal to award to the present petitioners the costs incurred by their mother in the Kumbakonam Sub-Court, before that Court had returned the plaint. The Munsif holds that subsequent to the re-presentation of the plaint in the Mayavaram Court, the suit abated on Thayali Anni's death; that no petition was put in by the plaintiff or by the present petitioners for the substitution of the petitioner's names on the record in the place of Thayali Anni; and that he had no power in these circumstances to award to the petitioners the costs incurred by Thayali Anni. The petitioners' contention before me is, that he was mistaken in supposing that he had no power to do so. I am of opinion that the District Munsif is right. If a suit abates on the ground that no representative of a deceased defendant is brought on record, there is, as far as I am aware, no provision entitling the representatives of the deceased defendant to come to Court and ask for the costs of the suit. When the abatement of the suit is in consequence of the death of the plaintiff, there is provision made in the Code for ordering the costs of the defendant to be paid out of the estate of the deceased plaintiff. But there is no similar provision for directing the plaintiff to pay to the heirs of the deceased defendant the costs incurred by such deceased defendant when the suit abates in consequence of his death. What remedy, if any, would be open to the heirs in such a case, does not arise for decision in this petition. It may be that they might be entitled to institute a suit for the purpose. At any rate, my attention is not drawn to any authority for holding that the Court can award in the suit which has abated costs to the heirs of the deceased defendant against the plaintiff.

The order of the Munsif was, therefore, right and I dismiss this petition.

Petition dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 742 OF 1910.

February 20, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

YELAMBAL ACHI—DEFENDANT—APPELLANT

versus

GOVINDASAMI ODAYAR—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), ss. 20, 72—Refusal to receive document—Appeal.

Semble:—If a Sub-Registrar merely refuses to take up a document for registration, no appeal will lie to the Registrar against the order.

Gangava v. *Sayava*, 21 B. 699, referred to.

Second appeal against the decree of the District Court of Tanjore in Appeal Suit No. 411 of 1909, presented against the decree of the Court of the District Munsif of Tiruvalur in Original Suit No. 142 of 1908.

Mr. *G. S. Ramachandra Iyer*, for the Appellant.

Mr. *V. Narasimha Aiyangar*, for the Respondent.

JUDGMENT.—The point raised in second appeal is that the suit to compel registration is not maintainable in this case as the Sub-Registrar did not refuse to register the document but under section 20 of the Registration Act refused to take it up for registration; and that the Registrar, on appeal, must be taken to have done the same thing. Reliance is placed on *Gangava* v. *Sayava* (1). Assuming that, when a Sub-Registrar refuses to take up a document for registration, no appeal would lie to the Registrar, and no suit could be instituted in the regular Courts to compel registration, it is not shown that in this case registration was not refused. The District Munsif says that there was an appeal against the Sub-Registrar's order to the Registrar under section 72. If the Sub-Registrar merely refused to take up the document for registration, no appeal would lie to the Registrar against his order according to the appellant's contention. The point raised here does not seem to have been argued in the lower Appellate Court. We cannot assume that there was not an order refusing registration by the Sub-Registrar and by the Registrar. On this ground, we dismiss the second appeal with costs.

Appeal dismissed.

(1) 21 B. 699.

In the matter of GULAM ALI.

MADRAS HIGH COURT.

INSOLVENCY PETITITON No. 5 OF 1911.

March 20, 1911.

Present:—Mr. Justice Wallis.

In the matter of GULAM ALI SHAMS-UD-DIN SAHEB, INSOLVENT.

Insolvency—Hypothecation—Stock-in-trade, possession, order and disposition—Presidency Towns Insolvency Act (III of 1909), *s.* 52.

The petitioner, one of the creditors of an insolvent, claimed to rank as a secured creditor against the sale-proceeds of the stock in trade of the insolvent. He had obtained a letter of hypothecation in which one term was:—"I agree to deliver to you the keys of the said business premises and to take from you every morning the said keys and return them to you every evening. For breach of any stipulation contained herein or failure to pay the money due when demanded, it shall be lawful for you without my consent to retain the keys and seize the goods or otherwise take possession of them." The agreement was carried out and when the insolvent subsequently absconded, the petitioner took possession of the stock-in-trade and had it sold:

Held, (1) that on the day of the bankruptcy, which related back to the day of absconding, the stock-in-trade was in the possession, order and disposition of the insolvent so as to make him the reputed owner thereof under section 52 of the Presidency Towns Insolvency Act;

(2) that the possession which the petitioner had under the agreement was not real possession;

Ex parte National Guardian Assurance Co., In re Francis, 10 Ch. D. 408; 40 L. T. 237; 27 W. R. 498 and *Ex parte Cohen, In re Sparke*, 7 Ch. Ap. 20; 41 L. J. Bk. 17; 25 L. T. 473; 20 W. R. 69, approved.

In the matter of William Hastie, 11 C. 451, distinguished.

(3) that a deliberate arrangement, such as the agreement, contemplated to deceive the public was a fraud upon the Act;

Hilton v. *Tucker*, 39 Ch. D. 669; 57 L. J. Ch. 973; 59 L. T. 172; 36 W. R. 762, distinguished.

(4) that, in any event, under the agreement, the goods were absolutely in the possession, order and disposition of the insolvent during the working hours of the day;

(5) that the petitioner was not entitled to rank as a secured creditor.

FACTS.—The material facts appear from the judgment. The letter of hypothecation under which one of the claimants, Hinduji Jeethaji, claimed to rank as a secured creditor ran thus,—

"Madras.....19 .

To

HINDUJI JETHAJEE,
MADRAS.

DEAR SIRS,

With reference to the promissory-note executed by us for Rs....., this day in your favor, we.....merchants carrying on business in..... Madras, hereby hypothecate unto you the good-will of the said business, the stock-in-trade now existing, and the goods that may be added to or substituted for the goods now existing together with all the debts that are now owing to or that may become due to us in respect of the said business by way of collateral security for the due re-payment of the said sum of Rs.....We hereby declare that we have not till now mortgaged, pledged, hypothecated or created any sort of lien, claim, demand or interest in and to and over the said goods or good-will or assets. And we further agree and declare not to alienate, mortgage, pledge or hypothecate or otherwise deal with the said goods or good-will or assets, save and except with your consent previously obtained. We further declare that the stock-in-trade of the said business is now worth about Rs.....We agree to deliver to you the keys of the said business premises and to take from you every morning the said keys and return them to you every evening. For breach of any stipulation contained herein or failure to pay the money due when demanded, it shall be lawful for you, without our consent previously obtained and without notice to us, to retain the said keys and seize the goods or otherwise take possession of them and to sell the said property after three days' notice thereof to us.

Yours faithfully."

Mr. *W. B. Barton*, instructed by Messrs. *Grant* and *Greatorex*, for the Claimants.

Mr. *Nugent Grant*, instructed by Mr. *Wilson*, for the Official Assignee and the Opposing Creditors.

JUDGMENT.—In these two connected cases, the Official Assignee has rejected the claims of the petitioners to be entitled to rank as secured creditors against the sale-proceeds of the stock-in-trade of the insolvent which was in his possession and which after the insolvent had absconded, they took possession of and directed to be sold by the Madras Sales Agency. The sale-proceeds were claimed and recovered by the Official Assignee and subsequently, as I have said, he refused to admit the petitioners' claim to rank as secured creditors and these two notices of motion,

though they do not so state expressly, must be regarded as appeals from the decision of the Official Assignee.

They—one of them at any rate—raise a question of very considerable importance. Hinduji Jeetaji, the first petitioner, made various advances to the insolvent and obtained promissory-notes and what I may call letters of hypothecation in which one term was:—"We agree to deliver to you the keys of the said business premises and to take from you every morning the said keys and return them to you every evening. For breach of any stipulation contained herein or failure to pay the money due when demanded, it shall be lawful for you, without my consent, to retain the keys and seize the goods or otherwise take possession of them." The effect of these provisions really is to make the mortgagee custodian of the keys out of business hours and until the happening of the breach referred to, he has apparently no right to intermeddle with the goods even during these hours. There is evidence that that agreement was carried out and the important question arises whether under this arrangement, "the stock-in-trade was left in the possession or order or disposition of the insolvent in his trade or business by the consent and permission of the true owner under such circumstances that he was the reputed owner thereof"—this is the language of section 52 of the Presidency Towns Insolvency Act—and whether this state of things existed at the commencement of the insolvency, the commencement of the insolvency being the date of the first act of bankruptcy according to another section.

Now, I think it may be said at once that this provision is a product of local ingenuity. From the time of James I down to the present day, during which these provisions have been in force, no one, so far as can be ascertained, has ever yet thought that it was enough to defeat the provisions of the Act that every day when the trader locks up his shop and leaves it and goes to his place or residence, instead of keeping the keys under his own pillow for the night, he should hand them over to the mortgagee and take them back again in the morning. Such a proceeding is one of which the people trading with the insolvent would be absolutely unaware so that in the view of everybody, the goods would be at the order and disposition of the insolvent and he would be the reputed owner thereof.

If this is enough to take the case out of the section, the latter will become very largely a dead letter. As we know, all traders have a very natural objection to its being known that they have had to pledge their stock-in-trade because it affects their credit. If it be enough to secretly hand over the keys every night in some other part of the town and get them back next morning to prevent the goods from being in the possession, order and disposition of the trader, one can scarcely doubt that this method will be very widely adopted and the object of the Legislature defeated. However, if that is the law, I am bound to give effect to it but I am of opinion that it is not the law. I am of opinion that, under this agreement, these goods continued to be in the possession, order or disposition of the trader, notwithstanding that the keys were taken every night to the secured creditor in another part of the town and were taken from him every morning. A case was cited, *In the matter of William Hastie* (1), in which an insolvent obtained an advance and the lender insisted that the stock-in-trade should be given as security and that the key of the godown in which the goods were stored should be delivered to him at once. I think it was the next day the insolvency happened and it was held that by getting possession of the key, the lender had got possession of the goods and that he did all that he could do and that the goods had ceased to be in the possession, order or disposition of the insolvent. But that was, in my opinion, a very different case from this in which the only right the lender reserved to himself was a right of keeping the keys at night when the premises were shut up and he had not even then any right to intermeddle with the stock until the happening of a breach. In my opinion, any possession which the lender had under that arrangement was not a real but a sham possession, and that, as I understand it, is the test. In the case of *Ex parte National Guardian Assurance Co., In re Francis* (2), that is the test which is laid down. Discussing the evidence in that case, Lord Justice James said:—"It was not a sham but a real possession, taken for the

(1) 11 C. 451.
(2) 10 Ch. D. 408; 40 L. T. 237; 27 W. R. 498.

purpose of giving effect to the security of the Company." And Lord Justice Thessiger also said at page 415 that it was necessary to arrive at a conclusion whether the possession was a real one or a mere sham. If, as held in the circumstances of that case, the possession of the true owner was a real one, the case is at once taken out of the section, but I am prepared to hold that in this case the possession was a mere sham. Further, I find in the case of *Ex parte Cohen, In re Sparke* (3), it is said of the agreement proved in that case by Lord Justice James:—" The agreement was evidently concocted for the purpose of evading, if possible, the remedy which the Act as to bills of sale intended to provide for the benefit of the creditors. This attempt at fraud does not, in my opinion, strengthen the position of those who rely upon it to support the assignment. To hold that such an assignment could stand would be a direct encouragement to fraud." Lord Justice Mellish says:—"It is a device between them for the benefit of the debtor, to enable him to avoid that registration which the Act of Parliament has required." Similarly, in this case, I should be prepared to hold that a device of this sort, under which the debtor was in effect really left in the enjoyment of an effective control of the goods, was simply a device to effect fraud upon the Act, such as spoken of here. A deliberate arrangement such as this to deceive the public differs, in my opinion, entirely from such a case as *Hilton* v. *Tucker* (4).

Further, whether I am right in the view I have taken or not, there cannot be the least doubt that under this agreement during the working hours of the day, those goods were absolutely in the possession, order and disposition of the insolvent. He got the keys in the morning and he returned them late at night and under the circumstances I hold that they were during the day time in his absolute order, possession and disposition. Then, under the Act, the Insolvency relates back to the act of Bankruptcy, and on sending for the petition upon which the adjudication was made, I found that the adjudication is made on an affidavit which alleges that "on or about the 13th of December, the said insolvent, with the object of secluding himself, so as to deprive his creditors of the means of communicating with him, locked up the place of business and left Madras taking the keys thereof." And the evidence is that he left for Bombay on that night. Even assuming that before he left for Bombay, he had handed the keys to these creditors, still the words of the Act are "with intent to defeat or delay his creditors, he departs from his usual place of business or otherwise absents himself." It seems to me that he must have left his place of business on the night of the 13th with the intention of so starting for Bombay and that the act of Bankruptcy must be considered as having taken place when he left his place of business on the evening of the 13th without any intention of returning, at a time when in my judgment the goods were in his possession, order or disposition with the consent of the true owner, that is to say, the hypothecatees.

So much for the appeal in the first case of Jeetaji. With regard to the second appeal of Jeevaji, the case is not even so strong because the letter of hypothecation in that case which recites that the goods have been deposited with the creditor says nothing whatever about this arrangement of handing over the keys every night and taking them again in the morning. The evidence is that there were two sets of keys, one set of which was handed to Jeetaji every night and the other to Jeevaji. Though these two professed to be absolute strangers to each other, they never heard of each other even, yet they combined in all the steps taken for realizing the goods, and the evidence of there being two sets of keys is of a very unsatisfactory character. I am not prepared to hold that it has been satisfactorily proved that Jeevaji had even this sort of possession which would have resulted to him from the keys being left in his house every night and taken away in the morning. It looks to me more as if this was an after-thought intended to bring him into line and to put him within as strong a position as Jeetaji. At any rate, the onus is distinctly upon him to establish that the goods were in his possession and I hold he has failed to establish that by satisfactory evidence. The result is that

(3) 7 Ch. Ap. 20; 41 L. J. Bk. 17; 25 L. T. 473; 20 W. R. 69.

(4) 39 Ch. D. 669; 57 L. J. Ch. 973; 59 L. T. 172; 36 W. R. 762.

both these appeals must be dismissed with costs.

Appeals dismiseed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 67 OF 1911.

February 14, 1912.

Present:—Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

P. L. CHRISTENSEN—DEFENDANT—APPELLANT

versus

K. SATTIA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. II, rr. 1, 2—First suit on contract—Second suit for compensation for services—Res judicata.

In a previous suit the plaintiff based his claim on a personal contract with the defendant for the supply of boats at an agreed rate and on failing to prove that agreement, brought this suit for recovery of the same money as compensation for services rendered:

Held, that the 2nd suit was barred as *res judicata* under section 11 of the Civil Procedure Code. The matter directly and substantially in issue in the first suit was whether the defendant owed the plaintiff any sum on account of the use by him of the plaintiff's boats. The ground in the second suit ought to have been taken as an alternative in the first suit in the event of the respondent not having been able to prove a direct contract.

Appeal against the judgment and decree of the District Court of Amherst, in Suit No. 233 of 1909.

Messrs. *Lentaigne*, *McDonnell* and *Clifton*, for the Appellant.

Messrs. *Giles* and *Higginbotham*, for the Respondent.

JUDGMENT.

FOX, C. J.—The first question on this appeal and the only one which has so far been argued is whether the suit is barred as *res judicata* under the provisions of sections 11 and 12 and Order II, rule 2 of the Civil Procedure Code. The suit, the decision in which is put forward as a bar to the present suit, is No. 251 of 1907, in which the present plaintiff was the plaintiff and the present defendant and Venkat Reddy and Y. Subramoney were defendants. * *

* * * * * * * *

In Suit No. 251 of 1907, the plaintiff alleged and endeavoured to prove by evidence a contract for the supply of the boats at an agreed rate and that such contract had been made by him with P. L. Christensen personally. The District Judge found the contract not proved, but on the evidence he came to the conclusion that the plaintiff was led to believe by the second and third defendants that he had let his boats to the first defendant and that the latter knew that he was under that impression and designedly took no steps to remove it and consequently he was debarred from denying that the plaintiff had let his boats directly to him. He also found that the second and third defendants had engaged the plaintiff's boats for and as agents for the first defendant. On these grounds, he found on the second and third issues that the plaintiff had let his boats to the first defendant and had not let them to the second and third defendants. He gave the plaintiff a decree for the amount claimed with costs as against the first defendant, and dismissed the suit with costs as against the second and third defendants. The first defendant appealed to this Court against the decree against him and this Court reversed the decree on the ground that the question of a contract between the plaintiff and the first defendant made through the agency of the second and third defendants had not been raised by the parties and had not been involved in the suit. This decision was given on March 15, 1909. Suit No. 238 of 1909 was instituted on August 24, 1909. In the plaint, it is described as a suit for compensation for services rendered and it is put forward as a suit open to the plaintiff and contemplated by section 70 of the Contract Act. Omitting all mention of the contract alleged in the previous suit, the plaint merely says that the plaintiff supplied the boats and the defendant employed them, and the services were reasonably worth to the defendant Rs. 100 a day for each boat. The ground of claim was apparently simply the facts that the plaintiff had supplied the boats and he had not intended to do so gratuitously, and the defendant had had the benefit of them. Consequently, he was bound to make compensation for the use of them. When the case came on for hearing, it was agreed by both sides that the evidence in Suit No. 251 of 1907 should be treated as evidence in the case. In the further evidence the plaintiff gave in the later suit, he again

said that the defendant had agreed to pay him Rs. 100 for each boat.

In face of the obvious fact that on the plaintiff's own allegations and also on those of the defendant in both suits, the boats had been supplied by the plaintiff under a contract made by him with some one, that was, either with P. L. Christensen, personally, or with Venkata Reddy and G. Subramoney as agents of Christensen, or with them as principals, the District Judge gave the plaintiff a decree, thinking apparently that the rule of law embodied in section 70 of the Contract Act applied to such a case. This question need not be discussed now since the only point at present for decision is whether the later suit was not barred as *res judicata*. Omitting parts of it which have no bearing, the first para. of section 11 of the Code of Civil Procedure enacts that no Court should try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a Court competent to try such subsequent suit and had been heard and finally decided by such Court. The matter directly and substantially in issue between the plaintiff and first defendant in Suit No. 251 of 1907 was whether that defendant owed the plaintiff any amount on account of the use by him of the plaintiff's boats. Under Order II, rule 1, the plaintiff was bound to frame his suit as far as practicable in such a manner as to afford ground for a final decision upon "the subject in dispute," and in such a manner as to prevent further litigation concerning such subject.

Under Order VII, rule 1 (*c*), his plaint had to set forth the facts constituting his cause of action. He chose to set forth as such facts a contract made personally with the first defendant, which he subsequently failed to prove. He was bound in that suit to put forward the whole case on which he relied as grounds for the Court giving him the relief he asked for. Even inconsistent allegations of fact were open to him [see *Venkatachellam Chetty* v. *Maung Kyauk Lon* (1).]

He chose to base his claim on allegations of fact which could not be supported. His suit was finally dismissed. This was tantamount to a decision that nothing was due to him by the first defendant on the facts which he had put forward, or on the facts which he might have but did not put forward in support of his claim. In my opinion, the matter directly and substantially in issue, namely, whether the first defendant owed him any money on account of the use of his boats, was heard and was finally decided by the Appellate Court's decision on the appeal from the decree in Suit No. 251 of 1907, and the hearing of the Suit No. 238 of 1909 was barred by the provisions of section 11 of the Code of Civil Procedure. I would allow this appeal, set aside the decree of the District Court, and dismiss the suit with costs, and order the plaintiff to pay the defendant's costs of this appeal.

HARTNOLL, J.—I take the same view as the learned Chief Judge. The matter directly and substantially in issue in both suits is the same. It is whether the appellant is liable to pay a certain sum of money to the respondent on account of the use of certain boats. Explanation 4 to section 11 of the Civil Procedure Code enacts that any matter which might and ought to have been made ground of defence and attack in such former suit should be deemed to have been a matter directly and substantially in issue in such suit. In the first suit, it was alleged that there was a direct contract between the parties. Such was not proved. Now the ground is taken that the appellant is liable under the principle enacted in section 70 of the Contract Act. That this ground might have been made a ground for attack in the former suit is clear. Whether it ought to have been, depends on the facts of the case. This was laid down in the case of *Kameswar Pershad* v. *Raj Kumari Rattan Koer* (2). In that case, their Lordships also said:—"Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important." In this case and in the former, the matter in issue is, what were the true facts of a certain transaction. No confusion could have arisen by taking the present ground as an alternative in the former case in the event of the respondent not having been able to prove a direct contract. I am certainly of opinion that it ought to have been made a ground of attack in the former suit. Hence the first sentence of section 11 is applicable and bars the

(1) 5 L. B. R. 251; 4 Bur. L. T. 24; 9 Ind. Cas. 469.

(2) 20 C. 79; 19 I. A. 234.

present suit. I, therefore, concur in the order proposed by the learned Chief Judge.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 221 OF 1912.

October 12, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

CHALLAPALLI HANUMANULU PANTULU—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANT—RESPONDENT.

Land revenue—Land Acquisition Act (I of 1894), s. 16—Acquisition for a Municipality—Transferee of Municipality—Inam land—Exemption from revenue—Madras District Municipalities Act (IV of 1884), s. 279.

Certain *inam* land was acquired for a Municipal Council under the Land Acquisition Act and by successive sales the plaintiff became the owner of it. He contended that the Government was entitled only to quit-rent as from the *inamdar* and not ground rent:

Held, that when the land vested in the Government, it became ordinary Government property liable to assessment in the hands of any person who might afterwards become its occupier. If the plaintiff claimed to hold the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of the ordinary assessment. The Government order conferring an absolute property on all transferees from a Municipality simply removed all the objections to the transfer on the ground that the transferor is a Municipal Council and did not grant to such transferees an exemption from payment of land revenue.

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 157 of 1908, presented against the decree of the Court of the District Munsif of Bezwada, in Original Suit No. 324 of 1906.

Mr. *T. Prakasam* and *V. Ramadoss*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.—The plaintiff's suit is for a declaration that the Government is not entitled to levy ground rent for certain land in his occupation and for the recovery of the amount collected from him by the Government as ground rent.

The District Judge has decided, and, in our opinion, quite rightly, that the plaintiff has not made out any cause of action. Two points are argued in second appeal. The *first* is that the Municipality acquired by the land acquisition proceedings the *inam* right which belonged to the original owners of the land and that by successive sales the plaintiff now owns that right. The Government, it is contended, is entitled only to quit rent as from the *inamdar* and not ground rent. Assuming that a Civil Court could go into this question, there is really no basis for the contention. The land was acquired by the Government for the requirements of the Bezwada Municipality under the Land Acquisition Act. It is quite clear that when the land was acquired, the title to it vested in Government. See section 16 of the Act. Section 279 of the Madras Act IV of 1884 does not help the plaintiff at all. It provides that on payment by the Municipality of the amount of compensation awarded for the land, the land shall vest in the Municipality. It is quite clear from that section itself that it is the Government that is to acquire the land. The effect of the section is merely to declare that the title which vests in the Government by the acquisition passes to the Municipality when the Municipality pays the amount settled as compensation. The title of the Municipality, therefore, was derived from Government. When the land became vested in the Government, it became ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier. If the plaintiff claims to hold the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of the ordinary assessment. The appellant's Counsel argues that it must be taken that there was such a grant in this case because, when G. O. No. 210, dated the 20th February 1889, was issued, permitting Municipal Councils to transfer lands vested in them by sale, mortgage or otherwise, no condition was inserted that the assignee would be liable to pay such assessment or ground rent as might be fixed by the Revenue Authorities and that this condition was inserted only in an order passed in the year 1900. The argument is that, under the previous order of 1889, every transferee from

the Municipality would acquire an absolute right to the property transferred free from the payment of any assessment; in other words, that order granted an exemption for payment of land revenue to all persons who might purchase lands from the Municipality. This is a contention which it is impossible to uphold. There are no words of exemption from liablity to assessment in the Government Order of 1889. No exemption can be claimed without a grant or exemption in express words The construction to be placed on the order of 1889 would be that the transferees would obtain a title to the land under their transfers although the transferor might be a Municipal Council, that is, to remove all the objection to the transfer on the ground that the transferor is a Municipal Council. There is no reason for differing from the conclusion of the lower Appellate Court. We dismiss the second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1717 AND 1182 OF 1910.

January 22, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Miller.

IN S. A. No. 1717 OF 1910

ABDUL KADIR BEARI—PLAINTIFF—APPELLANT

versus

BAGADE SHIVA RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

IN S. A. No. 1182 OF 1910

BAGADE SHIVA RAO—DEFENDANT—APPELLANT

versus

ABDUL KADIR BEARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract—Agreement reduced to writing—Undue influence or fraud not proved—Discretion of Court—Contract Act (IX of 1872), s. 16.

In the case of an agreement reduced to writing, a Court cannot, in the absence of fraud or undue influence, within the meaning of section 16 of the Contract Act, refuse to enforce its terms, however unreasonable they may be. Under such circumstances, the Court has no discretion.

Dhanipal v. *Raja Maneshar Bakhsh Singh*, 33 I. A. 118; 28 A. 570; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292, referred to.

Second appeals against the decree of the District Court of South Canara, in Appeal Suit No. 253 of 1909, presented against the decree of the District Munsif of Kasargod, in Original Suit No. 213 of 1908.

Messrs. *K. P. Madhava Rau* and *K. P. Lakshmana Rau*, for the Appellant.

Messrs. *B. Sitarama Rau* and *H. Balakrishna Rau*, for the Respondents.

JUDGMENT.—There is evidence to support the District Judge's finding that Exhibit I is genuine. We are bound by that finding in second appeal. We are further of opinion that the District Judge is right in finding that the amount due under that document must be paid by the plaintiff, as well as the amounts due under Exhibits II and XI before he can redeem the property.

But we can find no grounds for not enforcing the terms of the contract evidenced by Exhibit I. It is not suggested that it was brought about by fraud or undue influence as defined in section 16 of the Contract Act. It is pleaded before us that the period of 20 years fixed for redemption is unreasonable and would not be enforced by a Court of Equity, but the 30 years expired in 1887, and it does not appear that the mortgagor, either before or since that time, ever wished to redeem. It is certainly no reason for not enforcing the terms of the contract. In the circumstances of this case, the Court has, in fact, no discretion. *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (1). We are also of opinion that the value of the paddy payable under Exhibit I should be calculated according to the market-rate on the day when the account is made up for the purposes of drawing up the mortgage decree.

In the result, we must dismiss the plaintiff's appeal (No. 1717), and allow the appeal of the 1st defendant (No. 1182) with costs payable by the plaintiff to the 1st defendant throughout.

We must, therefore, direct the District Judge to restore the appeal to his file and draw up the usual mortgage decree for the plaintiff on the basis of the above findings.

Appeal No. 1717 *dismissed.*

Appeal No. 1182 *allowed.*

(1) 33 I. A. 118; 28 A. 570; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 740 OF 1910.
February 8, 1912.
Present:—Mr. Justice Miller and
Mr. Justice Sundara Aiyar.
UNDE RAJAHA RAJA SIR RAJA VELUGOTI SRI RAJAGOPALAKRISTNA YACHENDRA BAHADUR VARU, K. C. I. E., PANCHAHAZAR MUSABDAR RAJAH OF VENKATAGIRI
—PLAINTIFF—PETITIONER
versus
VEMURU CHINTA REDDI AND OTHERS
DEFENDANTS—RESPONDENTS.

Compromise—Agreement to abide by decision in another suit—Adjustment—Jurisdiction.

In a suit to recover the amount due under a pro-note, the parties agreed to abide by the decree of the District Munsif in a suit for cancellation of the same pro-note:

Held, that the agreement was not binding on the parties in the subsequent suit. The agreement could not be regarded as an adjustment of the subject-matter of the suit by a lawful agreement or compromise.

The ordinary rule is that when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule but where the exceptions do not apply, the rule must prevail.

Rukhanbai v. *Adamji*, 33 B. 69; 10 Bom. L.R. 366; 1 Ind. Cas. 622, *Moyan* v. *Pathukutti*, 31 M. 1; 3 M. L. T. 98; 17 M. L. J. 545, relied upon.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Court of Nellore in Small Cause Suit No. 97 of 1907, dated the 17th day of Febraruy 1908.

Mr. *S. Subramania Iyer*, for the Petitioner.

Dr. *S. Swaminathan*, for the Respondent.

JUDGMENT.—This is an application by the plaintiff in Small Cause Suit No. 97 of 1907 in the District Court of Nellore to revise the judgment of the District Judge. The suit is to recover from the defendants a sum of Rs. 349-8 on a pro-note executed by them, in favour of the plaintiff in 1906. The defendants pleaded that there was no consideration for the note, that they had instituted a suit, Original Suit No. 281 of 1907, in the District Munsif's Court of Nellore for the cancellation of the note and that the suit was, therefore, not maintainable. It appears, from the B Form Diary, that the suit was adjourned pending the decision of the Munsif in Original Suit No. 281 of 1907, and that, after the Munsif's decision of the suit declaring the pro-note not enforcible against the defendant, this suit was dismissed. The judgment of the District Judge states: "Both parties represented in this Court that they would abide by the decree of the District Munsif of Nellore in Original Suit No. 281 of 1907 on his file in regard to the question raised in this case." The question referred to in this sentence seems to be whether the pro-note was unenforceable on the ground that it was not supported by any consideration. Unfortunately, there is no written record of the representation by the parties except what appears in the judgment. Nor are the parties agreed as to what exactly the representation was. The plaintiff says that the agreement between the parties was that the question in dispute should be decided in accordance with the final judgment of the matter in Original Suit No. 281 of 1907 on the file of the District Munsif of Nellore, which was capable of being carried up on appeal to the District Court and finally to this Court. The defendants, on the other hand, contended that the decision of the District Munsif in Original Suit No. 281 of 1907 was to be accepted as binding between the parties in the Small Cause Court. In the view we take of the case, we think it unnecessary to decide which of these statements is correct. It may be noted that the decision of the Munsif in Original Suit No. 281 of 1907 was reversed by the District Court on appeal and the pro-note was held to be binding on the defendants; and the second appeal against the District Judge's judgment was dismissed by this Court.

The question argued in this revision petition at the hearing was,—assuming that the plaintiff had originally represented that the case might be decided in accordance with the decision of the Munsif in Original Suit No. 281 of 1907, he thereby disentitled himself to ask subsequently that it should be decided by the District Judge on the merits. We are not at present concerned with the question of what legal effect, apart from any agreement between the parties, the judgment of the Munsif in Original Suit No. 281 of 1907, or the final appellate judgment in that case, would have upon the controversy in the small cause suit,

We have come to the conclusion that the defendants were not entitled to insist on the representation originally made by the parties as a bar to the plaintiff's right to the trial of the small cause suit. The agreement in question cannot be regarded as an adjustment of the subject-matter of the suit by a lawful agreement or compromise. The agreement did not settle the dispute but postponed the settlement and purported to authorise the Court to settle it in a certain manner. A compromise has been defined as "a mutual agreement between two or more persons at difference, to put an end to such difference, upon certain terms agreed upon." (Burrill's Dict., quoted in 8 American Cyclopædia of Law and Procedure, page 501). It must be an agreement which one of the parties can insist on the Court enforcing against the will of the other. Can it be said in this case that one of the parties could insist on the Court postponing the Small Cause suit till the District Munsif's decision in Original Suit No. 281 of 1907? We think, not. The ordinary rule is that, when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law, and that parties have no right to interfere with its authority to do so. There are no doubt well understood exceptions to this rule, but where the exceptions do not apply, the rule must prevail. Notwithstanding the pending of a suit, the parties may settle their disputes as they like by any lawful arrangement, and the Court is then bound to give effect to the settlement. Again, they may ask the Court to refer the questions in dispute to an arbitrator, in which case, though the decision of the cause is primarily transferred to another tribunal, the Court will retain some control over the proceedings. The parties may also enter into an agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. This again is subject to the control of the Court.

The present case does not fall within any of these exceptions. Our attention is not drawn to any rule or principle which would compel a party to adhere to any agreement by him that the suit may be decided in a manner different from that prescibed by law. For instance, we do not think that if a litigant agreed that the Judge might decide the suit in the manner that a certain individual might advise, such an agreement would bind him. In *Rukhanbai* v. *Adamji*(1), Beaman, J., held that an agreement that certain disputes relating to the accounts between the parties in the case should be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him, was not binding. The learned Judge observes that it did not amount to an adjustment or compromise and that the agreement not being in writing would not constitute a binding reference to arbitration. He elaborately discusses the question whether an agreement to refer to arbitration and to be bound by the award passed by an arbitrator can be treated as amounting to a compromise and expresses disinclination to accept as sound the decisions cited before him in support of the position that such an agreement would amount to an adjustment or compromise when an award had been passed by the arbitrator. We consider it unnecessary to express any opinion on this question, as it is clear that the agreement in the present case cannot be treated as a reference of the dispute in the small cause suit to the arbitration of the Munsif who was trying Original Suit No. 281 of 1907. In *Moyan* v. *Pathukutti* (2), an agreement by the plaintiff to take a certain oath and to have his suit dismissed, if he failed to do so, was regarded as not binding on him. We hold that the agreement in question in this case did not deprive the plaintiff of his right to have the suit decided on the merits. We, therefore, reverse the decision of the Judge and remand the suit to the District Munsif of Nellore to be disposed of by him according to law, as a regular original suit. The costs of this petition will abide the result.

Case remanded.

(1) 33 B. 69; 10 Bom. L. R. 366; 1 Ind. Cas. 622.
(2) 31 M. 1; 3 M. L. T. 98; 17 M. L. J. 545.

G. N. DAR, B. A. LL. B.,
Vakil High Court.
SRINAGAR (Kashmir)

TOLA RAM *v.* MA KAING.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 179 OF 1910.

February 15, 1912.

Present:—Mr. Justice Twomey.

TOLA RAM—PLAINTIFF—APPELLANT

versus

MA KAING—DEFENDANT—RESPONDENT.

Buddhist Law—Inheritance—Hnapazon *and* let-tetpwa—*Husband's share in* lettetpwa *inherited by wife during coverture.*

Property inherited by the wife from her father after her marriage is *lettetpwa* and not *Hnapazon*. The husband, as the party through whom the inheritance did not come, is entitled to one-third share of such property.

Appeal against the decision of the District Court of Toungoo, in Civil Appeal No. 24 of 1910, dated the 31st March 1910, confirming that of the Township Court of Pyu, in Civil Suit No. 445 of 1909.

FACTS.—Plaintiff-appellant sued Ma Kaing (respondent) for declaration of the title of the judgment-debtor, Mg Yan Bye, husband of Ma Kaing, to certain property attached by him in execution of a decree against Yan Bye. The respondent alleged that the property was hers. Both the lower Courts dismissed the plaintiff's claim. On 31st August 1911, the case was remanded by Mr. Justice Twomey for further evidence. On receiving the additional evidence, the following judgment was delivered:—

Mr. *Palit*, for the Appellant.

Mr. *Gaunt*, for the Respondent.

JUDGMENT.—From the evidence recorded on remand, it is clear that the property in suit was inherited by Ma Kaing from her father, Saya Paing, after Ma Kaing's marriage with the judgment-debtor, Yan Bye.

Though not *hnitpazon* in the sense that it was acquired by the joint industry of the husband and wife, it was *lettetpwa*, in which, according to the rulings both of this Court and of the Judicial Commissioner, Upper Burma, the husband, as the party through whom the inheritance did not come, acquired a one-third interest.

The decree of the District Court is set aside. A decree will be given in the appellant's favour declaring that the judgment-debtor Yan Bye is entitled to a third share in the property in dispute and that this share may be attachad in execution of the appellant's decree.

RAMAN CHETTY *v.* NAGARATHNA NAICKER.

The respondent will pay one-third of the appellant's costs in all Courts.

Decree set aside.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 131 OF 1903.

February 23, 1912.

Present:—Mr. Justice Wallis.

R. M. A. R. RAMAN CHETTY AND OTHERS—PLAINTIFFS

versus

P. NAGARATHNA NAICKER—DEFENDANT.

Partners—Suit on a pro-note—Parties—Promissory-note—Transfer—Actionable claim—Assignment—Transfer of Property Act (IV of 1882), ss. 130, 137.

The proper parties to a suit on a pro-note in favour of a firm are all the members of the firm when the obligation on it was contracted; the fact that one of them has retired would make no difference. He is still a proper party to join the suit unless before suit there has been a due and valid assignment of the chose in action from the partners to one of them.

A promissory-note unless transferred in accordance with the Negotiable Instruments Act, must be transferred according to the provisions of section 130 of the Transfer of Property Act. Section 137 of that Act does not render oral assignments valid.

Arunachala Reddi v. *Subba Reddi*, 17 M. L. J. 393; 3 M. L. T. 7, followed.

Mr. *C. P. Ramaswami Iyer*, for the Plaintiffs.

Messrs. *T. Ethiraja Mudaliar*, and *W. V. Rungasamy Iyengar*, for the Defendants.

JUDGMEMT.—This is a suit brought by the plaintiff, R. M. A. R. Raman Chetty, on a promissory-note in a two-fold character of payee and indorsee of the note. At the trial, the claim of the plaintiff as indorsee broke down as he was unable to prove the authority of the agent who made the endorsement. And the plaintiff's Counsel then contended that he was entitled to succeed as a sole payee owing to the fact, as he alleged, that, subsequently to the making of the note, his partner had retired from the firm and he had become the sole owner of the firm, and he adduced evidence to that effect. Thereupon, I allowed him to make the other member of the firm a party to the suit either as plaintiff or defendant and adjourned the case. When the case came on, no further argument was addressed to me nor evidence called by either side, and

treating the case as undefended, I gave judgment, without assigning reasons, for the plaintiff, on the basis that the original plaintiff had become the sole owner of the note. The Appellate Court, considering that this question had not been sufficiently and distinctly raised, had directed a fresh trial of this issue. Fresh evidence has been called and I have to decide the case upon that evidence and upon contentions of law which had been raised before me. The evidence of assignment is that of the first plaintiff who died before this issue was tried but whose evidence on the previous occasion is available as he was cross-examined and also the evidence of his partner. According to the evidence of the partner, the arrangement for his retirement was an oral one, that as the business was being conducted at a loss, he agreed to retire from it and leave all the liabilities and assets to his other partner. The evidence is not very satisfactory but is borne out to some extent by the fact that the present note was undoubtedly endorsed over to the present first plaintiff although the authority to do so could not be satisfactorily proved in the case owing to the terms of the Powers-of-Attorney. I am prepared to hold that the second plaintiff, as he now is really, did retire from the firm and that the agreement between the parties was that he should cease to have any interest in the note. But then the question arises whether a mere oral transfer, which is all the evidence proves, is sufficient, in the case of one partner retiring from a firm. The law, as laid down in Lindley on Partnership, is, that the proper parties to the suit are the members of the firm when the obligation was contracted, and that the fact that one of them has retired makes no difference and he is still a proper party to join the suit just as a fresh partner, who is brought in, would not be a proper party. Of course, a suit in the case of partnership may be instituted in the name of the partnership firm, and then those who are members of the firm at the time may be entitled to the benefits of judgment. But this is not a suit in the name of the firm. As this promissory-note was made at a time when the two present plaintiffs were partners, this suit ought properly to have been instituted in the name of both partners unless before suit there was a due and valid assignment of the chose in action from the partners to one of them, the second plaintiff having been added after the period of limitation. Now, there is only an oral assignment of the chose in action. There is no assignment of the promissory-note under the Negotiable Instruments Act, and the question is—Is such oral assignment good? The point is covered by the authority of the case *Arunachala Reddi* v. *Subba Reddi* (1), to which I was a party, which is binding upon me, and from which I see no reason to recede. As is well known, the intention of Legislature in amending this Chapter of the Transfer of Property Act, was to bring the law in India generally into conformity with the law in England, which under the Judicature Act requires assignments of chose in action to be in writing, a provision which is, in my opinion, highly necessary for the benefit of the other party to the contract who ought not to be embarassed by mere oral allegations of transfer which may easily be distinguished and upon which it may be very difficult for him to act with any degree of safety to himself. Section 130 of the Transfer of Property Act provides:—"The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor." Then section 137 says:—"Nothing in the foregoing section of this Chapter applies to stocks, shares or debentures or to instruments which are for the time being, by law or custom, negotiable or to any mercantile document of title to goods." All those kinds of actionable claims have their own proper methods of assignment under mercantile law and they constitute, perhaps, taken collectively, the most important classes of actionable claims, and to say that the effect of the section is that all these actionable claims, not only promissory-notes, but bills of lading payable to order and the whole of this class of actionable claims, unless there is any express statutory provision to the contrary, are capable of oral transfer in addition to the methods of transfer provided by the mercantile law, is to my mind a most startling conclusion, and a conclusion which it appears to me to a very large extent would defeat the intention of the Legislature. It does not appear to me to be necessary to give section 137 of the Act any such extensive construction. It seems to me that if such action-

(1) 17 M L. J. 393; 3 M. L. T. 7.

able claims ought to be considered at all as capable of transfer otherwise than by the methods recognised by the mercantile law, it can only be by treating them as mere actionable claims within the meaning of section 130 and ignoring their character as mercantile documents which have special methods of transfer of their own. In this case, there has been no assignment under section 130 by the two plaintiffs to the one plaintiff and, therefore, on this point, which was not argued before me on the previous occasion, the suit fails and is dismissed with costs.

There is another matter which I ought to mention. On the last occasion, the defendant was put into the box and in somewhat hesitating manner, and to my mind absolutely unmistakably, admitted the execution of the promissory note.

The Applelate Court left the matter to me. When the case came up again, the plaintiff was in a position to prove beyond any possibility of doubt that the promissory-note had been executed and I allowed the issue to be framed for that purpose; with the ill-fortune which has dogged the plaintiff all along, he did produce a witness and put him into the box to prove the execution of the note but subsequently he was not able to produce the witness for further cross-examination and so his evidence has become unavailable. On this part of the judgment of the Appellate Court, I take the evidence given at the first trial by the defendant to prove sufficient execution. However, on the other question, I am of opinion that the plaintiff's case fails and must be dismissed with costs.

Suit dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1567 OF 1909.

February 19, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Sri JANAGANTI CHINA VENKATA-RAJAUM GARU—PLAINTIFF—APPELLANT

versus

KAPPOJEE LINGANNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Inconsistent pleas—No rule of law to prevent.

There is no rule of law which prevents a defendant from raising inconsistent pleas, at any rate, where the facts to which the pleas relates are not within his personal knowledge.

Second appeal against the decree of the Temporary Subordinate Judge's Court of Vizagapatam, in Appeal Suit No. 257 of 1907, presented against the decree of the Court of the District Munsif of Chodavaram, in Original Suit No. 390 of 1906.

Mr. *V. Ramesam*, for the Appellant.

Mr. *S. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—The defendants pleaded that the lands were their own private *inam* and that if it should be found that their right to hold was burdened with any service to the plaintiff, they were prepared to render the service due. It is contended that these are inconsistent pleas which cannot be combined by the defendants. There is certainly no rule preventing a defendant from raising inconsistent pleas, at any rate, where the facts to which the pleas relate are not within his personal knowledge. The next contention is that as it has been found that the defendants were bound to render service, it must be presumed that the lands in question were held by them as emoluments for rendering service. It is not shown that the Subordinate Judge has based his finding on the ground that there was no such presumption.

He comes to the conclusion that on the evidence on record, the lands were held by the defendants merely with the burden of service and not as emoluments for service. He was entitled to arrive at that finding on the evidence on record and the question of onus is immaterial.

The last contention urged is that the defendants must be held to have forfeited their right to hold the lands even if they were not merely for emoluments for service, which could be resumed at the plaintiff's will. We are unable to agree with Mr. Ramesam that there is such a denial of the plaintiffs' right in Exhibit C as to work as a forfeiture of the defendant's right to hold the lands. We dismiss the second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 28 OF 1912.

February 15, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

SINGARAM CHETTIAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KALIYANA SUNDARAM PILLAY—PLAINTIFF—RESPONDENT.

Security—Redemption decree — Mortgage-money — Deposit in Court—Execution— Security for mesne profits—Whether deposit money can be security.

In a redemption suit, the mortgagor obtained a decree and in accordance with the decree deposited the mortgage amount of Rs. 10,000 in Court. An appeal was filed by the mortgagee and execution was ordered only on the mortgagor furnishing security for Rs. 3,000 for any mesne profits that might be payable by the mortgagor to the mortgagee in case the decree of the lower Court was reversed on appeal. The mortgagor wanted the Court to accept as security the sum of Rs. 10,000 which he had deposited in Court:

Held, per *Abdur Rahim, J.*, confirming the order of the lower Court, that the mortgagor was entitled to give it as security. The decree directed that the money should be deposited in Court; it did not say to the credit of the defendant. The money remained to the credit of the suit and there was no reason why it could not be given as security.

Per *Sundara Aiyar, J. contra*—The sum of Rs. 10,000 was no longer the money of the mortgagor and he had no disposing power over it. Only some property over which one has a present disposing power could be given as security. So, no charge could be created over the mortgagee's liability for Rs. 10,000 which would come into existence in case the decree for redemption was reversed. Such a mere possibility of a debt could not be transferred according to the principles embodied in section 6 of the Transfer of Property Act.

Appeal against the order of the Subordinate Judge's Court of Kumbakonam, dated the 18th January 1912, in E. P. No. 101 of 1911 (in O. S. No. 23 of 1910).

The *Advocate-General* and Mr. *S. Muthia Mudaliar*, for the Appellants.

Mr. *G. S. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—In my opinion, the order of the Subordinate Judge accepting the security tendered by the respondent is right. He has accepted the Rs. 10,000, deposited by the respondent in Court under a decree passed in a suit for redemption, as security for Rs. 3,000 for any mesne profits that might be recovered from him by the appellants. The money which is in deposit in Court under the decree is the amount which would be payable to the defendants, who are the mortgagees, as money due under the mortgage. The defendants-respondents, who have appealed against the decree for redemption, will not be entitled to this money if they succeed in their appeal, and the decree for redemption is set aside, in which case the money will be available as security. On the other hand, if the defendants' appeal fails and the decree for redemption is confirmed, the defendants will be entitled only to the Rs. 10,000 and there would be no claim for mesne profits at all. The decree directs that the money should be deposited in Court. It does not say to the credit of the defendants; and I am not, therefore, prepared to hold that the property in the money has passed to the defendants, though they may undoubtedly apply for an order that the money may be paid to them. They have made no such application but have appealed against the decree by virtue of which alone they would be entitled to apply that the money may be paid to them. The money remains to the credit of the suit and I see no reason why such money cannot be given as security. Even if defendants draw the amount, they will be liable to refund the amount in case they succeed in their appeal.

In these circumstances, it is difficult to see why the money should not be a valid security. I would, therefore, dismiss this appeal.

SUNDARA IYER, J.—I regret I am unable to agree in the conclusion arrived at by my learned brother. The plaintiff obtained a decree for redemption against the defendants. The mortgage-money payable by him according to the decree was Rs. 10,000. The defendants have filed an appeal against that decree. In the meanwhile, the plaintiff wants to execute his decree for redemption and to take possession of the mortgage property. At the defendant's request, this Court passed an order that the plaintiff should not execute the decree and take possession of the property unless he gives security to the satisfaction of the lower Court for Rs. 3,000 for the mesne profits that would be payable by the plaintiff to the defendants in case the decree of the lower Court should be reversed on appeal The plaintiff now wants the Court to accept as security for Rs. 3,000 the sum of Rs. 10,000 which he has deposited in Court

on account of the mortgage-money due under the decree. The lower Court has held that he is entitled to have that amount accepted as security. The question for decision is, whether the sum of Rs. 10,000 in Court can legally be accepted as security for the sum of Rs. 3,000 that might become payable by the plaintiff as mesne profits. In my opinion, it cannot be. According to the decree, the plaintiff is entitled to recover possession only on paying a sum of Rs. 10,000 into Court. In addition to that liability, the order of this Court has also made the plaintiff's right to take possession conditional on his further giving security for Rs. 3,000. Now, can he give the Rs. 10,000 which he has deposited as security for Rs. 3,000?

The sum of Rs. 10,000 is, as I have already stated, mortgage-money payable to the defendants, and the plaintiff's right to recover possession is conditional upon this mortgage-money being paid to the defendants. Ordinarily, a decree for redemption would direct that the plaintiff should pay the money to the defendants, the mortgagees, or into Court. Evidently, the object of this alternative provision is to guard against the plaintiff's right to recover possession being affected by the failure on the part of the defendants to receive the money from the plaintiff. The section provides that payment into Court is equivalent to the payment to the defendants so far as the plaintiff's right to recover possession is concerned. I cannot doubt that, when a mortgagor who obtains a decree for redemption pays the mortgage-money into Court, he pays it for the benefit of the defendants; whatever his intention may be, that is why he was directed to pay the money into Court. It is impossible for me to suppose that the plaintiff could be entitled to recover possession and at the same time to contend that the money paid into Court is his. If the money did continue to be his, even after the deposit in Court, it is difficult to see how the defendants could be entitled to draw it; and I am, therefore, obliged to come to the conclusion, *first* that the sum of Rs. 10,000 is no longer the money of the plaintiff, and *secondly*, that he has no disposing power over it. The latter position, namely, that it is not any longer in his disposition, would by itself be sufficient to prevent him from tendering it as security for Rs. 3,000. The result of allowing this Rs. 10,000 to be given as security would be, in my view, to regard what has already been paid to the credit of the defendants as money which the plaintiff could dispose of so as to tender it as security for another liability. The respondent, no doubt, could put his case in another way. Treating the money as the defendants', the respondent might say that he is prepared to create a charge over the defendants' liability for Rs. 10,000 which will come into existence in case the decree for redemption is reversed. And it is a strong fact in his favour that the liability to pay the mesne profits would also arise only on the same contingency, namely, the reversal of the decree for redemption. So far as the substantial justice of the case is concerned, the respondent has an unshakeable position and I should be willing to dismiss this appeal if I could ; but I am unable to see any way to do so. Now, when a Court directs security to be given, it may either be personal security or security of property. The security tendered in this case is not the personal undertaking of any third person. It is a charge on the debt of Rs. 10,000 which would become due from the appellants to the respondent in case of the reversal of the decree. But could the respondent create a charge on such a debt? What is the nature of debt? There is at present no indebtedness on the part of the defendants to the plaintiff, for we must proceed on the assumption that the decree of the lower Court regulates the present rights of the parties. Under that decree, the plaintiff is entitled to the property and the defendants are entitled to the Rs. 10,000; and, in my opinion, the defendants are as much the present owners of the Rs. 10,000, if they drew it, as they are of any other money belonging to them; and the result of a reversal would be only to create a debt as from the date of the reversal of the decree. Can a person then tender as security an expectation of a debt coming into existence? In my opinion he cannot. He can only tender something over which he has a disposing power. A mere possibility of a debt cannot be transferred according to the principle embodied in section 6 of the Transfer of Property Act. No doubt, the liability for mesne profits would only arise on the expectation being realised but that

does not alter the position of the parties. The circumstance would, no doubt, be a justification for not ordering the respondent to give any security at all for mesne profits becoming due, the defendants would have Rs. 10,000, of the plaintiff's money into their own hands, and they could deduct Rs. 3,000 from the amount which they would have to pay back. But the Court has directed that for the contingent liability of Rs. 3,000, security should be furnished. The fact that the liability would arise only in a certain case cannot alter the rule as to what can be given as security. It must be some property over which the plaintiff has present disposing power ; and as the plaintiff has no disposing power over the Rs. 10,000, I must hold that amount cannot be given as security. Mr. G. S. Ramachandra Iyer has drawn our attention to the definition of security, namely, something which makes certain. But how can a charge over a property, over which the plaintiff has no disposing power and, therefore, no right to create a charge, make anything a bit more certain than it is already ? I must hold that it cannot. I would, therefore, allow this appeal without costs.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 47 OF 1911.

January 25, 1912.

Present:—Mr. Piggott, J. C. and Mr. Rafique, A. J. C.

Khan Bahadur ALI MUHAMMAD KHAN PLAINTIFF

versus

CHHEDAN AND ANOTHER—DEFENDANTS.

Grove-holder, position of—Proprietor a licensor—Licensor and licensee, position of, governed by the same general principles of law as that of lessor and lessee—Sale, lease or mortgage, transfer by way of, difference between.

The plaintiff, who was the proprietor of a village, sued the defendants Nos. 1 and 2, who were the holders of a grove, and the defendant No. 3, a mortgagee in possession of the right of defendants Nos. 1 and 2 in the grove, for possession on the ground that defendants Nos. 1 and 2 had forfeited their rights by transferring possession to defendant No. 3. The *wajib-ul-arz* of the village provided that ".....without the permission of the proprietor the holder of a grove has no right to sell or mortgage the trees; and if the said grove-holder abandons his residence within the limits of the proprietor's estate he forfeits his entire rights in respect of the grove."

Held, that the position of a grove-holder in a case like the present was that of a licensee entitled to use, for certain purposes, land belonging to the proprietor who was the licensor.

According to the general principles of law applicable to leases, the forfeiture of a lease is not involved in the case of the breach of any condition for which forfeiture is not prescribed as the proper penalty under the terms of the lease or agreement under which the lessee holds. There is no reason why a similar principle should not apply to the case of a licensor and licensee generally.

There is an essential distinction between a transfer by way of lease or mortgage and a transfer by way of sale in which case different considerations would apply.

Lal Bahadur v. *Mohammad Karim Khan*, S. C. No. 240; *Nurendra Narayan Roy* v. *Ishan Chundra Sen*, 22 W. R. 22; 13 B. L. (R. F.) B. 274; *Sheo Dayal* v. *Deputy Commissioner, Barabanki as Manager of Bilhara Estate*, S. C. A. Nos. 53 to 57 of 1909, referred to.

Appeal against the decree of the District Judge, Sitapur, dated 26th November 1910, upholding that of the Officiating Munsif, Biswan, dated 27th July 1910.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Gopal Sahai*, holding brief of Mr. *G. H. Thomas*, for the Respondents.

JUDGMENT.—The plaintiff in this case is the proprietor of village Maharaj Nagar in which the first two defendants are the holders of a certain grove. The said defendants have mortgaged their rights in the grove to the defendant No. 3 and have put him in possession of the same. The plaintiff thereupon sues for possession of the grove by ejectment of all three defendants, on the ground that the grove-holders had no transferable right and that by transferring possession over the grove to a stranger, they have forfeited whatever rights they possessed so as to give the plaintiff a right of re-entry. The Court of first instance held that the plaintiff had no right under the circumstances to re-enter into possession of the grove, but gave him a declaratory decree to the effect that the mortgage-deed executed, on January 19th, 1909, by defendants Nos. 1 and 2 in favour of defendant No. 3 in respect of the grove in question, is inoperative as against the plaintiff and not binding upon

him. In this decree, the defendants acquiesced; the plaintiff appealed to the District Judge, but the lower Appellate Court, though differing in one or two matters of detail from the view taken of the evidence by the Court of first instance, has affirmed the decision of that Court. The plaintiff comes before us in second appeal, and we have to decide whether on the facts of the case, as admitted and found by the Courts below, the plaintiff has established his right to actual possession over the grove in suit by ejectment of all three defendants. The suit is based mainly on the provisions regarding grove-holders contained in the village *wajib-ul-arz*. This recites that there are in the village sixty-four groves in the possession of tenants; no rent is taken from such tenants, nor have they any rights over the soil of the groves.

"They are merely proprietors over the right to the produce of the trees (*sirf haqqiat sar darakhti ke malik hain*); they may take fruit and fallen timber; they are also entitled to lop branches according to their needs for the manufacture of implements of agriculture, and even to fell two or three trees in case of necessity in order to build a house or on the occasion of such an event as a wedding or the like. Without the permission of the proprietor, they have no right to sell or mortgage the trees; in case of a sale effected with the permission of the proprietor, the latter is entitled to one-fourth of the price. He takes nothing in the case of a mortgage effected with his permission, but if the mortgagee eventually acquires proprietary possession, he is bound by the above condition as to payment of a portion of the price. Without permission of the proprietor, the holder of a grove has no power to sell or mortgage the trees; and if the said grove-holder abandons his residence within the limits of the proprietor's estate (*dehat milkiat*), he forfeits his entire rights in respect of his grove. In the event of his subsequent return, it is at the option of the proprietor to restore him possession of the grove or not as he may think fit." The above are all the conditions in the *wajib ul-arz* bearing upon the point in issue and it may be noticed at once that they only provide in express terms for the proprietor's right of forfeiture or re-entry in the event of the grove-holder's abandoning his residence. There is no express provision as to what will be the proprietor's rights in the event of a grove-holder's selling or mortgaging the trees of his grove in contravention of the terms of the *wajib ul-arz*.

The case for the plaintiff-appellant was presented to us in argument from two or three different points of view which may be dealt with separately. In the first place, we may consider whether the plaintiff ought to succeed on the ground that he is suing to enforce a right, call it a right of escheat or forfeiture, or what you will, which has accrued to him in virtue of a local custom binding upon the parties. From this point of view, it would be incumbent on the plaintiff to show that by local custom whenever a grove-holder mortgages with possession the whole or any portion of his grove and puts the mortgagee in possession, he thereby forfeits all his rights in respect of the grove or the mortgaged portion of the same, and the proprietor becomes entitled to possession over the same. It is obvious that the provisions of the *wajib-ul-arz* do not go so far as this, and there is nothing in the oral evidence which carries the plaintiff's case any further. From the point of view of custom, the plaintiff's case clearly fails.

In passing to consider the question in issue from another point of view, we wish to guard ourselves against complicating the matter by any discussion as to whether a grove-holder in the position of the first two defendants in this case can be said to be in any sense of the word a "tenant" in respect of the grove occupied by him. It is sufficient to say that the position of a grove-holder in a case like the present is at any rate that of a licensee entitled to use for certain purposes a plot of land belonging to the proprietor, who is his licensor. The relations between the parties are governed by the terms of the license under which the grove was originally planted or occupied by the licensee; these terms may be such as to constitute a contract of tenancy or to put the parties in the position of lessor and lessee, but whether they are so or not, does not affect the question from the point of view we now propose to consider. The plaintiff's case, in its broadest form, may be put in this way, that the first two defendants held the grove in question as his licensees (if not as his lessees) subject to certain conditions, one of which was that they should have no right to sell or mortgage the

trees ; that there has been a breach of this condition on their part, and that the breach is of such a nature as to involve forfeiture of their rights. We have already said that the plaintiff has, in our opinion, failed to establish any customary law binding on the parties which makes the forfeiture of the grove-holder's rights the necessary penalty of a breach on his part of the conditions against transfer of those rights by way of mortgage. The plaintiff, therefore, can only appeal to the general principles of law, and these are, in our opinion, against him. Whether we refer by way of analogy to the provisions of section 111 of the Transfer of Property Act (IV of 1882), or to those of section 52, clause (2) of the Oudh Rent Act, the principle involved seems to be that forfeiture of a lease is not involved in the case of the breach of any conditions for which forfeiture is not prescribed as the proper penalty under the terms of the lease or agreement under which the lessee holds. We see no good reason why a similar principle should not apply to the case of a licensor and licensee generally ; and we note that a similar principle was affirmed by this Court in the case of *Lal Bahadur* v. *Mohammad Karim Khan*(1). We note in this connection that it may well be that a distinction ought to be drawn in a case like the present between transfers by way of lease and transfers by way of sale. In the latter case, the principles, which governed the decision in *Nurendra Narayan Roy* v. *Ishan Chundra Sen* (2), would have to be considered. These principles seem to us to have also determined the decision of this Court in an unreported case, *viz.*, *Sheo Dayal* v. *Deputy Commissioner of Barabanki as Manager of the Court of Wards in charge of Bilahra Estate*(3), decided on April 8th, 1909. The transfers with which the Court had to deal in these cases were transfers by way of sale, and I may add that the rights of the grove-holders in the village which was there in question, as recorded in the *wajib-ul-arz*, would seem to have been even more strictly limited than those proved by the *wajib-ul-arz* in the present case. At any rate, in the case of a transfer by way of sale, it may be said that there has been on the part of the transferor an entire abandonment of his rights in favour of another person, so that if a grove-holder in a case like the present purports to sell outright whatever rights he may possess in respect of his grove, he clearly has no rights left which he can set up against another person, and the transferee who is left in acutal possession cannot plead that there exists as between himself and the landlord any contract of license in respect of the trees in the grove, or the land on which they stand, which can secure him against ejectment or prevent the landlord from treating him as a mere trespasser. The case of a mortgage is different, in that the grove-holder cannot be said to have entirely parted with or abandoned his own rights, and he has still something left which he can plead against the landlord so as to protect the mortgagee, who after all is only in temporary possession by permission of the mortgagor and subject to the latter's right of redemption. It seems to us very difficult in a case like the present to draw any valid distinction between a mortgage such as we have before us and a *zar-i-peshgi* lease, or a lease for a term of years, or even a sale of the produce of the trees for a particular year, or specified number of years. In the absence, therefore, of any express provision in the *wajib-ul-arz*, or of any satisfactory evidence as to the existence of a custom giving the proprietor a right of forfeiture or re-entry in case of a breach of the rule against alienation by way of mortgage, we are unable to see that such right arises in favour of the plaintiff in the present case by reason of any general principle of law. Nor are we prepared to accede to the contention that a penalty by way of forfeiture should be presumed to exist, or should be read into the terms of the *wajib-ul-arz*, on the ground that in the absence of such provision, the rule against transfer of the grove-holder's rights by way of mortgage becomes meaningless and of no possible effect. The rule would in any case be efficacious to restrain an abuse of which the proprietor would have good reason to complain, namely, the mortgaging of his rights by a grove-holder who was on the point of leaving the village. The declaration which the Courts below have granted the plaintiff, and have embodied in their decree, is not to our minds as valueless as the plaintiff appears to think; it would serve to protect his rights in the event of the present grove-holders' (defendants Nos. 1 and 2) dying

(1) S. C. No. 240.
(2) 22 W. R. 22; 13 B. L. R. (F. B.) 274.
(3) S. C. A. Nos. 53 to 57 of 1909.

without heirs, or abandoning the village. If such an event were to occur, and the plaintiff were then to claim actual possession by way of escheat under the custom recorded in the *wajib ul-arz*, the mortgagee, defendant No. 3, would be prevented from resisting that claim on the strength of the mortgage in his favour by reason of the decree which has been rightly passed in this case declaring that the said mortgage is inoperative as against the plaintiff and not binding upon him.

In the third place, it was contended before us that, even though we might not be able to decree the plaintiff's claim as brought, we ought nevertheless to give the plaintiff some sort of decree which would put him in possession in the place of the third defendant, either upon payment of the mortgage-money or not as the Court might think fit, but subject in any case to the right of redemption possessed by defendants Nos. 1 and 2, the actual grove-holders. We have endeavoured to state this contention as it was laid before us, but we cannot say that we fully understand it or that we can conceive of any principle of law upon which any such decree could be based. It would involve reading into the provisions of the *wajib-ul-arz* a rule giving the proprietor a sort of right of pre-emption in case of transfers by way of mortgage, and to do this seems to us far more difficult than to read into the same rules a provision as to right of forfeiture when no such provision actually exists.

From every point of view, therefore, this appeal fails and must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 42 OF 1911.

February 8, 1912.

Present:—Mr. Justice Sundara Aiyar.

KULANDAVELU PEDAYACHI—PLAINTIFF—PETITIONER

versus

KAMATCHI AYENGAR—DEFENDANT—RESPONDENT.

Contract—Partition—Benefit to a third party—Burden goes with benefit.

By a partition agreement between the plaintiff and his brother, it was provided that the defendant should enjoy certain land for her maintenance and pay the *kist* due on it to the plaintiff and his brother. The plaintiff sued to recover monies paid by him on account of the above *kist*:

Held, that the defendant was liable, even though the defendant was no party to the partition-deed. She took the benefit under it subject to the burden placed on her by that document.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif's Court of Mayavaram, in S. C. S. No. 484 of 1910, dated the 5th September 1910.

Mr. *T. V. Muthukrishna Aiyar*, for the Appellant.

Mr. *T. R. Venkatrama Sastry*, for the Respondent.

JUDGMENT.—I am unable to sustain the decision of the District Munsif in this case. The plaintiff sued to recover monies paid by him on account of *kist* of certain land in the possession of the defendant, which, he alleged, the defendant was bound to pay to him. The plaintiff's case was really based on a contract. By a partition agreement between him and his brother, it was provided that the defendant should enjoy certain land for her maintenance and pay the *kist* due on it to the plaintiff and his brother, Rs. 8 to each of them. The District Munsif dismissed the suit on the ground that the plaintiff could claim no relief on the basis of the partition-deed because the defendant was not a party to it. But it was under the partition-deed that she got her right to hold the land. Though not a party to the contract, she was one who took a benefit under it, subject to the burdens placed on her by that document. She was, therefore, bound to pay the *kist* to the plaintiff and his brother as provided therein. In fact she got possession of the land by means of a suit based on the partition-deed.

The District Munsif has not disposed of the other contentions which the defendant raised. His decree must, therefore, be reversed and the suit remanded for fresh disposal on the other questions raised by the defendants. The costs of this petition will abide the result.

Decree reversed and case remanded.

KASHI RAM *v.* SAHIB-UN-NISSA.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 410 OF 1910.

January 25, 1912.

Present:—Mr. Piggott, J. C. and Mr. Rafique, A. J. C.

KASHI RAM AND OTHERS—PLAINTIFFS

versus

Chaudhrain SAHIB-UN-NISSA—DEFENDANT.

Decree, construction of—Declaratory decree—Civil Procedure Code (Act V of 1908), s. 47—Mortgage of Nankar *rights—Mortgagee's right to enforce payment against* Talukdar.

One *B.* was the owner of a village in the *Nawabi* time. He got the village included in a *Taluka* and was granted in exchange a cash allowance of Rs. 240 per annum as *malikana* in perpetuity. In 1870 *M.*, the son of *B.*, obtained against the husband of the defendant-respondent, *Talukdar*, a decree from the Settlement Court by which Rs. 240 per annum was decreed to him as *nankar*. In 1896 and 1898, *M.* executed deeds of mortgage in respect of portions of the *nankar* in favour of the predecessors-in-title of the plaintiffs-appellants, who obtained a decree for possession on the basis of the mortgage-deed in 1901. The plaintiffs brought the present suit against the defendant *Talukdar* for recovery of the amount of *nankar* for six years on the basis of the mortgages. The representative of the mortgagor was not impleaded as defendant in the case.

The relevant part of judgment of the Settlement Court was as follows:—"Ordered that the claim of the plaintiff for the receipt of Rs. 240 per annum against the defendant be decreed. Order communicated to the parties. A note should accordingly be made in the papers. The plaintiff will recover Rs. 240 per annum in execution of the decree:"

Held, (1) that, on a proper construction, it must be held that the decree was merely declaratory and that the suit was not barred by section 47, Civil Procedure Code. The operative part ended with the words "be decreed". What followed appeared to be directions to the office. The decree fixed no date for the payment of the *nankar*. The mere addition of the direction that the *nankar* was to be realized on the execution side would not alter its character as a declaratory decree;

Debi Singh v. *Rattan Singh*, 6 O. C. 239; *Raja Partab Singh* v. *Raja Sarat Singh*, 8 O.C. 361; *Ram Dial* v. *Inder Koer*, 16 A. 179, referred to.

Mansa Debi v. *Jiwan Lal*, 9 A. 33; *Lakshmi Bai* v. *Madhavrav*, 12 B. 65; *Ashootosh Bannerjee* v. *Lukhimoni Debia*, 19 C. 139; *Kaveri* v. *Venkamma*, 14 M. 396; *Aitamma* v. *Naraina Bhattar*, 30 M. 504; 17 M. L. J. 402, distinguished.

(2) that the fact of the defendant-respondent being no party to the deed of mortgage was no bar to the plaintiffs enforcing payment against the defendant.

Appeal against the decree of the Subordinate Judge, Barabanki, dated 29th July 1910, reversing that of the Munsif, Fatehpur, dated 28th May 1910.

Mr. *E. Manuel*, for the Appellant.

Mr. *Sami-ullah Beg*, for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was instituted by the plaintiffs-appellants in the Court of the Munsif of Fatehpur, on the 10th of August, 1910, for the recovery of Rs. 870 as arrears of *nankar* for six years on the following allegations:—

One Bande Ali was the owner of the village Danialpur in the *Nawabi* time. He got the village included in the *Taluka* of Karkha during the *Nawabi* and was granted in exchange a cash allowance of Rs. 240 per annum as *malikana* in perpetuity by the then *Talukdar* of Karkha. The allowance was paid regularly to Bande Ali and after his death to his son Mehdi Hasan. In 1870, Mehdi Hasan also obtained a decree against Chaudhari Mohammad Hasan, the husband of the defendant-respondant, from the Settlement Court by which Rs. 240 per annum as *nankar*, was decreed to Mehdi Hasan on the ground that his father had got the village of Danialpur included in the *taluka* of Karkha in consideration of receiving Rs. 240 per annum as *malikana* in perpetuity. On the 25th of March, 1896, Mehdi Hasan executed a deed mortgage in favour of Manak Chand, in respect of Rs. 70 per annum *nankar*, out of his Rs. 240 per annum *nankar*, in lieu of Rs. 200. On the 16th of August, 1893, Mehdi Hasan executed another mortgage in favour of Manak Chand in respect of Rs. 75, out of his remaining *nankar*, in lieu of Rs. 200. The two mortgages were for two years and carried interest at 2 per cent. per mensem payable every six months. In default of payment of interest, the mortgagee was given the right to enter into possession of the mortgaged *nankar*. Mehdi Hasan made a default in the payment of interest due on the two mortgages. Manak Chand brought a suit for possession and obtained a decree on the 11th of March, 1901, and possession on the 25th of February, 1904. Both Mehdi Hasan and Manak Chand are dead. The plaintiffs-appellants are the reversioners of Manak Chand. Mehdi Hasan has left a son called Nawab Ali. The defendant-respondent is the widow of Chaudhari Mohammad Hasan and is in possession of the *Taluka* of Karkha in which the village of Danialpur is included. The plaintiffs-appellants claim Rs. 870 for six years from the 30th of April, 1904, to

the 30th of June, 1909, at the rate of Rs. 145 per annum on the basis of the mortgages mentioned above, out of the *nankar* payable to Mehdi Hasan's son annually and pray that the sum decreed be made a charge on village Danialpur. The claim was brought against the defendant-respondent only. Nawab Ali was not impleaded as a defendant in the case.

The defendant-respondent resisted the suit on various grounds, two of which need only be mentioned as they alone have been pressed before us. It was urged in defence that the suit was barred by section 47 of the Code of Civil Procedure and that the claim as brought was not maintainable. The first Court disallowed the objections of the defendant-respondent and passed a decree in favour of the plaintiffs-appellants. On appeal by the defendant-respondent the decree of the first Court was reversed by the Subordinate Judge on the ground that the claim was barred by section 47 of the Code of Civil Procedure. The plaintiffs-appellants have preferred this appeal and challenge the finding of the lower Appellate Court.

The question whether the suit of the plaintiffs-appellants is barred under section 47 of the Code of Civil Procedure, depends upon the construction of the decree of the Settlement Court, dated the 30th of November, 1870. The decree of the Settlement Court, it may be observed, is not on the record, but the judgment of the Settlement Court is. It is marked as Exhibit 19 in the case. The relevant part of the judgment is as follows:—

"Ordered that the claim of the plaintiff for the receipt of Rs. 240 per annum against the defendant be decreed. Order communicated to the parties. A note should accordingly be made in the papers—the plaintiff will recover Rs. 240 per annum in execution of the decree, dated, 30th November, 1870."

The learned Subordinate Judge, on the strength of the last sentence of the order, has held that the provisions of section 47 of the Code of Civil Procedure apply to the case and bar the suit. He says that "the last sentence clearly shows that the Court meant that Rs. 240 per year should be realized in the execution department. As held by Mr. Spankie in *Debi Singh* v. *Rattan Singh*(1), I cannot, in 'disregard and defiance' of the terms of the decree, hold that it is merely declaratory. Hence I find that section 47, Civil Procedure Code, bars the suit." The finding of the lower Appellate Court appears to be based on a defective apprehension of the decree of the Settlement Court. The operative part of the order quoted above ends with the words *** (is decreed). For, immediately after the said words, the sentence is that order pronounced in the presence of the parties. What follows that sentence appears to be directions to the office. And even if it be said that the whole order in question is to be taken as operative part of the judgment, the Court that made the order could not confine and determine the remedy of the decree-holder that he may have under the law to enforce his decree. The decree of the Settlement Court fixed no date for the payment of the *nankar*. It merely decreed the claim to an annual *nankar* of Rs. 240. In other words, it was declared by that decree that the plaintiff Mehdi Hasan had a right to get Rs. 240 per annum as *nankar*. The decree was clearly a declaratory decree. The mere addition of the direction that the *nankar* was to be realized on the execution side would not alter the character of the decree. And if after passing a declaratory decree, the Court further said that the *nankar* was to be realized by execution of the decree, such a direction would not enable the decree-holder to execute his decree, for a declaratory decree is incapable of execution. In a suit for redemption instituted in the Settlement Court, the following decree was passed :— "Ordered that the plaintiff's claim be decreed against the defendant on condition of his (plaintiff's) paying from his own pocket Rs. 775-8 in the month of *Jeth*, fallow season, that then he shall be entitled to possession of the mortgaged share, but if default be made on his behalf in the fulfilment of either of these conditions, the decree shall be incapable of execution and the order for redemption shall be deemed not to have been passed." The plaintiff failed to deposit the money and many years after, a representative of the plaintiff brought a regular suit to redeem the mortgage on the basis of the decree of the Settlement Court. The claim was resisted on the ground that it was barred by sections 13 and 244 of the Code of Civil Procedure, 1882. It was held by this Court that the decree of the Settlement Court was not intended to grant consequential relief but was

(1) 6 O. C. 239 at p. 243.

intended to be merely declaratory, and that the suit was not barred by the provisions of sections 13 and 244 of the Code of Civil Procedure, 1882. One of the reasons for holding that decree to be merely a declaratory decree was that it "did not fix a limited period for the payment of the mortgage-money." *Vide Debi Singh* v. *Rattan Singh* (1).

In another case, which was decided by a Bench of this Court, it was held "that where a Settlement Court decree did not fix a time within which the mortgage-money was to be paid, the decree was merely a declaratory decree and incapable of execution and in such a case a subsequent suit for redemption was not barred." Vide *Raja Partab Bahadur Singh* v. *Raja Surat Singh* (2)

A similar point was raised in a case before the High Court at Allahabad. In that case plaintiffs sued to recover a certain sum as maintenance for the years preceding the suit and for the right to get that sum as maintenance in future. The Court gave the plaintiffs a decree. On the basis of their decree, plaintiffs sued for the recovery of maintenance that fell due after the decree. An objection was taken to the claim on the ground that no suit was maintainable and that the plaintiffs should have executed their decree. Knox and Burkitt, JJ., held that as no distinct date for the payment of future maintenance was fixed by the original decree, the suit was maintainable, *vide Ram Dial* v. *Inder Kuar* (3). In the case before us, the decree of the Settlement Court, dated the 30th of November 1870, fixes no date for the payment of the *nankar* to Mehdi Hasan.

However, the learned Pleader for the respondent contends, on the authorities quoted below, that in spite of the omission to fix a distinct date for the payment of the *nankar* in the decree of the 30th of November, 1870, the decree is not a declaratory decree, but is capable of execution. The authorities are:— *Mansa Debi* v. *Jiwan Lal* (4); *Lakshmi Bai* v. *Madhavrav* (5); *Ashutosh Banerjee* v. *Lukhimoni Debya* (6); *Kaveri* v. *Venkamma* (7); *Aitamma* v. *Naraina Bhattar* (8).

(2) 8 O. C. 361.
(3) 16 A. 179.
(4) 9 A. 33.
(5) 12 B. 65.
(6) 19 C. 139.
(7) 14 M. 396.
(8) 30 M. 504; 17 M. L. J. 402.

In *Mansa Debi* v. *Jiwan Lal* (4), a decree was awarded to the plaintiff for a sum of Rs. 15 per mensem by way of maintenance during her life-time. Plaintiff sought to recover maintenance from the 28th of October, 1882, to the 28th of May, 1885, by execution of the original decree. It was urged by way of defence that the decree sought to be executed was merely a declaratory decree and could not be executed. The High Court held that the decree was not merely a declaratory decree. The case is not on all fours with the case before us. The fact that the plaintiff asked for maintenance from the 28th of October, 1882, shows that the original decree, dated the 18th of July, 1883, must have fixed at least the date from which the allowance was to run. No such date is given in the decree of the 30th of November 1870. Moreover, the latest judgment of the Allahabad High Court on the point under discussion is contained in *Ram Dial* v. *Inder Kuar* (3), already referred to.

The case reported as *Lakshmi Bai* v. *Madhavrav* (5), is also distinguishable from the present case. In the Bombay case, a Hindu widow obtained a decree on the 7th of September 1865, directing that a sum of Rs 36 should be paid to her every year on account of her maintenance. In 1881, she sought to recover her maintenance by execution of the decree, dated the 7th of September 1865. An objection was taken that the decree was barred by limitation. Incidentally the question also arose whether the decree was declaratory or not. West and Birdwood, JJ., held that the decree contained a positive command by the Court to defendant to pay Rs. 36 per annum and hence the decree was not declaratory. And as the cause of action for the realization of the maintenance accrued on the default of the defendant every year, the application for execution was not barred by limitation. In the present case, the decree of the 30th November 1370, contains no command to defendant to pay *nankar* to Mehdi Hasan. The decree declares the right of Mehdi Hasan to get Rs. 240 per annum *nankar* from the *Talukdar*.

In *Ashutosh Mukerjee* v. *Lukhimoni Debya* (6), the decree was that the plaintiff do get Rs. 50 per mensem "on account of her maintenance from 1st January 1886, and onwards, during the life-time of the said plaintiff."

The High Court held that the plaintiff could recover her maintenance in execution of her decree, without further suit. This case does not also help the respondent as a date from which payment per month was to be made was fixed by the decree.

In the case reported in *Caveri* v. *Venkamma* (7), the question under discussion was not before the Court. The case was decided on another point.

In the case reported as *Aitamma* v. *Naraina Bhattar* (8), the decree fixed the date of payment of future maintenance from the date of the plaint. Moreover, the question whether the maintenance-holder should seek his remedy by suit or by an application in execution was not raised.

Thus, none of the authorities cited by the learned Pleader for the respondent helps his contention that the decree, dated the 30th of November 1870, passed in favour of Mehdi Hasan is not a declaratory decree. We hold that the said decree is a declaratory decree and that the suit of the plaintiffs-appellants is not barred by the provisions of section 47 of the Code of Civil Procedure.

Another objection taken for the respondent is that the suit of the plaintiffs-appellants is not maintainable for the reasons, *viz.*, that the defendant-respondent is no party to the deeds of mortgage in favour of Manak Chand and that the latter was not an assignee of the decree of the 30th of November, 1870. The argument in support of the first ground of objection is that whatever rights Manak Chand had were acquired by him under his contracts with Mehdi Hasan. The enforcement of those rights depends on the terms of the said contracts. The defendant-respondent was not privy to the said contracts and they cannot be enforced against him. The learned Pleader for the respondent, in support of his contention, relies on the case of *Jamna Das* v. *Pandit Ram Autar Pande* (9). The facts of that case were that one *Musammat* Lakpati Koer borrowed Rs. 40,000 from Jamna Das and executed a deed of mortgage on the 2nd of June, 1893, in his favour in respect of her *zemindari* and her mortgagee rights in certain other *zemindari*. Three years after, in 1896, she sold to Pandit Ram Autar Pande all her immoveable property including the equity of redemption in the *zemindari* and the mortgagee rights. Out of the sale price, Rs. 40,000 were left with the purchaser in order to redeem the mortgage of the 2nd of June, 1893. The Pandit did not redeem the mortgage of Jamna Das. The latter sued to recover the mortgage-money and prayed for three reliefs, *viz.*:—

(*a*) A decree for principal and interest against Pandit Ram Autar Pande, the purchaser, and other defendants;

(*b*) A decree for sale of the entire mortgaged property; and

(*c*) A decree against the person and other property of the defendants (including the purchaser) in case the sale proceeds of the mortgaged property were less than the decretal amount. The purchaser pleaded *inter alia* that his person and other property and the mortgagee rights of the mortgagor were not liable. His defence was allowed. A decree *nisi* under section 88 of Act IV of 1882 was passed allowing the sale of the mortgaged property with the exception of the mortgagee rights of the mortgagor. In execution of his decree, Jamna Das had the mortgaged property sold but the sale-proceeds were insufficient to satisfy the decree. He then applied for a decree under section 90 of the Transfer of Property Act against the person and property of Pandit Ram Autar Pande. The prayer of the decree-holder was refused and his petition rejected. The decree of the first Court was affirmed both by the High Court of Allahabad and the Privy Council. Their Lordships of the Privy Council delivered a short judgment. "The action" they said, "is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his

(9) 16 C. W. N. 97; 13 Ind. Cas. 304; 11 M. L. T. 6; 9 A. L. J. 37; (1912) 1 M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 34 A. 63.

vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage-debt. Therefore, he is not a person from whom, in the words of the 90th section of the Transfer of Property Act, the balance is legally recoverable."

The principle upon which the case of Jamna Das was decided has no application to the present case. Had it been decided in that case that Jamna Das could not enforce his mortgage against the mortgaged property in the hands of Ram Autar Pande, the purchaser of the equity of redemption, because the latter was no party to the contract of mortgage, the argument for the respondent would have been relevant. All that was decided in the case of Jamna Das was that he could not recover the balance of his debt after selling the mortgaged property from the person and other property of the purchaser of the equity of redemption on the ground that by the terms of the deed of sale, some of the sale price was left with him for payment to the mortgagee. In the present case, the plaintiffs-appellants do not seek to recover anything more than the property mortgaged to their ancestor, Manak Chand. The contention for the respondent fails.

The second ground of objection is that Manak Chand not being a transferee or an assignee of the decree of the 30th of November 1870, the suit is not maintainable. The objection has been urged on the basis of the argument for the appellants that as Manak Chand was not a transferee or an assignee of the decree of the 30th of November, 1870, the plaintiffs-appellants could not execute that decree taking that decree to be a decree capable of execution and not a declaratory decree. The respondent, accepting the argument of the appellants, says that as they do not represent an assignee of the decree in favour of Mehdi Hasan, dated the 30th of November, 1870, they cannot maintain the suit. The contention for the respondent involves the assumption that a suit on the basis of a decree can be maintained only by the decree-holder or by his assignee or transferee and not by a person in whose favour less than the right awarded by the decree has been transferred. It may be that a person in whose favour a partial right out of the decreed right has been transferred may not, under the provisions of the Civil Procedure Code, execute the decree but no law or authority has been cited in support of the argument that such a person cannot maintain a suit to enforce the partial right conveyed to him by the decree-holder. In fact there are cases on record where lessees for a term of years from persons holding decrees for maintenance have sued and obtained decrees against the parties in possession of the estate charged with the payment of the maintenance. *Vide Nawab Wala Qadar Vazir Mirza* v. *Khuda Bakhsh* (10). We find that the suit of the plaintiffs-appellants is maintainable.

The appeal prevails. The decree of the Subordinate Judge is set aside and the decree of the first Court is restored. Costs of all the Courts are allowed to the appellants.

Appeal allowed.

(10) S. C. A. No. 695 of 1895.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1391 OF 1910.

January 2, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Sri Raja SATRUCHERLA VEERABHADRA RAJU GARU *alias* SIVASKANDA RAJU BAHADUR GARU AND ANOTHER—PLAINTIFFS' LEGAL REPRESENTATIVES—APPELLANTS

versus

GANTA KUMARI NAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Rent suit—Exchange of patta *and* muchilikas—*Madras Rent Recovery Act* (*VIII of* 1865), *s.* 7—*Madras Estates Land Act* (*I of* 1908), *s.* 53—*Accrual of right—Limitation.*

A landlord is entitled to maintain a suit for rent under the Estates Land Act without tendering a *patta*. Even under the Rent Recovery Act, the exchange of *pattas* and *muchilikas* or the tender of a *patta* was not necessary to give the landlord a right to the rent, and section 7 of the Act did not lay down any rule of limitation.

The effect of section 7 was to make the tender of a *patta* a condition precedent to entitle the landlord to institute *legal proceedings* to enforce the terms of a tenancy and not a condition necessary to complete his right to the rent.

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The right to each instalment of rent accrues on the date fixed for the payment of the instalment according to the contract between the parties or according to usage and not when a *patta* is tendered. Limitation would run from that date.

Second appeal against the decree of the District Court of Vizagapatam, in Appeal Suit No. 159 of 1909, presented against the decision of the Court of the Sub Collector at Parvatipur Division, in E. S. No. 34 of 1908.

Mr. *V. Ramesam*, for the Appellants.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—In this case, the plaintiff, a land-holder, instituted a suit for rent of *Faslis* 1315 to 1317 and of a portion of *Fasli* 1318. The Sub-Collector passed a decree in the plaintiff's favour which was reversed by the District Court, so far as the rent for *Faslis* 1315 to 1317 was concerned on the ground that the plaintiff did not tender a *patta* to the defendant for those *Faslis*, and the suit for rent for those *Faslis* was, therefore, unsustainable under the provisions of section 7 of the Rent Recovery Act, VIII of 1865. That section provided that "no suit brought, and no legal proceedings taken, to enforce the terms of a tenancy shall be sustainable unless *pattas* and *muchilikas* have been exchanged as aforesaid." The effect of the section was to make the tender of a *patta* a condition precedent to entitle a landlord to institute legal proceedings to enforce the terms of a tenancy. It did not make the exchange of *pattas* and *muchilikas*, or the tender of a *patta*, necessary to give the landlord a right to the rent of the land in the tenant's possession. That right was complete when the tenant obtained from the land his landlord's share of the produce. It was held, while Act VIII of 1865 was in force, in cases where rent was payable by instalments, that the right to each instalment of rent accrued on the date fixed for the instalment and that limitation would run from that date. The District Judge observes:—"If the terms of section 7 of the Rent Recovery Act were not complied with, within the *Fasli*, suits brought to recover arrears of rent were barred by time. This suit, for arrears of rent for *Faslis* 1315 to 1317 was barred by time under the Rent Recovery Act as no *pattas* admittedly were tendered within any of those *Faslis*."

We cannot agree with the Judge that section 7 laid down any rule of limitation. The limitation for a suit for rent is three years from the time, when it accrues due and it accrues due when it is payable according to the contract between the parties or according to usage, and not when a *patta* is tendered. The tender of a *patta* is only a statutory pre-requisite to entitle the landlord to take legal proceedings against his tenant and not a condition necessary to complete his right to the rent. This condition has now been dispensed with by the Estates Land Act. Section 53 of that Act makes the tender of a *patta* necessary only when the landlord wishes to distrain and sell the tenant's moveable property or to bring the holding to sale. The result is, the landlord is now liberated from the necessity of doing an act which was necessary when the old Act was in force. The plaintiff is, therefore, entitled to maintain his suit for rent of *Faslis* 1315 to 1317 without tendering a *patta*.

We must, therefore, allow the appeal and award to the plaintiff rent for *Faslis* 1315 to 1317 also to the extent claimed in the appeal.

The District Judge allowed interest at 6 per cent. per annum. This modification will stand as it has not been disputed by the appellant. The parties will pay and receive proportionate costs throughout.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 346 OF 1910.

January 26, 1912.

Present:—Mr. Lindsay, A. J. C., and Mr. Rafique, A. J. C.

BISHESHAR TEWARI—DEFENDANT—APPELLANT

versus

BISHESHAR DAYAL—PLAINTIFF AND DARGAHI LAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 127, 144—"*Share*", *use of, in Art.* 127—*Joint family property passing to a stranger by sale.*

One *S.* owned a 4 anna share in a village. He died leaving a widow, *P.*, and three sons, *G.*, *D.* and *B. G.*

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died leaving a son *T.* who also died leaving no issue. On 5th January 1893, *D.* and *P.* as guardian of her minor son *B.* executed a deed of sale in respect of the 4-anna share in favour of the defendant-appellant. The vendee had been in possession of the share over since. On 11th September 1909, *B.* instituted this suit to recover possession of the whole share conveyed by the sale-deed of 1893 on the allegation that the sale was made for a fictitious price without any legal necessity during his minority.

It was found as a fact by the Courts below that the plaintiff had failed to prove that he came of age within three years before the institution of the suit:

Held, that the case was governed by Article 144 and not Article 127 of Schedule I of the Limitation Act;

The word "share" in Article 127 is used as a verb and not a noun. The suit contemplated by Article 127 is a suit by a member of a joint family against other members of the joint family to be restored to joint enjoyment on the allegation of having been unlawfully excluded from it. The Article does not apply to a suit where the alleged joint family property has passed by sale to a stranger.

Appeal against the decree of the District Judge, Fyzabad, dated 5th July 1910, reversing that of the Subordinate Judge, Fyzabad, dated 29th March 1910.

Mr. *F. G. D. Lincoln*, for the Appellant.

Mr. *Ahmad Jamil*, for the Respondents.

JUDGMENT.—One Sital Prasad owned 4-annas share in the village of Dostpur Raghu, Pargannah Mangalsi, District Fyzabad. He died some time prior to 1893, leaving a widow *Musammat* Phuljhari and three sons, called Ganesh Prasad, Dargahi Lal and Bisheshar Dayal. Ganesh Prasad died leaving a son, Tameshar Prasad, who is also dead. He left no issue. On the 5th of January 1893, Dargahi Lal and *Musammat* Phuljhari as guardian of her minor son, Bisheshar Dayal, executed a deed of sale in respect of the 4-annas share left by Sital Prasad in favour of Bisheshar Tewari in lieu of Rs. 1,700. The vendee has been in possession of the said share since. On the 11th of September 1909, Bisheshar Dayal, the plaintiff-respondent No. 1, instituted a suit in the Court of the Subordinate Judge of Fyzabad to recover possession of the share conveyed by the sale-deed of the 5th January 1893, on the allegation that the sale was made for a fictitious price without any legal necessity during his minority and that he had attained majority only on the 14th of September 1906.

The claim was brought against Bisheshar Tewari, the defendant-appellant and Dargahi Lal. The latter was impleaded as a defendent in the case on the assertion that he had declined to join as a plaintiff. Dargahi Lal did not appear to defend the suit.

Bisheshar Tewari, the defendant-appellant, resisted the suit. He denied that the sale in question was made without any legal necessity and for a fictitious price or that the plaintiff-respondent No. 1 had attained majority on the 14th of September 1906. On the contrary, it was alleged that he had attained majority several years before the date given in the plaint and that the claim was barred by limitation.

The Court of first instance found for the plaintiff-respondent No. 1 on the question of legal necessity and against him on the plea of limitation. It held that the plaintiff-respondent No. 1 had failed to prove that he became major on the 14th of September 1906, and hence the suit was barred under Article 144 Schedule II of Act XV of 1877. The claim was accordingly dismissed. Bisheshar Dayal preferred an appeal to the District Judge who disagreed with the first Court both on the point of limitation and the question of legal necessity. He agreed with the first Court that the claim would be out of time if Article 144 of Schedule II of the Limitation Act were applicable as the plaintiff respondent No. 1 had failed to prove the alleged date of his attaining majority. But the learned Judge held, on the authority of the case of *Lal Gauri Kant* v. *Shankar Baksh Singh* (1) that the case of the plaintiff-respondent No. 1 was governed by Article 127 of Schedule II of Act XV of 1877, as the claim was for a share in joint family property. And, as the defendant-appellant had failed to prove that the claim was brought more than twelve years after the knowledge of the plaintiff-respondent No. 1 about his exclusion from the property in suit, the claim was within time. On the question of legal necessity, the learned Judge was of opinion that the sale of the 5th January 1893, was made to pay off a mortgage created by Sital Prasad, the father of the plaintiff-respondent No. 1, and was good to the extent of the mortgage-money. The claim was, therefore, decreed on the payment of the mortgage-money. Bisheshar Tewari, the vendee, filed a second appeal in this

(1) 2 O. C. 348.

Court which was heard by Mr. Chamier on the 9th of March 1911. Mr. Chamier considered the decision of Mr. Blennerhassett in *Lal Gauri Kant* v. *Shankar Bakhsh Singh* (1) of doubtful accuracy and referred the appeal to a Bench.

The appellant challenges the decree passed against him by the lower Court on two grounds, *viz.*, that Article 144 and not Article 127, Schedule II of Act XV of 1877, applies to the case and that if the sale was made for legal necessity it should not have been set aside on the payment of mortgage-money.

To take up the question of limitation first. Article 127 of Schedule II of Act XV of 1877 is as follows :—

"By a person excluded from joint family property to enforce a right to share therein."	Twelve years.	When the exclusion becomes known to the plaintiff.

The language of the Article shows that five things are required for its application, *viz*:—

1. There must be a joint family.
2. There must be a joint family property.
3. Plaintiff must be member of the joint family.
4. Plaintiff must have been excluded from the enjoyment of the joint family property, and
5. Plaintiff's suit must be for restoration to joint enjoyment.

In the present case, it is in evidence that long prior to the institution of the suit, the plaintiff-respondent No. 1 had separated from his brother, Dargahi Lal, *vide* the evidence of plaintiff-respondent No. 1, page 20. Nor was there any joint family property at the time of the institution of the suit. The claim of the plaintiff-respondent No. 1 was not to enforce a right to share in the joint family property, but to recover the entire joint family property from a third person to whom it had been conveyed long ago. The fact that at the time of sale the family was joint and the property conveyed was joint family property, would not bring the case under Article 127, Schedule II of the Limitation Act. As remarked by Mr. Justice Candy, Article 127 is meant to apply to suits for partition, vide *Raoji* v. *Bala* (2).

The observations of Straight and Mahmood, JJ., in the case of *Amme Raham* v. *Zia Ahmad* (3), make the point much clearer. They say that the plaintiff in a suit under Article 127 prays to enforce his right to share in and not to a share of the joint family property, that is, the plaintiff sues to restore the *status quo ante* of enjoyment that by his exclusion he has been deprived of. The suit contemplated by Article 127 is a suit by a member of the joint family against other members of the joint family to have restoration to joint enjoyment on the allegation of having been unlawfully excluded from joint enjoyment. The Article does not apply to such a suit as the present where the alleged joint family property has passed by sale to a stranger — *vide Bhavrao* v. *Rakhmin* (4). The case reported as *Lal Gauri Kant* v. *Shankar Bakhsh Singh* (1), relied upon by the learned Judge, appears to have followed the case of *Issuri Dutt Singh* v. *Ibrahim* (5).

It appears that the learned Judges, who decided the two cases reported as *Issuri Dutt Singh* v. *Ibrahim* (5) and *Lal Gauri Kant* v. *Shankar Bakhsh Singh* (1) took the word "share" in the phrase "to share therein" in Article 127 for a noun and not a verb. In later cases, some of which have already been referred to, it was pointed out that the word "share" in the phrase quoted above is used as a verb and not a noun. And we think that is the correct interpretation of the Article under discussion. We hold that the present case is governed by Article 144 and not by Article 127, Schedule II of the Limitation Act. And as there is the concurrent finding of fact of the two lower Courts that the plaintiff-respondent No. 1 has failed to prove that he came of age on the 14th of September, 1906, his claim stands barred under Article 144, Schedule II of Act XV of 1877.

In view of our finding on the plea of limitation, it is unnecessary for us to express an opinion on the question of legal necessity.

The appeal prevails. We set aside the decree of the lower Appellate Court, and restore that of the first Court. Costs of all the Courts are allowed to the defendant-appellant against the plaintiff-respondent No. 1.

Appeal allowed.

(2) 15 B. 135. (3) 13 A. 282.
(4) 23 B. 137. (5) 8 C. 653.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1223 OF 1910.

February 23, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

THE MAHARAJA OF VIZAYANAGARAM —DEFENDANT—APPELLANT

versus

MAHASWARAM RAMABHADRAYYA AND ANOTHER—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 6—Ryot in possession—Prior possession of another person for 12 years.

When a person dispossesses another from land, of which the latter was in possession for the statutory period and acquired a prescriptive right, he cannot resist a suit for possession simply because he happened to be in possession at the time the Estates Land Act came into force.

The object of section 6 of the Act is only to confer on the tenants in possession as against the landlord an occupancy-right. It is not intended to destroy the occupancy-right which vested prior to July 1908, in favour of another person wrongfully in possession in July 1908.

Second appeal against the decree of the Temporary Subordinate Judge's Court of Vizagapatam, in A. S No. 111 of 1909, against that of the Court of the District Munsif of Rajam, in O. S. No. 273 of 1907.

FACTS.—Suit to recover a piece of land. The suit land was surveyed as a part of the *jerayati* land of the Rajah of Vizayanagaram and was leased by the Rajah, the 3rd defendant, to the 1st defendant who entered into possession in 1906. The plaintiff claimed it as his *inam* and also alleged long possession until his dispossession in 1906.

The lower Appellate Court found that the suit land was originally *jerayati* but that plaintiff had been in long possession and on this ground gave plaintiff a decree. The 3rd defendant appealed.

Mr. *S. Srinivasa Aiyangar*, for the Appellant.

(1) The 1st and 2nd defendants obtained a *cowle* from the Rajah in 1906 and were in possession of the land at the date when the Estates Land Act came into force. They are entitled to rights of occupancy in it under section 6 of the Act.

(2) The Subordinate Judge erred in holding that plaintiff was entitled absolutely to the land. I will be entitled to levy rent under section 45 of the Estates Land Act.

(3) The suit is barred by limitation under section 13 of the Madras Survey and Boundaries Act.

[*N. B.*—There was no order by the survey authorities.]

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—The first point urged is that as defendants Nos. 1 and 2 were in possession of the land in question on the date when the Estates Land Act, I of 1908, came into force, they acquired the right of occupancy in the land under section 6 of the Act, and that the plaintiff is, therefore, not entitled to recover possession from them. It has been found by the lower Appellate Court that the plaintiff was in possession of the land for more than the statutory period before he was dispossessed in 1906. He had, therefore, acquired by prescription either the absolute right to the property or the right of a *ryot*. We are clearly of opinion that the object of section 6 of Act I of 1908 was only to confer on *ryots* in possession as against the landholder the occupancy-right in the land and that it was not intended to destroy the occupancy-right which vested, in our opinion, prior to July 1908, in favour of another person wrongfully in possession of the holding in July 1908. This argument cannot, therefore, be upheld. It is next argued that the Subordinate Judge is wrong in holding that the plaintiff acquired an absolute title to the land by his possession and that under section 45 of Act I of 1908, the 3rd defendant would be entitled to recover rent from the plaintiffs. It is unnecessary to decide in this case what interest in the land the plaintiff acquired by prescription and whether under section 45 of the Act he would be bound to pay to 3rd defendant the rent fixed for the land. The plaintiff is clearly entitled to recover possession in any event. It is argued that the suit is barred under section 13 of Act IV of 1897, but there was no order passed under the Act. The second appeal is dismissed with costs.

Appeal dismissed.

In re HAROLD TUCKER.

CALCUTTA HIGH COURT.
ORDINARY ORIGINAL CIVIL JURISDICTION.
January 15, 1912.
Present:—Mr. Justice Chitty.
In re HAROLD TUCKER—PETITIONER.

Christian Marriage Act (XV of 1872), ss. 41, 46—Jewess—Divorce—Intended marriage with Christian—Registrar, refusal by, to solemnize marriage—High Court—Direction to solemnize marriage.

A Jewess was married and subsequently divorced from her husband according to the Jewish law. She desired to marry a Christian who applied to the senior Marriage Registrar of Calcutta to marry them, but the Registrar refused to do so without an order of the High Court. In the circumstances, the High Court directed the Registrar to take the necessary steps to solemnize the marriage.

This was an application in the matter of an intended marriage between Harold Tucker of 32, Chowringhee Road, in the town of Calcutta and Isabella Landeman of No. 14, Corporation Place, in the said town of Calcutta.

It ran as follows:—

1. That your petitioner, Harold Tucker, is a British subject and resident of the town of Calcutta and that he is a Christian by religion and by profession a caterer and has attained his full age being at present of the age of 36 years.

2. That Isabella Landeman is a Jewess and has also attained her full age being at present of the age of 47 years.

3. That the said Isabella Landeman was some time ago married in Calcutta to one Marco Landeman, a member of the Jewish community, according to Jewish rites and ceremonies but subsequently and on the 20th day of January 1909, the said Isabella Landeman obtained a divorce from the said Marco Landeman according to the Jewish rites and ceremonies as will appear from the affidavit made in the above matter of Solomon Tweuna, who was the Priest who granted the said divorce. The said Isabella Landeman having obtained the said divorce is now a single woman and at liberty to marry again.

4. That your petitioner, being desirous of being married to the said Isabella Landeman, applied to the senior Registrar for Marriages at Calcutta to marry them under the provisions of Act XV of 1872 aforesaid; your petitioner and the said Isabella Landeman gave the necessary notice required under the said Act to the said senior Marriage Registrar of Calcutta and further explained to the said Registrar that the said Isabella Landeman had formerly been married but had obtained a divorce according to the rites and ceremonies of the Jewish community and requested the said Registrar to take all necessary steps to solemnize the said marriage with as little delay as possible and to issue the necessary certificate, but the said Registrar refused to take any steps in the matter of the said proposed marriage or to issue the said certificate without an order of this Honourable Court.

5. That your petitioner submits that the said dissolution of marriage of the said Isabella Landeman is valid and subsisting and is of full effect and virtue under the Jewish Laws, customs, rites and ceremonies and that the said Isabella Landeman is now a single woman and free and competent to marry your petitioner.

6. That there is no lawful impediment to the marriage between your petitioner and the said Isabella Landeman and that they are desirous and are ready and willing to be joined in matrimony and to abide by all the rules, rites and ceremonies prescribed for marriage solemnized by or in the presence of a Marriage Registrar and as such Registrar shall direct.

Your petitioner, therefore, humbly prays your Lordships:—

(*a*) That on the application of your petitioner or of the said Isabella Landeman or either of them for that purpose, the senior Marriage Registrar of Calcutta do solemnize the said marriage in due form under the provisions of the said Act XV of 1872 and do issue a certificate in terms prescribed in the said Act.

The application was supported by the affidavit of one Soloman Twsuna which ran as follows:—

I Solomon Tweuna a member of the Jewish community and one of the Priests of the said community and at present residing at No. 25, Chattawalla Gully, in the town of Calcutta make oath and say as follows:—

1. That I am and have been a Jewish Priest for over thirty years and as such am personally well acquainted with the rites and ceremonies that are necessary to be observed and performed for valid marriages and dissolution of marriages between the Jewish people and I say that I have in my capacity as such Priest on several occasions granted dissolution of

marriages amongst the members of the Jewish community.

2. That I say that it is necessary in order to divorce two members of the Jewish community, who have been lawfully married according to Mosaic Law and to the rights and ceremonies of the Jewish community, to observe and perform the following conditions, *viz.*:

To ask if both parties are agreeable to being divorced and on each of them stating that they wished to be divorced, then the certificate of divorce is drawn up by the Priest before whom the parties have appeared and is signed by him and is handed by him to the husband who states to his wife in the presence of the Priest and the witneses that from this day she is no longer his wife according to the Jewish or Mosaic Law and he then hands the certificate to his wife which she returns to the Priest and the divorce is then complete and the parties are free to marry again.

3. That I know and am personally well acquainted with both Isabella Landeman formerly Birnberg and Mordecai, otherwise called Marco Landeman, both of whom are members of the Jewish community and I say that I know that they were lawfully wedded according to the Jewish or Mosaic law, rites and ceremonies about eighteen years ago.

4. That I know that the said Isabella Landeman has obtained a valid divorce according to the Jewish or Mosaic law rites and ceremonies from the said Mordecai, otherwise Marco Landeman, and that the said dissolution of marriage was conducted by me and I say that all the rites and ceremonies necessary or required to be observed and performed as set out in the 2nd paragraph of this my affidavit were duly observed and performed and that nothing else is necessary to be done to dissolve the said marriage and the said Mordecai, otherwise Marco Landeman, and Isabella Landeman are now no longer considered as husband and wife by the Jewish community but are both at liberty to marry again.

5. That a marriage between a Jew and a Christian cannot be solemnized by a Jewish Priest and that the same cannot be held in a Jewish Synagogue as the Priest can only solemnize and grant marriages where both the parties are Jews.

Mr. *J. E. Bagram*, instructed by Messrs. *Gregory* and *Jones*, Solicitors, appeared for the Petitioner.

ORDER.—The senior Marriage Registrar of Calcutta do, under the provisions of Act XV of 1872, receive and publish the notice of the intended marriage given to him in writing in the form prescribed in and by the said Act and, upon compliance with the provisions of section 41 of the said Act take all of such steps as may be necessary for the solemnization of the marriage intended to be held between the said Harold Tucker and Isabella Landeman in the said petition named.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 334 OF 1910.

October 20, 1911.

Present:—Mr. Justice Abdur Rahim.

SIVAGURUNATHA CHETTIAR AND ANOTHER—PETITIONERS—APPELLANTS

versus

RAMASWAMI IYENGAR—RESPONDENT.

Representative suit—Death of plaintiff—Another member of the class entitled to continue suit—Civil Procedure Code (Act V of 1908), s. 2, O. I, r. 8, scope of.

Where a voter in *Devastanom* circle instituted a suit with sanction under the Civil Procedure Code, Order I, rule 8, for a declaration that the election of a member of a *Devasatanom* committee was void and for an injunction restraining him from exercising the office of such member and he died pending suit.

Held, that another voter was entitled to be brought on the record and to continue the suit:

Handford v. *Stone*, 57 Eng. Rep. 320; *In re Alpha Company*: *Ward* v. *Alpha Company*, (1903) 1 Ch. 203; 72 L. J. Ch. 91; 51 W. R. 201; 87 L. T. 646; 10 Manson 237; *Molff* v. *Can Boolan*, 96 L. T. 502; *Watson* v. *Cave*, 17 Ch. D. 19; 44 L.T. 40; 29 W.R. 433, relied upon.

Order I, rule 8 of the Civil Procedure Code applies not only to cases where concurrent interests are concerned but also where they are similar though distinct and the sanction granted to a voter whose interest is personal to himself is not, therefore, bad.

Srinivasachariar v. *Ragarachariar*, 23 M. 28, followed.

Mere misdescription of a proper party as legal representative would not in itself justify the setting aside of the order of revival.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 14th day of March

1910, in Interlocutory Application No. 130 of 1910, in Original Suit No. 26 of 1909.

Messrs. *S. Srinivasa Iyengar* and *S. Muthiah Mudaliar*, for the Appellant.

Mr. *S. V. Padmanabha Iyengar*, for the Respondent.

JUDGMENT.—This petition raises the question whether, when the sole plaintiff in a representative suit instituted with permission obtained under rule 8, Order I, dies before there has been any adjudication, the suit can be revived or continued by one of the persons having the same interest in the suit. The question is not directly covered by any precedent, and is one, by no means, easy to decide.

The suit, in which the order impugned by this petition has been made, was instituted with sanction obtained under rule 8, Order I by one Srinivasachariar, a voter in the Kumbakonam Devastanam circle, seeking a declaration that the election of the 7th defendant as a member of the Devastanam Committee is void and for an injunction to restrain him from exercising the office of such member. Srinivasachariar died before the date on which the case was posted for examination of witnesses and, on the application of the respondent, another voter in the Devastanam who wanted to proceed with the suit, it has been revived, and the respondent's name has been ordered to be entered in the cause title as the legal representative of the deceased Srinivasachariar. The respondent claimed that in law he was a representative of Srinivasachariar inasmuch as he was one of the voters on whose behalf Srinivaschariar instituted the suit. It seems to me clear beyond dispute that the respondent does not come within the definition of legal representative as given in clause (*ii*) of the definition asit has not been contended before me that he does. He cannot, in any way, be said to represent the estate of the deceased; in fact he has no concern with such estate. But if he is entitled to continue the suit, mere misdescription of the respondent in the order of the Subordinate Judge as legal representative of the deceased plaintiff would not in itself justify me in setting aside the order. The misdescription may be rectified, if necessary.

The substantial question, therefore, is whether the suit can be continued by the respondent. There can be no doubt that the right of the deceased plaintiff to sue in this case was personal to himself and so far as that right is concerned, it must be held to have come to an end on his death. Mr. S. Srinivasa Iyengar contends that with the cessation of the deceased plaintiff's right to sue, the suit itself ceased to exist or became dead, while the learned Pleader for the respondent contends that the action being a representative one, the other persons having the same interest, whom the deceased was allowed to represent, must be held for the purposes of continuing the action to be his co-plaintiffs. Before proceeding further, I may mention that Mr. Srinivasa Iyengar also contended that the sanction granted to the deceased plaintiff under Order I, rule 8 is itself bad inasmuch as the right of each voter is personal to himself. But as pointed out by Sheppard, J., in *Srinivasachariar* v. *Ragavachariar* (1), with reference to the corresponding provisions of the Code of Civil Procedure of 1882 (and the language of rule 8, Order I is identical in this respect with the language of section 30 of the Code of 1882), this rule of procedure, which is founded on a rule of the English Court of Chancery, applies not only to cases where the concurrent interests are concerned but also where they are similar though distinct. Besides, the defendants never objected to the order granting sanction under rule 8. I will, therefore, deal with the present question on the basis of the sanction having been validly granted. I shall first examine the provisions of the Code. It cannot be said that either rule 2 or 3, Order XXII, in terms applies to this case; not rule 2 for the simple reason that it contemplates cases where there are actually more than one plaintiff or defendant on the record, and not rule 3 for the same reason so far as the first part of sub-rule (1) is concerned, and, so far as its second part is concerned, it could not apply as it deals with cases in which a sole plaintiff's right to sue survives to his legal representative, and here the right of the deceased to sue, in so far as it was for his own benefit, would not survive at all. Sub-rule (2) apparently deals with cases where an application could be made under sub-rule (1) and has not been made, though that is not expressed; but if the direction that

(1) 23 M. 28.

the suit shall abate was to be taken to apply to cases other than those comtemplated by sub-rule (1), the result would be that the suit would abate so far as the deceased plaintiff is concerned. But as I have said, the Legislature does not purport by these sections to deal with the revivor, or more strictly speaking, the continuance of a representative suit instituted by a sole plaintiff.

Now, let us see what light is thrown on the question by rule 8, Order I, itself and the other provisions of the Code. The effect of the permission granted under rule 8 is to make the suit as one "on behalf of and for the benefit of" the deceased and other voters in the Devasthanam including the respondent. All the voters are to be given notice of the institution of the suit and any of them might apply to be made a party to such suit and would, subject, perhaps, to the discretion of the Court, be entitled to join. Sub-rule 2 does not impose any limit or condition as to the time within which the application must be made, but it is contended by Mr. S. Srinivasa Iyengar that one necessarily implied condition is that the suit must still be in existence at the date of the death of the plaintiff. He says that when Srinivasachariar died, the suit died with him, and, therefore, there would be nothing to revive or continue. No doubt that would be the result if the suit was instituted solely in his own right and not under the provisions of rule 8. The contention, however, is that the sanction obtained under that rule does not in any way affect the personal character of the action so far as its prosecution by the plaintiff up to adjudication is concerned, though after adjudication other members of the class will be bound by and entitled to the benefit of the decree, as provided by section 11, Explanation VI of the Code. It is only after adjudication that other intersted persons not parties to the suit would be treated as claiming under the person litigating and allowed, when necessary, to take part in the proceedings so that if the plaintiff dies after decree, any of the other persons on whose behalf the suit was brought can carry on the proceedings. But until adjudication, the plaintiff is *dominus litis* and not a trustee of the action, and, therefore, on his death the action, if his right to sue does not survive as in this case, must necessarily cease to exist. This, in substance, is the argument of Mr. Srinivasa Iyengar and in support of it he relies on a number of English rulings.

The provisions of the Code regarding suits of a representative character are apparently, as I have said, founded on the rules of Chancery practice in England, and as there is no clear and express provision in the Code relating to the particular question, I may appropriately refer to the English decisions to ascertain the principle which should govern this case. It stands to reason that, so far as the continuing or not continuing the suit is concerned, the plaintiff should have entire control of an action of this nature; he has, no doubt, obtained permission to prosecute the suit on behalf of the others, but has not bound himself to do so. In that sense, he is undoubtedly *dominus litis* and not a trustee of the action. He may, therefore, withdraw from the suit or compromise it with the defendants and it cannot be open to other persons to prevent him from doing so and to compel him to devote his time and money in prosecuting the suit for their benefit. This is what is laid down in *Handford* v. *Stone*(2), *In re Alpha Company, Ward* v. *Alpha Company* (3); *Molff* v. *Can Boolan* (4). But it does not follow, because the plaintiff on the record can withdraw from the suit or compromise it for his own benefit, that other members of the class have no interest in the suit In fact, they have a most vital interest as the adjudication will bind them equally with the plaintiff, and I see no reason why that interest should not be considered still subsisting after the death of the plaintiff to enable them to pursue the action. It is conceded that the suit may be continued when the plaintiff dies after decree, but why should it make any difference that he died before the decree. It is argued that after decree the plaintiff became a trustee of the action. But this is not so, though he would be a trustee of the fruits of the decree in his hands. At least in actions other than those involving administration of the estate of a debtor on behalf of all the creditors, *i. e.*, creditor's actions, it cannot be said that the plaintiff who has obtained a decree in a representative suit is bound to go on with it. It is observed by

(2) 57 Eng. Rep. 320.
(3) (1903) 1 Ch. 203; 72 L. J. Ch. 91; 51 W. R. 201; 87 L. T. 646; 10 Manson 237.
(4) 96 L. T. 502.

Kekwich, J., in *Ward* v. *Alpha Company* (3), which was an action by a debenture-holder on behalf of himself and other debenture-holders:—"He cannot prevent another debenture-holder coming in and claiming benefit of the decree but he is not bound to go on because some other person may be entitled to the benefit of the action." He then points out that the reason why a second suit with the same object would be stopped after the first suit has been commenced is to prevent improper costs, and it seems to me clear that in this country, the Legislature having permitted the other members of the class represented by the plaintiff to apply to be made parties in the plaintiff's suit, it would be the duty of the Court to restrain a second independent suit.

As I have pointed out, the Legislature in sub-rule (4) rule 8, Order I, does not for obvious reasons impose any limit of time within which applications must be made to be made parties, as it may be necessary for the prosecution of their interests that other persons interested should be allowed to intervene at any stage of the suit.

See also *Watson* v. *Cane* (5). And it does not stand to reason why, if any member of the class is competent by a future application to come in as a plaintiff or defendant in order to safeguard his interest or to get rid of the effects of improper conduct of the suit by the plaintiff, he should not be allowed to do so in a case where the plaintiff is dead and his legal representative is not competent to maintain the suit. Why should all the proceedings already taken be treated as wasted, when the very policy of representative actions is to prevent a multiplicity of actions? On the other hand, the Court is vested with a discretion as to whether it should or should not grant an application under sub-rule (2) of rule 8 in the circumstances of a particular case.

In this case, the action, in my opinion, being continued, there can be no doubt that the respondent has been rightly allowed to continue it.

The petition must be dismissed with costs.

Petition dismissed.

(5) 17 Ch. D. 19; 44 L. T. 40; 29 W. R. 433.

PUNJAB CHIEF COURT.

Civil Revision No. 1519 of 1909.

November 21, 1911.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

TAPESSIER AND COMPANY—DEFENDANTS—PETITIONERS

versus

NASIR-UD-DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 21 (last clause), application of—Arbitration Act (IX of 1899), ss. 2, 3. 19—Civil Procedure Code (Act V of 1908), Sch. II, s, 18—Arbitration—Agreement to refer—Bar to suit.

The provisions of Act IX of 1899 apply to a case where a suit could be instituted in a Presidency town if the matter submitted to arbitration were the subject of a suit.

Consequently, the last 37 words of section 21, Specific Relief Act, do not apply to an agreement to refer to arbitration in such a case.

Where no application for stay of suit under section 19 of the Arbitration Act, or under section 18, Schedule II, Civil Procedure Code, 1908, is made, the existence of the agreement to refer to arbitration does not bar the suit under section 21 of the Specific Relief Act.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Delhi, dated the 24th February 1909.

Lala *Dharm Das Suri*, for the Petitioners.

Mr. *Balwant Rai*, for the Respondents.

JUDGMENT.—The sole question on which the petitioner's Pleader has addressed us in this case is whether or not the plaintiffs-respondents' suit was barred by the last clause of section 21 of the Specific Relief Act, 1877. On behalf of the petitioners it is urged that the suit was so barred, on the grounds, (1) that on the date on which the suit was instituted in the lower Court, *viz.*, the 16th October 1908, the new Civil Procedure Code, which, by section 22 of the second Schedule, has repealed the last 37 words of section 21 of the Specific Relief Act, so far as they affected an agreement to refer to arbitration to which the provisions, of that Schedule apply, had not come into force, and (2) that the plaintiffs-respondents had refused to refer the matter to arbitration before instituting their suit. In answer to this argument, the Pleader for the plaintiffs-respondents has referred to sections 2 and 3 of the Indian Arbitration Act, IX of 1899, and with reference to these sections has contended (1) that the provisions of the

said Act applied in the present case inasmuch as the Head office of the petitioners being in Calcutta, which is a Presidency town, the present suit could have been instituted in that town, and (2) that by virtue of section 3 aforesaid, the last 37 words of section 21 of the Sepcific Relief Act did not apply to the agreement to refer to arbitration which is relied on by the petitioners. We think that this contention is well founded and must prevail. In fact, the learned Pleader for the petitioners conceded that the present suit could have been instituted in the Presidency town of Calcutta and that the provisions of Act IX of 1899 were applicable to the present case. It is further conceded that no application under section 19 of the aforesaid Act or under section 18 of the second Schedule of the Civil Procedure Code was made to the lower Court for stay of suit.

We accordingly hold that the suit of the plaintiffs-respondents was not barred by the last clause of section 21 of the Specific Relief Act at the time the suit was instituted and we dismiss this revision with costs.

Revision rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 923 OF 1911.

January 26, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re PRATTIPATI SESHAYYA AND OTHERS—PLAINTIFFS—APPELLANTS

Hindu Law—Woman's estate—Adverse possession—Prescription—Stridhanam—*Pleading.*

When the possession of a Hindu woman is adverse, the question must be decided as to what was her *animus possidendi*:—Did she assert an absolute title in herself or did she claim to hold as the heiress of any person? The latter would be the ordinary presumption, and the heirs to her *stridhanam* must specially plead that by prescription she had acquired a title which would descend to the heirs as *stridhanam*.

Second appeal against the decree of Temporary Subordinate Judge's Court of Guntur, in A. S. No. 270 of 1908, presented against the decree of the Court of the District Munsif of Narasaraopet, in O. S. No. 1142 of 1906.

Mr. *P. Nagabhushanam*, for the Appellants.

JUDGMENT.—I see no reason to doubt that the decision of the lower Appellate Court is right. It has been found that the 1st defendant's husband was adopted by Venkatalakshamma to her husband, Pedda Kamayya.

* * * * *

The next point raised is that, as it is found that Venkatalakshamma was in possession, the 1st defendant's husband's right to the property was extinguished and that the 1st defendant has, therefore, no right to retain possession now. An issue was raised in the Court of first instance with respect to the possession of the 1st defendant. The issue is in these terms: "Whether the suit lands were in the possession and enjoyment of the 1st defendant for over 12 years before the institution of the suit?" The wording of the issue is rather curious. If the object were to raise the question now argued before me, one could have expected it to be framed somewhat in these words:—"Whether the possession of Venkatalakshamma was adverse to the 1st defendant, and whether the 1st defendant's right was extinguished by Venkatalakshamma's possession?" The issue as framed would have been appropriate to a suit in ejectment by the 1st defendant against Venkatalakshamma or any one else who obtained possession from or through her. As it is, there was no question raised as to whether Venkatalakshamma's possession was on behalf of or adverse to the 1st defendant. The District Munsif did not deal with this issue at all. On appeal, the 8th ground in the memorandum of appeal was:—"The lower Court should have recorded findings on issues Nos. 4 and 5 and also decided the same in favour of the appellants." The Subordinate Judge merely finds that Venkatalakshamma obtained the land as the heiress of her husband and was in possession, and that she did not hold it as a maintenance grant from the plaintiff's grandfather.

In second appeal, Mr. Nagabhushanam, of course, perceived what was necessary to entitle his client to succeed, and took the point in his 4th ground of appeal that "the 1st defendant's husband having died more than 12 years ago, and Venkatalakshamma having

been in possession prior, as well as subsequent, to his death, the right of the 1st defendant, if any, to the property in dispute has been extinguished." It is by no means clear to my mind that this point was really raised in either of the two lower Courts. If Venkatalakshamma was in possession adversely to the 1st defendant, then, no doubt, the 1st defendant's claim to recover possession from Venkatalakshamma would be barred at the expiration of 12 years. But even this would not be sufficient to give the plaintiffs a right to succeed on the death of Venkatalakshamma. The question would be, assuming Vankatalakshamma's possession was adverse to the 1st defendant, what was her *animus possidendi* ? Did she assert an absolute title in herself or did she claim to hold as the heiress of her son ? The latter would be the ordinary presumption, in the absence of any evidence to the contrary; and if she held as heiress of her son, on her death, the person entitled to succeed would be her son's heir, that is, the 1st defendant, and the plaintiffs would have no title to recover. It was incumbent on the plaintiffs, in order to disclose a title to succeed to the property on the death of Venkatalakshamma, to state that Venkatalakshamma by prescription had acquired a title which would descend to the heirs to property held by her as *stridhanam*.

This they did not do.

* * * * *

The point now put before me not having been raised in the Courts below, and it being one which would require an investigation of facts, I am bound to disallow it. I, therefore, dismiss this second appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1129 OF 1909.

January 9, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

KAMOLA RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KAURA KHAN—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 12, 65—Contract by person of unsound mind—Claim for refund of sums advanced.

The provisions of section 65 of the Contract Act are not applicable to a contract entered into by a person of unsound mind.

Such a contract is void and no claim for a refund of sums advanced to a person of unsound mind is maintainable.

Mohori Bibi v. *Dharmo Das*, 30 C. 539, 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114, relied upon.

Second appeal from the order of the Divisional Judge, Multan Division, dated the 21st May 1909.

The Hon'ble *R. B. Shadi Lal*, for the Appellants.

Mr. *Shah Nawaz*, for the Respondent.

JUDGMENT.—The facts in this and in the two connected cases are fully stated in the judgment of the learned Divisional Judge. In each case plaintiffs claim to recover principal and interest in respect of a bond executed by defendant, Sheikh Kaura Khan, the total sum claimed in the three suits amounting to Rs. 9,026-13. The main defence in all these suits was that the bonds were executed by a person whose mind was at the time "unsound" within the meaning and for the purposes of section 12 of the Indian Contract Act, 1872, and that consequently the so called contract between the plaintiffs and the defendant was in law no contract at all, and plaintiffs were entitled to no relief.

The District Judge found that "the whole of the evidence for the plaintiffs is full of incidents that show that the defendant lived in a whirl of drink, drugs and excitement and that he was quite incapable of understanding business matters" and that the contract was induced by undue influence. He further found that a total sum of Rs. 1,178 had been advanced by plaintiffs to defendant on various dates and he gave the former a decree for that sum together with interest at the rate of Rs. 12 per cent. per annum from the date of the loan to the date of institution of the suit. From the decree defendant appealed to the Divisional Judge and plaintiffs lodged cross-objections, and the Divisional Judge remanded the case for further inquiry as to whether defendant was of unsound mind, within the meaning of section 12 of the Contract Act, at the time when the bonds, upon which the suits were based, were executed.

Evidence was, therefore, taken by the Munsif with reference to this issue and as a result he reported that "it was clear that

the defendant was of unsound mind" at the time.

The Divisional Judge, after consideration of the whole of the evidence on the record, held that "there does not appear to be any doubt that Kaura Khan was a person of weak intellect from his birth, and this weakness of intellect developed into insanity owing to the course of debauchery in which he embarked," and that Kaura Khan was not competent to contract at the time when he executed the bonds. The learned Judge was of opinion that it was very doubtful whether the sum of Rs. 1,178 had ever been paid to defendant, but that even if it had been paid, plaintiffs, whose father was the original money-lender and who must have known he was dealing with a person of weak intellect, who did not know what he was doing, were not entitled to claim recovery even of such sums as might have been advanced to defendant.

Plaintiffs' suits were accordingly dismissed in their entirety and from the decrees passed by the Divisional Judge they have preferred further appeals in the two cases in which they claimed, respectively, Rs. 4,718 and Rs. 3,592 and they have also applied for revision of the decree in the case in which they claimed Rs. 716. This judgment will dispose of all three cases.

We have heard Mr. Shadi Lal in support of plaintiffs' contentions and we have read the evidence upon the record. There is against plaintiffs a concurrent finding of three Judges who are all agreed that the defendant was, at the time of the execution of the bonds, a person of weak intellect and quite incapable of understanding business matters. With this finding, we are ourselves in entire accord, as it is abundantly proved, even by the evidence of witnesses called by plaintiffs themselves, that Kaura Khan was quite incapable of understanding the contracts made by him and of forming a rational judgment as to their effects on his interests. The evidence shows that he was naturally of weak intellect and that after the death of his father, who left him a very large property, he took to drink and drugs and indulged in other vices. In fact, he would appear to have been almost always drunk and we see no reason to differ from the Divisional Judge's finding that plaintiffs' father must have known that he was practically imbecile. Plaintiffs' witness, Tikaya Ram, a drink contractor, has had to admit that about the time when defendant executed the bond of the 28th September 1902, he was "surrounded by prostitutes and blackguards," "was usually drunk" and "used to get 2 or 3 bottles of spirit a day", and drank *bhang* as well. This witness also states that shortly after the execution of the said deed, the Deputy Commissioner was obliged to "banish" defendant from the city.

The rest of the evidence is very similar in its purport and proves conclusively that defendant was incapable of forming a rational judgment on matters of business and that all who came into contact with him (except possibly on rare and isolated occasions) must have known of his unsoundness of mind. Plaintiffs' father had frequent dealings with him and we cannot believe that he was ignorant of defendant's weakness of intellect.

We agree, therefore, with the findings of the lower Courts upon these points.

Mr. Shadi Lal contends that in any case plaintiffs are entitled to recover sums actually advanced by them to defendant, and in this connection relies upon the provisions of section 65 of the Indian Contract Act. But in a case of this kind, the decision of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmo Das* (1) is in point and upon its authority, we hold that these provisions are not applicable and that plaintiffs' claim even for a refund of sums advanced to the defendant must fail. We accordingly dismiss this and the connected appeal and application for revision with costs.

Appeal dismissed.

(1) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114.

SEETHARAMA CHETTIAR *v.* KRISTNA ROW.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 51 OF 1910.
February 8, 1912.
Present:—Sir Ralph Benson, Judge and
Mr. Justice Bakewell.
T. SEETHARAMA CHETTIAR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
M. KRISTNA ROW, THE DEVAN TRUSTEE OF RAMNAD SAMASTANAM, (VACATED THE OFFICE), RAJAH RAJESWARA SETHUPATHI *alias* MUTHURAMALINGA SETHUPATHI BROUGHT ON RECORD AS RESPONDENT IN THE PLACE OF THE DEWAN TRUSTEE—VIDE ORDER ON C. M. P. No. 2365 OF 1910, DATED 16TH DECEMBER 1910—31ST DEFENDANT—RESPONDENT.

Execution of decree—Application for execution of a decree by sale—Sale stayed by High Court—Warrant fees not paid—Application 'struck off'—Effect of such order—Civil Procedure Code (Act XIV of 1882), *s.* 295—*Realisation of assets.*

An order passed on an execution petition ending with the words "Petition struck off" is an order not known to the law and its effect has to be determined by a consideration of the circumstances of the case and the terms of the order itself.

Where, therefore, an application was made for the execution of a decree by sale of a debt, but the applicants failed to pay certain warrant fees, as the sale had been stayed by an order of the High Court, and the petition was, consequently, "struck off," the order simply amounts to an adjournment *sine die*. Even if the warrant fees had been paid, the Court could not have proceeded with the application at that stage.

Where moneys are realised on a personal decree and in execution, they are assets realised under section 295, Civil Procedure Code.

Second appeal against the decree of the District Court of Madura in Appeal Suit No. 527 of 1908, presented against that of the Court of the Additional Subordinate Judge of Madura, in O. S. No. 52 of 1908.

Mr. *R. Subrahmania Aiyar*, for the Appellants.

Mr. *K. Srinivasa Iyengar*, for the Respondent.

JUDGMENT.—The first question in this case is as to the effect of the order of the 31st January 1902, ending with the words "Petition struck off." It has been repeatedly held that such an order is not known to the law, and that its effect is to be determined by a consideration of the circumstances of the case and the terms of the order itself. In the present case, the application was for execution of a decree by sale of a debt, and as we read the order, it states that the applicants had failed to pay certain warrant fees into Court, and the sale had been stayed by an order of the High Court and then adds: "Petition struck off." We do not agree with the District Judge that the words regarding the stay of execution were written by a clerk and form no part of the order of the Court. If the applicants had made the requisite payment, the Court could not at that date have proceeded with the application, and there was, therefore, no reason for punishing the applicants for their default by the dismissal of their petition; and it would have been a reasonable exercise of the Courts' discretion to adjourn the matter pending further orders of the High Court.

We are of opinion that the terms of the order show that the Court merely declined to proceed further with the application at that time, and that it amounts to an adjournment *sine die*. We do not think that proceedings subsequently taken by the applicants have any bearing upon the question of what was the intention of the Court when it passed the order.

The second question is, whether the sum of which the appellants claim rateable distribution, was realised in execution. A compromise-decree was made in a suit to which the appellants were parties, which we construe as directing payment by the Rajah of Ramnad of a certain sum to the plaintiff therein, and that any monies recovered should be subject to rateable distribution among the creditors of the Rajah who might be entitled thereto. As trustee under a deed of settlement executed by the Rajah, the then plaintiff was bound to pay a monthly allowance to the Rajah, and the learned District Judge was apparently of opinion that the plaintiff should have withheld that payment from the Rajah, and distributed the amount among the parties to that suit. No such direction is, however, contained in the compromise-decree, and it would scarcely have been safe for the plaintiff to have paid away the trust monies in his hands otherwise than in accordance with the terms of the trust or the express order of the Court. The compromise decree is a personal decree against the Rajah and could only be enforced by the ordinary process of execution; and the monies in Court were realised under such process. In this view, there is no ground for the suggestions of the District Judge that the action of the then plaintiff amounted to a fraud upon the Court.

For these reasons, we are of opinion that the monies distributed among the respondents were realised in execution within the meaning of section 295, Civil Procedure Code of 1882, at a time when an application by the appellants for execution was pending in the Court, and that they were, therefore, entitled to bring this suit for a refund. The decree of the lower Appellate Court is reversed and that of the Subordinate Judge restored. Having regard to all the facts of the case, we make no order as to costs, in this or in the lower Appellate Court.

Decree reversed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 334 OF 1911.

May 9, 1912.

Present:—Mr. Justice Kensington and Mr Justice Chevis.

GUJAR—DEFENDANT—APPELLANT

versus

FATTEH JANG AND OTHERS—PLAINTIFFS—RESPONDENTS.

Valuation of suit—Appeal—Jurisdiction—Pre-emption suit.

For the purposes of determining the course of appeal in a pre-emption suit, the value for purposes of jurisdiction must only be looked at, and not the amount which the pre-emptors may have to pay.

Iftikhar Ali v. *Thakar Singh*, 15 Ind. Cas. 347, followed.

Muhammad Afzal Khan v. *Nand Lal*, 16 P. R. 1908; 146 P. L. R. 1908; 13 P. W. R. 1907; *Abdur Rahman* v. *Charag Din*, 19 P. R. 1908, 129 P. L. R. 1903, distinguished.

Second appeal from the order of the Divisional Judge, Hoshiarpur, dated 22nd December 1910, modifying that of the District Judge, Hoshiarpur, dated 2nd December 1909, decreeing plaintiffs' claim.

Sheikh *Umar Bakhsh*, for the Appellant.

Mr. *Fazl-i-Hussain*, for the Respondent.

JUDGMENT.—This is an appeal by the vendee in a pre-emption suit against the 2nd pre-emptors, who have paid Rs. 6,000 and taken over the land, in respect only of an item of Rs. 700 disallowed from the price by the lower Appellate Court.

There is a cross-objection by the pre-emptors as to a further item of Rs. 426 allowed to the vendee in both Courts.

The first ground of appeal raises a question of the jurisdiction of the lower Appellate Court to deal with the case, based on the Full Bench rulings [*Muhammad Afzal Khan* v. *Nand Lal* (1) and *Abdur Rahman* v. *Charag Din* (2).] The ruling in *Abdur Rahman* v. *Charag Din* (2) is clearly not in point and need not be discussed. The question involved, with reference to the ruling in *Muhammad Afzal Khan* v. *Nand Lal* (1), has been considered at length in *Iftikhar Ali* v. *Thakar Singh* (3). It is observed that our brother Rattigan was a member of the Bench giving that decision and he was also one of the Judges composing the Full Bench in *Muhammad Afzal Khan* v. *Nand Lal* (1). Great weight attaches, therefore, to the construction recently placed on the Full Bench ruling, and we ourselves are entirely at one with the learned Judges who have decided the case of *Iftikhar Ali* v. *Thakar Singh* (3) and consider that their decision should be followed.

Our conclusion is, therefore, that for purposes of determining the course of appeal in pre-emption suits, we have to look only to the jurisdictional value of the suit, and not to the amount which the pre-emptors may have to pay. The Divisional Court rightly assumed jurisdiction to deal with the case.

On the merits of the two comparatively trifling sums covered by the appeal and cross-objection we need only say that after looking closely into these matters, we think that the learned Divisional Judge is right on both points.

Both appeal and cross-objection are accordingly dismissed, the parties paying their own costs in this Court.

Appeal and cross objection dismissed.

(1) 16 P. R. 1908; 146 P. L. R. 1903; 13 P. W R. 1907.

(2) 19 P. R. 1908; 129 P. L. R. 1908.

(3) 15 Ind. Cas. 347.

SINGANAMALA KRISHNAMACHARLU v. SINGANAMALA VENKATAMMA.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 19 OF 1911.

January 24, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

SINGANAMALA KRISHNAMACHARLU AND ANOTHER—APPELLANTS

versus

SINGANAMALA VENKATAMMA, MINOR BY GUARDIAN AND FATHER POTHI LAKSHMANACHARLU—RESPONDENT.

Succession Certificate Act (VII of 1889), ss. 4, 9—Minor—Applying through natural guardian—Issue of certificate.

A succession certificate may be granted to a minor on application made by him through his natural guardian.

Otherwise, section 4 of the Succession Certificate Act would stand in the way of the minor suing for the effects of the deceased father and no such suit could be filed during his minority.

Ex parte Mahadev Gangadhar, 28 B. 344; 6 Bom. L. R. 281; *Gulabchand* v. *Moti*, 25 B. 523; 3 Bom.L.R. 795, considered.

Kali Coomar v. *Tara Prosunno Mukerjee*, 5 C. L. R. 517; and *Ram Kuar* v. *Sardar Singh*, 20 A. 352, followed.

The provisions of section 9 of the Act can be satisfied by the guardian depositing the necessary security on behalf of the minor.

Appeal against order of the District Court of Kurnool, dated the 10th October 1910, in C. M. P. No. 166 of 1909.

Mr. *B. Narasimha Row*, for the Appellants.

Mr. *T. V. Seshagiri Iyer*, for the Respondents.

JUDGMENT.—The question raised before us in this appeal is whether a succession certificate can be granted to a minor on application made by him through his natural guardian. We answer the question, which is not absolutely free from difficulty, in the affirmative. Apart from section 9 of the Succession Certificate Act VII of 1889, which we shall consider presently, there is nothing in the Act which precludes a minor from applying for a certificate, while we find that sections 8 to 13 of Probate and Administration Act, V of 1881, prohibit grants of Probate and Letters of administration to minors. If the minor is the heir of deceased, as is the case, the property will vest in him and he would be the person entitled to institute suits to recover debts due to the estate. Section 4 of the Succession Certificate Act lays down that no Court shall pass a decree against a debtor of the deceased person in favour of a person claiming to be entitled to the effects of the deceased except on the production by the person so claiming of a certificate issued under the Act. Now if where a minor is so entitled, the certificate were to be granted to his guardian, as suggested in *Ex parte Mahadev Gangadhar* (1), the requirements of section 4 would be satisfied; and if the certificate could not also be granted to the minor, as held in *Gulabchand* v. *Moti Chatraji* (2), the result would be that no suit could be instituted at all during the minority of the heir, a result which could not have been contemplated by the Legislature. Section 9, no doubt, lays down that, whenever the Court considers it desirable to take security from the applicant, it shall require him to execute a bond with two sureties, and it is argued that, as minor cannot execute such a bond, it must be held he is incompetent to apply for a certificate. But we think that execution of the bond by the guardian on behalf of the minor applicant would bind the minor and thus satisfy the provisions of section 9. In our opinion, therefore, this section does not present any serious difficulty. We may observe with reference to the Bombay decision that the attention of the learned Judges, who decided these cases, does not appear to have been drawn to the difficulty that would arise in collecting debts of the minor heir of a deceased person, if this view of the law were to be accepted as sound.

On the other hand, the Calcutta and the Allahabad High Courts have held in *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee* (3) and *Ram Kuar* v. *Sardar Singh* (4) that a certificate can be granted to a minor. We think this is the correct view and dismiss the appeal with costs.

Appeal dismissed.

(1) 28 B. 344; 6 Bom. L. R. 281.
(2) 25 B. 523; 3 Bom. L. R. 795.
(3) 5 C. L. R. 517.
(4) 20 A. 352.

SOMA BALLACHARIAR *v.* THIRUVENKATACHARIAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS No. 1484 AND 1590 OF 1909.

April 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

SOMA BALLACHARIAR AND OTHERS—APPELLANTS

versus

THIRUVENKATACHARIAR AND OTHERS—RESPONDENTS.

Hindu Law—Ceremonial Law—Usage—Right to receive honours in a temple—Right to determine precedence in the distribution of honours—Injunction—Jurisdiction of Civil Courts—Usage, whether can override texts of Shastras—*Memorandum of objection—Damages claimed by only one of objectors—Common basis of claim—Award of damages to all.*

Civil Courts have jurisdiction to determine the order of precedence in the distribution of honours in a temple and to protect, by an injunction, persons having a right to the first honours from such right being infringed by others who are entitled to the same honours subsequently.

Sri Rungachariar v. *Rungasawmy*, 32 M. 291, 5 M. L. T. 33; 3 Ind. Cas. 881, followed.

Where a long established usage in a tempie has determined the rights of particular persons to receive the first *thirthams*, such usage will be followed by Civil Courts, even though it may be an innovation on any prescribed rule of the Hindu *Shastras*, unless the text of the latter is of such coercive authority that it cannot be disobeyed.

Where, in the memorandum of objections put in by the respondents-plaintiffs in an appeal, only one plaintiff claimed damages for an infringement by the defendants of a right common to all the plaintiffs:

Held, that damages could be awarded to all the plaintiffs as the basis of the claim was common to them all.

Second appeal against the decree of the District Court of Tanjore, in A. S. No. 220 of 1909, presented against the decree of the District Munsif of Shiyali, in O. S. No. 133 of 1907.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar* and *Subramanya Aiyar*, for the Appellants (in No. 1484).

Messrs. *T. Rangachariar* and *K. S. Krishnaswami Aiyangar*, for the Respondents (in No. 1484).

Messrs. *T V. Gopalsawmy Mudaliar* and *G. S. Ramachandra Aiyar*, for the Appellants (in No. 1590).

Mr. *K. S. Krishnaswami Aiyangar*, for the Respondents (in No. 1590).

JUDGMENT.

S. A. No. 1484 OF 1909.

The plaintiffs in this case are persons who are entitled to the 1st, 3rd and 4th *thirthams* in the temple of Thirunagiri Ranganatha Swamy. Defendants Nos. 7 to 23 are entitled to *thirtham* along with them. Defendants Nos. 1 to 3 are the trustees of the temple and defendants Nos. 4 to 6 are the Archakas, whose duty it is to carry on the daily worship of the idol. The object of the suit is to establish the plaintiffs' right to receive the *thirtham* first after the conclusion of the *siva* and *Sathumurai*, that is, after the recitation of Tamil Vedas and hymns. In the plaint, the plaintiffs ask also for the establishment of their rights to other emoluments appertaining to the office they hold, but the right to these other honours and emoluments was really not denied by any of the defendants. There was a previous suit by some of the defendants jointly entitled to the 1st *thirtham* along with the plaintiffs for the establishment of their right to the honours and emoluments attached to the office. That suit was against the trustees and the suit ended in a compromise which will be referred to hereafter. The plaintiffs stated that while that suit was going on, the trustees and the *Archakas* acting in combination introduced an innovation which consisted in the *Archakas* taking the *thirtham* before it was offered to the plaintiffs and the other co-owners of the first *thirtham* office. The plaintiffs state that at the time of the compromise in the previous suit, the parties agreed that this innovation should be put an end to, but it was considered unnecessary to enter this understanding in the compromise.

Both the trustees and the *Archakas* deny the particular right set up now, namely, that the *Archakas* should not take the *thirtham* before it is given to the plaintiffs. In the written statement of the *Archakas* in para. 6, they state:

"It is always the practice for these defendants to take the *thirtham* first and then serve it to the plaintiffs, etc. It is in consonance with the custom, the *Shastras* and practice. It is included in religious rights and ceremonies. The plaintiff has no right to ask for any relief in that regard in a Civil Court."

In addition to the issues relating to the merits, there was an issue as to the right of a Civil Court to take cognizance of the suit. Both the lower Courts have found as a matter of fact that according to the usage and

practice of the temple, after the *Siva* and *Sathumurai* were over, the *Archakas* were not in the habit of taking *thirtham* themselves before making the distribution to the *thirthamgars* or to the various persons entitled to precedence in the distribution of the *thirtham*. That finding is based on the oral evidence in the case as well as on three documents. It has been contended in second appeal before us that these documents have been misconstrued; and in the course of the arguments it was also urged that two of these documents, namely, Exhibit B and Exhibit I, are not admissible in evidence at all against the defendants. Exhibit B is not of much importance. It is an agreement executed between the holders of the offices of the first and second *thirthams* and the defendants; the *Archakas* and trustee were not parties to it. The inadmissibility would really be a matter of no consequence, as it is stated that it was superseded by Exhibit I, which was executed in the year 1836. This document is an award passed by first and second defendants' father who was then the trustee of the temple. It set out the rights of the *thirthamgars*. It was apparently contended before the District Munsif that it would in no way bind the *Archakas* and trustees. But there was evidence before him showing that the *Archakas* were also parties to the dispute and that they made statements regarding their rights. The document does not contain any reference to *Archaka's* rights to take the *thirtham* first and both the Courts have drawn the inference from that fact that no such right existed at the time, as otherwise it would have been put forward. How far this inference is well founded is not really a matter for our consideration in second appeal. No objection was raised in the grounds of appeal in the lower Appellate Court to the admissibility of the document in evidence against the *Archakas* or the trustees, evidently because the document was put forward by the defendants themselves. The contest in the lower Appellate Court was about its effect as against the *Archakas* and the trustees. If the question of its admissibility had been raised, the District Judge would, no doubt, have had to consider whether, as found by the District Munsif, the *Archakas* themselves were not really parties to the dispute which was settled by the compromise. We cannot allow any question regarding its admissibility to be raised at this stage.

The 3rd document is Exhibit A, the compromise in the previous suit O. S. No. 100 of 1906. In that suit some of the first *thirthamgars* claimed the right to be given the *thirtham* first though no express statement was made in the plaint that the *Archakas* were not entitled to take it before them. In Exhibit IV, the written statement put in by the second defendant in that suit, the *Archakas'* right now put forward was alleged. In the compromise the right of the *thirthamgars* was stated in the term in which it was put forth in the plaint.

The *Archakas'* right was neither affirmed nor denied; but both the Courts believe the evidence adduced on behalf of the plaintiffs showing that *Archakas'* right was denied and that the denial was agreed to by the agent of the 2nd defandant, one of the present trustees who undertook to abolish the new practice. There is no question for consideration in second appeal with respect to the documents. None of these documents can be said to have been misconstrued. We must, therefore, accept the finding that according to the usage of the temple, the *Archakas* have not been taking the *thirtham* before offering it to the *thirthamgars*.

The point chiefly urged in the second appeal is that, according to the texts of Hindu religious books dealing with the way in which the *puja* and ceremonials in *Vaishnava* temples following *vaikanasa sutra* should be conducted, it is a part of the ceremonial enjoined that at the end of *puja*, the *Archakas* should sip the sacred water or *thirtham* and only thereafter distribute it to the *Goshti*, including those who have special rights of precedence. It is contended that a religious privilege like precedence in *thirtham* cannot be acquired in contravention of the rules of the Hindu *Sastras* and that, however long a practice in contravention of the *Sastras* may have been in existence, no one can acquire a legal right to compel either the trustees or the worshipping *Archakas* to continue to act against the injunctions of the *Sastras* and that these latter must be at liberty to rectify any practice that may be against the *Sastras*. For the respondents it is contended that usage is really the determining principle as to the ceremonial to be observed in a temple, that what has to

be looked to is whether any particular text of the *Sastras* has been adopted in the usage of any temple and that there are no texts of such paramount authority as to make it impossible for a temple to adopt a usage which may be contrary to what is laid down by them. The texts produced by the plaintiffs have been interpreted before us in different ways by both sides. As we understand the contention raised by the defendants in the lower Court, it was, not that the defendants were entitled to introduce an innovation which would not be questioned by the plaintiffs, but that the practice of the temple was in support of the defendants' case. It would appear, no doubt, that before the District Munsif the contention was urged that, according to the *Sastras*, it was a part of the *puja* or the ceremonial of worship that at the conclusion of the *puja*, the *Archakas* should sip the sacred water. But it does not appear to us that this was relied on as justification for any innovation. The texts appear to have been cited partly to support the defendants' evidence as to the actual usage and partly perhaps to show that a right which is against the injunctions of the *Sastras* could not be legally acquired by a usage which was contrary to the texts. We are unable to say that it has been proved in this case that there are any texts of such coercive authority as to set aside a usage with respect to rights regarding *thirthams*, that is, that there are any texts the disobedience of which has been proved to make it impossible that the plaintiffs could have the right to the *thirtham* in preference to the *Archakas*.

In the course of the arguments, another point was put forward. Briefly, it is this:—the plaintiffs admittedly have the right to the *thirtham* only after the *puja* is over, the *puja* now including the *Siva* and *Sathumurai*. It is contended that a person, who is entitled to *thirtham* after the conclusion of the *puja*, cannot, by virtue of this right, object to any change in the *puja* which would be in accordance with the *Sastras* requiring or permitting the *Archaka* to sip the sacred water as a part of the ceremonial of the *puja*. This contention again it is unnecessary to deal with in this case. If the trustees or the *Archakas* have a right to introduce such an innovation and if in the assertion of such right they introduced it, it will then be time to consider whether the plaintiffs on account of their right to the first *thirtham*, can object to any change which would have the effect of postponing their getting the *thirtham* until the *Archakas* have taken it. As already stated, this was not the case of the defendants in the lower Courts. Their contention was not that they introduced an innovation but that the practice which they in no way violated allow the *Archakas* to take the sacred water first. On that question, the findings of the lower Courts are conclusive and must be accepted. With respect to the question of jurisdiction, the case of *Sri Rungachariar* v. *Rungasami* (1) is practically on all fours with this case. If the plaintiffs have a right to have their right to receive the *thirtham* first protected, then they are also entitled to ask the Court to decide for the protection of that right that the *Archakas* should not take the *thirtham* before them. As pointed out in that case, the question itself is one of precedence, and whether the plaintiffs are entitled to precedence over the *Archakas* or not it has necessarily to be decided by the Court. The objection taken to the finding, therefore, cannot be sustained.

The defendants complain that the form of the injunction granted by the lower Courts is likely to lead to inconvenience in practice. There is a negative injunction against the *Archakas* and the trustees that they should not interfere with the plaintiffs' rights, and there is also a positive injunction that they should show the plaintiffs the *maryadas* or honours, mentioned in the decree. We think that the plaintiffs' rights will be sufficiently protected by the negative injunction. The words, therefore, after "defendants Nos. 7 to 23", in clause 3 of the District Munsif's decree, will be expunged. In other respects, the decrees of the lower Courts will be confirmed. The appellants must pay the plaintiffs the costs of the second appeal.

S. A. No. 1590.

With respect to the memorandum of objections in S. A. No. 1590, both the Courts having found that the plaintiffs' rights have been infringed, it must be held that they are entitled to some damages. The District Judge disallowed the claim because the

(1) 32 M. 291; 5 M. L. T. 33; 3 Ind. Cas. 881.

memorandum of objections before him was presented only by one of the plaintiffs, namely, the 12th plaintiff. But he was entitled to do so on behalf of all and there can be no doubt that he did act on behalf of all as he did not claim any damages individually. The District Judge also says that there was nothing to show which particular plaintiff suffered annoyance. But as he himself points out, the right to the damages arises from the infraction of the plaintiffs' right and it is immaterial whether any, and if so, which of them suffer any annoyance. We must, therefore, modify the decree by decreeing Rs. 5 damages against the appellants. There will be no order as to costs on the memorandum of objections.

Decree modified.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 120 OF 1910.

April 30, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

Sri ABHINANA PURNA PRIYA VEDAGI BHASKAR THIRUMAL RAO SAHEB—DEFENDANT—APPELLANT

versus

ARNI RANGASAWMY RAO SAHEB—DEFENDANT—RESPONDENT.

Hindu Law—Impartible estate—Succession—Maintenance—Remoteness of relationship.

The right of a family member to claim maintenance from the holder of an impartible estate must be decided on the footing of the estate being joint and must depend on the question whether, if the estate were partible, the person claiming the maintenance would be entitled to maintain a suit for partition.

The question of succession to an impartible estate discussed.

The degree of relationship for determining the right to maintenance out of an impartible estate must be taken to be the same as for determining the right to partition in the case of a partible estate.

The right to maintenance is not lost by reason of the fact that the person claiming maintenance is only an adopted and not an *aurasa* son of his father.

The fact that a member is removed more than three degrees from the common ancestor is not a bar to his succession by survivorship and, therefore, is not a bar to his right to maintenance.

Appeal against the decree of the District Court of North Arcot, in O. S. No. 20 of 1908.

Messrs. *P. R. Ganapati Iyer* and *K. Y. Adiga*, for the Appellant.

Messrs. *S. Srinivasa Aiyangar* and *S. Dorasawmy Aiyar*, for the Respondent.

JUDGMENT.—This appeal is by the defendant, the *jagirdar* of Arni, in a suit instituted by the plaintiff to establish his right to receive maintenance from the defendant at Rs. 60 per month and for the recovery of arrears at the same rate from July 1905. The plaintiff is the adopted son of one Lakshmana Rao Saheb, who was the grandson of the plaintiff's grandfather's grandfather, Tirumal Rao Saheb. Tirumal Rao had two sons, Srinivasa Rao and Venkata Rao. The defendant is the grandson of Venkata Rao by adoption and the plaintiff is the great-grandson of Srinivasa Rao. The *jagir* of Arni is an impartible estate descendible to a single heir according to the rule of lineal primogeniture and is included in the schedule to the Madras Impartible Estates Act. The plaint alleges that the *jagir* is a joint ancestral hereditary estate of the family of the parties and is subject to the liability under the Hindu Law of providing for the maintenance of the other members of the family. It alleges further that whatever may be the nature of the estate, the defendant is bound to make suitable provision for the maintenance of the other members of the family according to the established usage. The plaintiff after the death of his father, Lakshmana Rao, made an application to the Court of Wards (which was then in possession of the estate on behalf of defendant) asking for the award of maintenance to him; but it refused to recognise his right and the Government confirmed the order of the Court of Wards. The defendant in his written statement denied that the *jagir* was common family property, out of which collateral male relations would be entitled to claim maintenance, and contended that even if it were a joint impartible estate; the plaintiff could not claim maintenance as he and the defendant were removed from each other more than three degrees from their common ancestor and the plaintiff was not in such a degree of relationship as would entitle him to claim partition if the estate were not impartible. The defendant also denied what he understood to have been alleged

in the plaint that he was in possession of the other joint family property in addition to the *jagir*. Other contentions were also raised by the defendant which it is unnecessary to refer to for the purposes of this judgment.

The District Judge in his judgment says that "that the *jagir* is an ancestral hereditary estate of the family is admitted. The plaint says that it is joint only in the sense that there has been no division in the family and that the members of the family are entitled to maintenance." He held that the remoteness of the relationship between the plaintiff and the defendant did not deprive him of the right to maintenance and that he was so related to the defendant, that if the estate were partible, he would be entitled to enforce partition. He also held that the Government order which denied the plaintiff's right to maintenance did not affect him. In the result the lower Court decreed maintenance to the plaintiff at the rate of Rs. 55 11-8 a month and arrears to the period claimed at the same rate.

On appeal, Mr. Ganapathi Aiyar, the learned Vakil for the appellant, repeated the contentions urged before the lower Court that the plaintiff's relationship to defendant was not such as would entitle him to claim partition of the estate if it were partible. But he went further and urged a contention, which is apparently opposed to the admission made by his client in the lower Court, that the estate being impartible, it could not be held to be joint property of the family of the parties after the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (1), and that according to that decision, the *jagir* must be held to be the absolute property of each *jagirdar* and not liable to the maintenance of any other member of the family on the footing of its being common family property. He went a step further and urged that apart from the result of the decision in *Sartaj Kuari* v. *Deoraj Kuari* (1), the *jagir* of Arni must be held to be the self-acquired property of the defendant and relied on the judgment of this Court in Appeal Suit No. 25 of 1871, in a suit instituted by the plaintiff's adoptive father against the defendant's grandfather, Tirumal Rao, for maintenance. We are of opinion that the defendant should not be allowed to set up this new plea relating to the character of the estate owned by the defendant. It is, no doubt, true that in Appeal Suit No. 25 of 1871, this Court observed that "it had been conclusively adjudged by the decision in the former suit between the parties that the property is self-acquired by the defendant under a *sanad* and awarded maintenance to Lakshmana Rao on the terms of the *sanad* which bound the *jagirdar* to provide for the maintenance of the members of the family according to usage and the orders of the Government." The former suit referred to in Appeal Suit No. 25 of 1871 was apparently Original Suit No. 76 of 1868. The view that then prevailed was that the holder of an unsettled *palayam* like Arni had no heritable proprietary right in the *palayam* and that each successive holder holds under a fresh title created by the gift of the Sovereign power. The view was set aside by the Judicial Committee of the Privy Council in Marungapuri case in *Collector of Trichinopoly* v. *Lakkamani* (2), which decided that notwithstanding the absence of a permanent settlement, the holder of such *palayam* might be the holder of a heritable estate. The previous decision of this Court in Appeal Suit No. 25 of 1871 proceeded, therefore, on a view of the law which is no longer supportable. The defendant's contention is contrary to his own statement in Exhibit F, the plaint in a suit instituted by him against the Secretary of State for India in Council, in which he stated that the *jagir* of Arni is the ancestral hereditary estate of this plaintiff and has been held by him and his successors in hereditary proprietary right. It is also, as already mentioned, contrary to his explicit admission in the lower Court in this case. We have no doubt that the contention is entirely unsustainable. But whatever its merits may be, we cannot permit the defendant to raise it here on appeal, especially as the question is not one purely of law.

Another contenion, admittedly not raised in the lower Court, is that whatever might be the former tenure of the *jagir*, the defendant is now holding under a fresh *sanad*, dated 14th April 1909, according to the terms of

(1) 10 A. 272; 15 I. A. 51.

(2) 21 W. R. 358; 14 B. L. R. 115; 1 I. A. 282.

which the defendant is bound to give maintenance only when he is required to do so by the established usage of his estate and when in addition the Government directs him to do so. Assuming that there is any substance in this contention based on a consideration of the new *sanad*, we must disallow it apart from the question whether the Government had any power to affect the plaintiff's rights by a *sanad* granted to the defendant.

It is perhaps doubtful whether we should allow the defendant to go back to any extent on the admission made by him in the lower Court that the *jagir* is an ancestral, undivided hereditary estate of the family. It was made with full knowledge of the decision of the Privy Council in *Sartaj Kuari* v. *Deo Raj Kuari* (1). But, as the argument purports to be based on a necessary legal inference from the decision of the Privy Council, we propose to deal with it briefly. In that case, the Judicial Committee held that an alienation made by an impartible *zemindar* in the North-Western Provinces could not be disputed by his son, who would be entitled to succeed to the estate on the death of the alienor and the rule laid down there has been subsequently held by the Privy Council, in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (3), to be applicable to the impartible estates in this Presidency. In *Sartaj Kunji* v. *Deoraj Kuari* (1), their Lordships held that the son, a holder of an impartible estate, has not such a right by birth in the estate as would entitle him to interdict an alienation made by his father. They observed that "The property in the paternal or ancestral estate acquired by birth under the *Mitakshara* Law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it." They were of opinion that "the foundation of the supposed restriction of the power of a father to make an alienation was the community of interest which the members of the family acquired by brith and that a right by birth did not exist where partition could not be enforced." Various decisions were cited before their Lordships in support of the position that all the members of the family have such a joint right in an impartible estate as to entitle them to object to the alienation by the holder for the time being. But their Lordships observed that the expressions in previous judgments of the Privy Council to the effect that the *zemindari* though impartible was "part of the common family property" in *Katama Natchiar* v. *The Raja of Shivaganga* (4); *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (5), or in a sense the joint property of the joint family, [see *Sivagnana* v. *Periasami* (6)], must be understood as having been made with reference to the question of succession and that though an impartible estate may for some purposes be spoken of as joint family property that co-parcenary in it which under the *Mitakshara* Law is created by birth does not exist. It is strongly urged for the appellant that there is in their Lordships' judgment a clear pronouncement of the absence of all co-parcenary in an impartible estate and that, therefore, no right to maintenance could be claimed by a member of the family on the ground that the estate is the joint property of the family. But the language of their Lordships seems to show clearly that they were then speaking of the absence of a co-parcenary which would have entitled the co-parceners to partition and to prevent alienations by the holder. For they do not disapprove of the estates being spoken of as joint for purposes of succession. The subsequent decisions of the Privy Council clearly show that where a question of succession is concerned, an impartible estate may be regarded as joint and governed by the rules of succession applicable to joint property. The appellant's contention is, that, in consequence of the view enunciated in *Sartaj Kuari* v. *Deoraj Kuari* (1), the existence of co-parcenary can only be regarded as a legal fiction for the purpose of determining the heirs of an impartible estate and not as a fact from which any other deduction can be made as a consequence flowing from it. But this argument appears to us to be altogether untenable. In the first place, the heir to an impartible estate has to be determined in the same manner as to partible property, according to the actual nature of the property in question, after finding

(3) 22 M. 383; 26 I. A. 83, 3 C. W. N. 415.

(4) 9 M. I. A. 539; 2 W. R. (P. C.) 31.
(5) 13 M. I. A. 333; 13 W. R. (P. C.) 21.
(6) 5 I. A. 61; 1 M. 312.

out whether the property was separate of the deceased holder and, therefore, descendible to his own heirs, that is, to his issue up to the third generation and then to his widow and daughter and daughter's son and in default of any of these to the agnate and cognate relations of the deceased. It would be immaterial, as laid down in *Katama Natchiar The Rajah of Shivagunga* (4), whether the deceased was a member of an undivided family or not. The succession to the property depends on the nature of the deceased's right to it and not on the status of the family to which he belonged. To find out the heir, therefore, the question has to be definitely answered whether the property belonged to himself either as his self-acquisition or as his ancestral property which devolved on him as single heir or whether it was the joint property of himself and other members of an undivided family. The line of succession in each case is different. In the former case, it goes to the deceased's own heirs, in the latter, it goes, in the absence of any issue, by survivorship to the eldest member in the next senior line of the undivided family to whom the estate jointly belonged, though held in possession only by a single person. For this purpose, again, it has further to be discovered who are members of the joint family to which the estate belongs. If, at any time, the members of the family then existing became completely divided in status with regard to all their property, including the impartible estate, then none of those branches, that became so divided from the branch to which the deceased, belonged would be entitled to succeed so long as there are any members in the branch or branches which subsequently continued to remain undivided with respect to the estate with the branch to which the deceased belonged. When it is necessary to determine whether the property in fact belonged to the deceased alone or not and, if it did not belong to him alone what individuals constituted the undivided family to which it belonged and what individuals cannot be regarded as members of this family, it seems quite unintelligible to speak of determining the heir by means of any fiction. Facts which have been ascertained can no longer constitute a fiction ; nor would the fiction of an undivided family enable the Court to determine the individuals who must be regarded as having constituted the family to which the estate belonged. It would not be enough to find out with what persons the deceased or his ancestors were undivided at the time that the estate was first granted for, though the family may be undivided at the time, the estate might still be separate property of the person to whom it was granted and descend to his own heirs. But, notwithstanding this, when it has once made a descent it would become the undivided property of all his successors. It might as well at any point of time become the separate property of one member and again resume the character of undivided property in the hands of his successors And the rule of succession would vary according to the nature of the right of each holder depending on the changes in the condition of the family. All this seems to make it impossible to hold that all conception of joint property is destroyed with regard to impartible estates by the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (1). The Privy Council has not really encouraged any such notion of the extinction of joint property with respect to them. In *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh* (7), which was decided by their Lordships shortly after *Sartaj Kuari* v. *Deoraj Kuari* (1), their Lordships held that when a *zemindar* left a legitimate son and two illegitimate sons and the legitimate son who succeeded subsequently died, the elder illegitimate son succeeded to the estate, by virtue of survivorship, a rule which would not apply unless the estate was the joint property of all the three sons, both legitimate and illegitimate of the previous holder. Sir Richard Couch, who delivered the judgment both in this case and in *Sartaj Kuari* v. *Deoraj Kuari* (1) does not speak of the joint ownership being a fiction. In *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* (8), decided in 1900, their Lordships speak of the Ayakudi *zemindari* as "a joint estate, though impartible" of the family. In *Udayarpalayam* case [*Kachi Kaliyana Rangappa* v. *Kachi Yuva Rengappa* (9)], where the question related to the succession to the impartible *zemindari*

(7) 17 I. A. 128; 18 C. 151.
(8) 24 M. 377; 28 I. A. 46.
(9) 28 M. 508; 2 A. L. J. 845; 2 C. L. J. 231; 10 C. W. N. 95; 7 Bom. L. R. 907; 15 M. L. J. 312; 1 M. L. T. 12; 32 I. A. 26.

of Udayarpalayam, which was claimed both by the heir to the separate property of the deceased *zemindari* and by persons who would be entitled to succeed by survivorship in case the estate was joint family property, their Lordships observed: "It is settled in accordance with a ruling of this Board that when impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line of a position held by the principal respondent," and approved of the judgment of this Court in *Naraganti Achamma Garu* v. *Venkatachalapathi Nayanivaru* (10), where the estate was held to be joint property. In *Sri Rajalakshmi Devi Garu* v. *Sri Raja Suryanarayana Dhatrazu Bahadar Garu* (11), Lord Davey in delivering the judgment of their Lordships, speaks of the estate held by the holder of an impartible *zemindari* in these terms: "Even if impartible, it may still be part of the common family property and descendible as such in which case the widow's estate of the appellant would be excluded. The real question, therefore, is whether it has ceased to be part of the joint property of the family of the first *zemindar* or (in other words) whether there has been an effectual partition so as to alter the course of descent." In *Ram Nundun Singh* v. *Janki Koer* (12), their Lordships (through Lord Davey again), speaking of the succession to the Bettia estate by a brother of the deceased *zemindar* said:—"But it appears that he was joint in estate with his brother and, therefore, was entitled to succeed him in the family property by survivorship." Having regard to these pronouncements of the Privy Council, it is unnecessary to make citations from the decisions of the High Courts but we may refer to a sentence in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (13). "In determining who the single heir is according to these principles, we have first to ascertain the class of heirs who would be entitled to succeed to the property if it were partible *regard being had to its nature as co-parcenary or separate property* and we have next to select the single heir by applying the special rule indicated above." If then an impartible estate retains the character of joint property for purposes of succession, does it not do so where the question relates to the rights of maintenance possessed by the members of the family to whom it belongs for purposes of succession? There can be no doubt and it is not questioned that until the decision in *Sartaj Kuari* v. *Deoraj Kuari* (1), the right to maintenance on the part of the other members of the family was based on their joint right to the estate and to be a substitute for the right to partition which they would possess if the estate were partible. The Privy Council has affirmed that basis of the right to maintenance subsequent to *Sartaj Kuari* v. *Deoraj Kuari* (1). In *Raja Yarla Gaddi Mallikarjuna Prasada Nayadu* v. *Raja Yarla Gadda Durga Prasada Nayudu* (14), the younger brothers of a *zemindar* had obtained partition of the joint property of the family except the *zemindari* of Devarakota which was held to be impartible. They subsequently sued for maintenance out of the *zamindari*. The Privy Council observed:—"Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit to which reference has already been made. It is true that in that suit a decree was made for the partition of a portion of the family property but it was a very inconsiderable portion and had no relation whatever to the *zemindari* estate. As to the *zemindari* estate, this Board held that it was impartible and the consequence is that the plaintiffs, as younger brothers of the *zemindar*, retain such right and interest in respect of maintenance as belong to the junior members of a Raj or other impartible estate descendible to a single heir." The right to maintenance was rested by them on the same basis in *Naraganti Achamma Garu* v. *Venkatachalapathi Nayanivaru* (10), already referred to. In *Sartaj Kuari* v. *Deoraj Kuari* (1) itself, their Lordships made citations from previous cases which based the right to maintenance on the estate being joint property. See *Periasami* v. *Periasami* (6); *Yanumula* v. *Yanumula* (5); *Baboo Beer*

(10) 4 M. 250.
(11) 20 M. 256; 24 I. A. 118.
(12) 29 C. 828; 7 C. W. N. 57; 4 Bom. L. R. 664; 29 I. A. 178.
(13) 17 M. 316 at p. 325.
(14) 24 M. 147; 5 C. W. N. 74; 27 I. A. 151.

Pertab Sahee v. *Maharajah Rajendar Pertab Sahe* (15). In *Maharana Shri Fatesingji Jesvantsingji* v. *Kuvar Harisangji Fatesangji* (16), the Bombay High Court regarded the right to maintenance as standing in lieu of the right to partition. See also *Himmatsing Becharsing* v. *Ganapatsing* (17); *Ramachandra Sakharam Vagh* v. *Sakharam Gopal Vagh* (18). In *Laliteswar Singh* v. *Bhabeswar Singh* (19), Brett J., observes: "In consequence of the incidents of primogeniture, an impartibility, which by immemorial custom attached to the Raj, they lose their right to enjoy a share of the family property, but as a compensation for that loss they are entitled to receive from the Raja certain portions of the landed property of the Raj as *babuana* grants for the maintenance of themselves and their descendants in the male line." In *Venkatachella Reddiar* v. *Venkatachella Reddiar* (20), Wallis and Sankaran Nair, JJ., held that the right to maintenance, as it was understood to exist before *Satraj Kuari* v. *Deoraj Kuari* (1), was not affected by the judgment in that case. We have, therefore, no hesitation in holding that the plaintiff's right to maintenance must be decided on the footing of the estate being joint property and must depend on the question whether if the estate were partible, the plaintiff would be entitled to maintain a suit for partition. Much reliance has been placed by the learned Vakil for the appellant on certain decisions of this Court with regard to the question whether the successor to an impartible estate takes it as part of the effects of his predecessor. The question there did not relate to the right to succession or to maintenance. The decision in *Satraj Kuari* v. *Deoraj Kuari* (1) has, no doubt, introduced an anomalous state of matters. Where an impartible estate is the joint property of the family, the members other than the holder for the time being have no such estate by birth as to entitle them to interdict an alienation by him. For purposes of alienation, the holder has all the powers of an exclusive owner. Is his successor then liable for all his debts as if he succeeded to his absolute property? On this question, a conflict of view exists among different Judges of this Court and of the other High Courts. See *Veera Soorappa* v. *Errappa Naidu* (21); *Nachiappa Chetitar* v. *Chinnaya Sami Naicker* (22); *Ramasami Naik* v. *Rama-Sami Chetti* (23); *Raja of Kalahasti* v. *Achigadu* (24); *Harpal Singh* v. *Bishan Singh* (25); *Indar Sen Singh* v. *Harpal Singh* (26); *Kali Krishna Sarkar* v. *Raghunath Deb* (27); *Ram Dass Marwari* v. *Tekait Brajo Behari Singh* (28) and *Subba Naidu* v *Nagayya* (29). We think it unnecessary to consider these decisions for the purpose of deciding the question of the right to maintenance with which we are concerned in this case. In the view we have taken, it is unnecessary to consider Mr. Ganapathi Aiyar's contention that if the plaintiff has no right to maintenance on the ground of the *jagir* being joint family property and not the exclusive property of the defendant, he would not be entitled to it otherwise under the texts of the Hindu Law giving special rights of maintenance to various persons and the decisions based on them.

We now proceed to deal with the question whether, on the footing that the plaintiff's right to maintenance is to be regaded as flowing from his membership of the joint family to which the *jagir* must be regarded as belonging, he is disentitled to it on the ground that he is too remote in relationship to the defendant. Mr. Ganapathi Aiyar's contention on this point is that the plaintiff is more than three degrees removed from Tirumal Rao Sahib from whom both he and the defendant are descended and that he is, therefore, not a joint owner of the *jagir*; and reliance is placed on two texts of Kathyayana and Devala respectively, and on Manu, Chapter IX, sections 186 and 187, as well as on the writings of various commentators who have accepted these texts as authoritative. It is admitted that this argument is opposed to the decision of this Court in *Gavuridevamma Garu* v. *Ramandora Garu* (30), as well as to the decision of the Bombay High Court in *Moro Vishvanath* v. *Ganesh Vithal* (31) an

(15) 12 M. I. A. 1; 9 W.R. (P. C.) 15.
(16) 20 B. 181.
(17) 12 B. H. C. R. 94.
(18) 2 B. 346.
(19) 35 C. 823; 8 C. L. J. 124; 12 C. W. N. 958.
(20) 20 M. L. J. 394; 4 Ind. Cas. 302; 7 M. L. T. 31.
(21) 29 M. 484; 1 M. T. 287; 16 M. L. J. 499.
(22) 29 M. 453; 16 M. L. J. 339; 1 M. L. T. 272.
(23) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.
(24) 30 M. 454; 17 M. L. J. 361.
(25) 6 A. L. J. 753; 3 Ind. Cas. 907.
(26) 8 A. L. J. 1251; 34 A. 79; 12 Ind. Cas. 915.
(27) 31 C. 224.
(28) 6 C. W. N. 879.
(29) 12 M. L. J. 89; 25 M. 424.
(30) 6 M. H. C. R. 93. (31) 10 B. H. C. R. 414.

that it is not supported by any decided case. It is argued that the decision of this Court is based on a misapprehension of a text of the *Mitakshara* and that both the decisions are contrary to the rule propounded in the texts of Hindu Law. The decision in *Gavuridevamma Garu* v. *Ramandora Garu* (30) related to the question of succession to an impartible estate, the question being whether the plaintiff in the suit was a co-parcener who would have been entitled to partition if the estate were partible. In the Bombay case, the question was whether the plaintiff was entitled to a decree for partition. It is admitted that the degree of relationship for determining the right to maintenance must be taken to be the same as for determining the right to partition in the case of a partible estate The texts mentioned above are relied on to determine the persons who are entitled to demand partition when the family is undivided. It is desirable to set out these texts. They are as follows:—Manu, Sloka 186, "To three (ancestors) water must be offered: To three the funeral cake is given. The fourth (descendant is) the giver of these (oblations). The fifth has no connection (with them)." Sloka 187: "Always to that (relative within three degrees) who is nearest to the (deceased) *sapinda* the estate shall belong. Afterwards a Sakulya shall be (the heir then) the spiritual teacher or the pupil."

Kathyayana: "When one himself dies unseparated, his son who has not received maintenance from the grandfather shall be made participator of the heritage. He is to get, therefore, the paternal share from the uncle or uncle's son. The very same share shall equitably belong to all the brothers or his son also shall get. Afterwards cessation (of succession) takes place." The commentators explain that "his son" means the great-grandson of the person whose estate is divided because the case of a grandson is considered and it is stated that the great-grandson's son is not entitled to any share. See Viramitrodaya, Chapter II, section 16. The Smriti Chandrika, the Madhinia, the Virada Chintamani, the Vinada Ratnakara and Apararka's commentary on Yajnavalkya have all been relied on as adopting the text of Kathyayana. It may be noted that the Vinada Ratnakara does not quote the portion stating that the property does not descend below the great-grandson. Devala, as cited by the Viramitradaya, runs thus: "Partition of heritage among undivided parceners and second partition among divided parceners dwelling together extends to the fourth in descent. This is the settled law." The Viramitrodaya interprets it thus: "The meaning is that partition of heritage extends to the fourth degree from the proprietor. This rule is alike applicable if co-parceners dwell together in re union by reason of the expression, 'dwelling together.'" The appellant's Vakil would restrict the right to partition to Tirumal Rao's son and grandson and refuse it to his great-grandson, the plaintiff. This does not seem to be in accordance with the interpretation of Kathyayana's text by the commentators, for the plaintiff would be great-grandson of Tirumal Rao who, according to the commentators, would be entitled to a share, the three degrees having to be counted from Tirumal Rao's son. Apart from this, however, the question is whether the texts have any application to the right of partition in a family where the descendants of various branches are living as one family, or whether they do not refer merely to the mode of division of the estate of a certain person amongst those who are entitled to take as his heirs, that is, to cases where the question for determination is who are the heirs entitled to take a person's estate as his heirs and to divide it between them. Could they apply where a share in the estate is not claimed as the heir of a particular individual but as one of the members of a family of co-parceners all living together in joint enjoyment of the estate? The accepted principle of the *Mitakshara* school of law is that in the case of ancestral property a person's son, grandson and great-grandson acquire a right by birth in it. Now suppose there are two co-parceners, *A.* and *B.* jointly owning certain ancestral property. The son or grandson and great-grandson of each of them would acquire a right in the property by birth. *A.*'s son having a right in the property, would not the son's great-grandson also acquire a right by birth in the right that he has and similarly would not *B.*'s son's great-grandson acquire a right in his interest? No doubt, if the property belongs to *A.* or *B.*, then, no doubt, any descendant of either in the third degree will not obtain

a right by birth in it. But after *A.* and *B.* have sons to them, how can this ancestral property be regarded as the property of *A.* and *B.* alone and not of their sons also? The texts cited refer in terms only to division among those who take as the heirs of a certain person of property which is regarded as belonging to him. Partition was ordinarily enforcible in ancient times by sons as against each other only after the father's death, though it was open to the father to make a division amongst his sons or to divide away any one of them at his pleasure. If he died without making a division and his issue all remained joint at his death and the question was who were entitled to divide what was regarded as his estate, the texts mentioned above lay down the rule applicable to such a case. Whether in the case of a person being the sole holder of ancestral property, it was regarded as belonging to him so as to make any restriction in the order of descendant who would be entitled to claim a share when the family remained undivided at his death, it is not necessary to consider. It is unlikely that it would be so regarded now. But, at any rate, where ancestral property belongs to two persons subject to the incident of survivorship as between them, it is very unlikely that it was ever regarded as property of either of them so as to make the texts applicable. The Hindu Law does not contemplate the necessity of division taking place at any time. Suppose five generations descended from several brothers live together, they are all maintained out of the joint family property, the members of the fifth generation being quite as much in enjoyment thereof as those of the higher generations. It may be that some of them take part in the actual management of the property; they may be utilising a part of it for some business carried on on behalf of the whole family. Now, if any one branch of all members up to the fourth generation should happen to die, is it to be said that the members of the fifth generation, who were till then in the joint enjoyment, would cease to be entitled to any right in the property? The principle applicable to such a case is really that applicable to joint owners and seems to have nothing to do with any rule of *sapindaship*. Again, if the texts in question are to be applied, it is by no means easy to determine from whom the generations are to be counted. If, at any point of time, the estate vested in a single person, it may be suggested that the counting should be from him; but what if it is not possible to trace any single individual in whom it was vested within living memory? No assistance can be derived from the texts in such a case. Nor is the matter free from difficulty even where such a person can be got at. Suppose *A.* has two sons, *B.* and *C.*; and each of them has several generations of issue, *B1*, *B2*, *B3*, *B4*, *C1*, *C2*, *C3*, and *C4*. Suppose *B*, *B1*, *B2*, and *C*, *C1*, and *C2*, are all dead, then according to the texts if the descent is to be cast from *A.*, neither *B3* and *B4* nor *C3* and *C4* would have any right to A's estate. The last texts do not provide for any one else being taken as the starting point from which the descent is to be cast, although an attempt was made in the Madras case [*Gavuridevamma* v. *Ramandora Garu* (30)] to introduce another rule, to which we shall presently refer. No text-writer has been cited who has applied the rule to determine the limits of co-parcenary right where several generations of co-parceners have been living together as one family. Chandeswara says that Kathyayana's text is applicable only when partition not having been made, property not enjoyed by one co-heir is solely enjoyed by another residing in the same Province; that is, the rule is one of limitation for the right to enforce partition when the co-parcener claiming it has not been in joint enjoyment, the period of limitation being not a certain number of years, but to be determined with reference to the number of generations that have been out of possession. Subodhini, a commentary on the Mitakshara, seems to admit that the rights to partition may be carried on even beyond the great-grandson. See West and Buhler, p. 652, and Stokes's Digest of Hindu Law Books, p. 365. According to the Vyavahara Mayukha, the text of Devala is applicable only where branches live together. A longer period of limitation seems to have been allowed where the branch claiming partition was not living in the same Province. In such a case, the right to claim partition was allowed for six generations after the original owner. See Colebrooke's Hindu Law, Vol. II, page 512, Sir T. Strange's Manual of Hindu Law, pages 327 and 396, and also T. L. Strange's Manual of Hindu Law, para. 347.

In the Bombay case already referred to, *Moro Vishvanath* v. *Ganesh Vithal* (31), one Nahav was the original acquirer of the property. The plaintiffs who claimed partition were beyond, while the defendants were within, the fourth degree from him. The plea on the merits was that the parties had been in a state of separation for 50 years; but it was also urged by Mr. Mandlik that after three steps of descent from the acquirer of the family property, a claim to partition would cease. This contention was not accepted. West, J., observed: "Where two great-grandsons lived together as a united family, the son of each would, according to the Mitakshara Law, acquire, by birth, a co-ownership with his father in the ancestral estate; yet, if the argument is sound, this co-ownership would pass altogether from the son of *A.* or of *B.*, as either happened to die before the other. If a co-parcener should die, leaving no nearer descendant than a great-great-grandson, then the latter would, no doubt, be excluded at once from inheritance and from partition by any nearer heirs of the deceased, as, for instance, brothers and their sons; but where there has not been such an interval as to cause a break in the course of lineal succession, neither has there been an extinguishment of the right to a partition of the property in which the deceased was a co-sharer in actual possession and enjoyment." The case put by the learned Judge seems to be one where the *acquirer* survives three generations of issue being in conveniently with him; in such a case, no doubt, the fourth generation of issue would not acquire any right in the property which is his own. The learned Judge does not deal with the case where the property is ancestral. The case was actually decided on the ground that the family must be regarded as having been divided. Nanabhai Haridas, J., refers to the texts of Kathyayana and Devala and criticises the interpretation put on the latter by the Mayukha which regards it as applicable to the case of re-united co-parceners only. He concludes: "Upon a consideration of the authorities cited, it seems to me that it would be difficult to uphold the appellant's contention that a partition could not, in any case, (other than that of absence in a foreign country) be demanded by descendants of [a common ancestor, more than four degrees removed, of property originally descended from him." He says, "that persons beyond the fourth degree would also be entitled to demand partition in such a case unless the three generations immediately below the person from whom it descends died before him. If the acquirer dies and the property vests in others, the issue of the latter also would acquire a right by birth." He does not say, however, that, where the property is not owned by a person solely but along with others, the mere fact that a co-parcener, in one line descended from him, is more than three degrees removed from him or from any descendant in that line, would destroy the right to claim a partition along with the co-parceners in another line. The case is no authority for any limitation to the right to partition where several generations of different lines have always lived together. In *Gavuridevamma Garu* v. *Ramandora Garu* (30), the plaintiff who claimed to succeed to an impartible estate was the nearest *sapinda* of the deceased holder. The plaintiff was the sixth descendant from one Bapam Dora who was the acquirer of the *zemindari*. The deceased holder was one degree further removed from him in the line of descent. It was contended that the plaintiff was not entitled to succeed to the estate and that the deceased holder's widow was the proper heir. This contention was negatived. The learned Judges, Scotland, C. J., and Innes, J., held that the family being undivided, the widow had no title. They rejected the contention that only near *sapindas* of the deceased, that is, *sapindas* within three generations, were joint owners of the estate. They say—"The limit of the co-heirs must be held to include undivided collateral relations who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. For, in the undivided co-parcenary interest, which vested in such co-parcener, his near *sapindas* were co-heirs, and when, on his death, the interest vested in his son, or other near *sapinda* in the male line, the near *sapindas* of such descendants or descendant became in like manner co-heirs with them or him, and so on, the co-heirship became e x tended, through the near *sapindas* down to the last descendant." This would practically let in

all the descendants without any limitation of degree. They then go on to say: "Obviously, therefore, as long as the status of non-division continues, the members of the family who have in this way succeeded to a co-parcenary interest are co-heirs with their kindred who possess the other undivided interests of the entire estate, and one of such kindred and his near *sapindas* in the male line cannot be the only co-heirs, until by the death of all the others without descendants in the male line to the 3rd degree, he has, or he and they have, by survivorship acquired the entire right to the heritage as effectually as if the estate had passed upon an actual partition with the co-heirs."

Mr Mayne understands the last passage to import that the continuance of the co-parcenary interest is subject to the condition that "no person who claims to take a share is more than three steps removed from a direct descendant who has taken a share. Whenever a break of more than three degrees occurs between any holder of property and the person who claims to take next after that holder, the line ceases in that direction and the survivorship is confined to those collaterals and descendants who are within the limit of three degrees." The learned author seems to overlook the fact that each descendant as soon as he is born takes a share in what is already vested in his own father and he has not got to claim it as the share of a person more than three degrees removed from himself. When the son, grandson and great-grandson of a co-parcener, *A.*, die leaving a son of the great-grandson, the shares vested in them have already been vested also in the son of the great-grandson and do not return completely to their ancestor, *A.* It appears to be doubtful whether the learned Judges of this Court meant to lay down that the property would go entirely to another branch although descendants in a lower degree than the third might be left in one branch. At any rate, such a view does not seem to be countenanced by the texts relied on. G. C. Sarkar in his Work on Hindu Law, 3rd Edition, page 196, says that "A male line, however low in descent, acquires a right by birth to both ancestral and self-acquired property of a paternal ancestor;" and he proceeds to say that, "if the third intermediate descendants were to die during the life-time of the owner of an ancestral property, the rights of the 4th descendant would not be in the least affected by that circumstance." The rule, he says, would be different if the paternal ancestor is separated from his descendants and not re-united with any of them and there is no son or grandson or great-grandson alive at the time of his death but only great-great-grandson." In *Naraguntu Lutchmeedavamah* v. *Yengama Naidoo* (32), a claim for heirship to an impartible *palayam* by a collateral relation in the 4th degree of descent from the common ancester was upheld against the widow, the deceased owner being a descendant of the 5th degree; but it was observed, in *Gavuridevamma Garu* v. *Ramandora Garu* (30), there was apparently some special circumstance in the case which would make it possible to contend that the question was not directly decided by the Privy Council. In *Ratan Dabee* v. *Modhoosoodun Mohapator* (33), the Calcutta High Court held that an unseparated grandfather's great-grandson's grandson would exclude a widow from inheriting the estate and *Govuridevamna* v. *Ramandora Garu* (30) was relied on in support of the position. It is, of course, unnecessary for the purpose of this case to decide whether a gap of three generations in any one line of co-parceners would prevent the lower descendants of that branch from claiming a share of the co-parcenary property as there was no such gap in this case. According to the principles and texts of the Hindu Law, such a gap would not affect the rights of descendants of the 4th and other generations. We see, at any rate, no ground for countenancing the contention that, even where there is no such gap, the descendants of persons removed more than three degrees from an ancestor are not entitled to take by survivorship on the extinction of the members of another branch descended from him. Such a rule derives no support from the writers on Hindu Law and is inconsistent with the principles of that law and unworkable in practice, besides being admittedly opposed to the authority of decided cases. We, therefore, hold that the plaintiff in this case would not be disentitled to partition if the estate were partible and is, therefore, not disentitled to maintenance.

But, then, it is argued that although this rule might be correct if the plaintiff were the *aurasa* son of his father, the position is different, as he is an adopted son,

(32) 9 M. I. A. 66; 1 W. R. 30 (P. C.)
(33) 2 C. L. R. 328.

because it is urged that in the case of an adopted son, the *sapinda* relationship extends only to three degrees in the adoptive family and that, therefore, the plaintiff is not a *sapinda* of the defendant. In support of this, reliance is placed on the authority of Dattaka Chandrika, section 3, pl. 18 to 24 and of Dattaka Mimamsa, section 6, pl. 32 to 38. It is not necessary to deal with this argument at any length because it is opposed to the authority of the Mitakshara, Chapter I, section 11, pl. 30 and 31, according to which an adopted son, being one of the six superior classes of sons, takes the inheritance of his father's *sapindas* and *samanadaka*. Besides, the question is, in our opinion, really concluded by the decisions of the Courts. The texts were examined at great length by Hobhouse, J., in a Full Bench decision of the Calcutta High Court, in *Gurugovind Shesha* v. *Anand Lal Ghose Mazumdar* (34), and it was pointed out that the provisions of section 3 of Dattaka Chandrika apply to the adopted son *quoad* the performance of funeral rites and these only. Verse I of the section expressly says: "Next, the funeral rights, performed by a son given, are determined." The subject of inheritance is treated in section 5. In that section it is expressly laid down that an adopted son is a heir to the kinsmen of the adoptive father where he is possessed of good qualities. The possession of good qualities is not now insisted on as a condition precedent to the right to the inheritance. Skyamabharan Sircar has elaborately examined all the original authorities on the question in his Vyavastha Chandrika. Manu Bandhayana, Gautama, Kalikapurana and Brihaspati are all cited as authorties in favour of the adopted son's right to inherit to the kinsmen of the adoptive father; the authority of Sir William Macnaghten and of the author of Dvita Nirnaya, as well as the opinion of the Pandits, are referred to in support of the opinion. The *Mitakshara* is also construed as supporting the claim of the adopted son to stand in the same position as an *aurasa* son. Mr. Ganapati Aiyar has contended that Verses 30 and 31 of section 11 of the *Mitakshara* have been mistranslated by Colebrooke and that Verse 31 does not in reality declare the adopted son's right to succeed to the *sapindas* and Samanadakas of the adoptive father but only declares him in conjunction with the five other superior classes of sons to be both an heir and a kinsman of the father. We are altogether unable to accept this contention. Kullukha Bhatta, one of the commentators of Manu, has interpreted the text of Manu expounded by Vijnaneswara in Verses 30 and 31 in the sense in which those verses have been translated by Colebrooke and the author of Vyavastha Chandrika has also understood the Verses in the same sense. See pages 179 and 180. In *Tara Mohun Bhuttachjaree* v. *Kripa Moyee Debia* (35), an adopted son was held to be entitled to succeed to the estate of a collateral who was fifth in degree from the common ancestor. The learned Judges, Loch and Hobhouse, JJ., observed: "With regard to the right of an adopted son to succeed collaterally as well as lineally, we think it sufficient to quote the Privy Council decision in the case of *Shumboo Chunder Chowdhury*, Sutherland's Privy Council judgments, page 25, which ruled that, according to the authorities on Hindu Law and the weight due to them, an adopted son succeeds, not only lineally, but collaterally to the inheritance of his relations." In *Puddo Kumar Debee* v. *Juggaut Kishore Acharjee* (36), the Calcutta High Court again held that the adopted son succeeds to the *sapinda* kinsmen of his father and that as regards the relationship of *sapindas*, there is no difference between the adopted son and the natural son. On appeal the Judicial Committee of the Privy Council took the same view. See *Government of Bengal* v. *Musammat Surruffutoonissa* (37). In *Mokundo Lal Roy* v. *Bykunt Nath Roy* (38), Morris and Prinsep, JJ., held that an adopted son was not precluded from inheriting the estate of one related lineally, although at a distance of more than three generations from the common ancestor. In *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (39), an adopted son, who was 4th in degree from the common ancestor, was held to be entitled to inherit to a collateral agnate and it was also held that the position of an adopted son was identical with that of an *aurasa* son in matters of inheritance. See also the Dattaka

(34) 5 B. L. R., (F. B.) 15; 13 W. R., (F. B.) 49.

(35) 9 W. R. 423.
(36) 5 C. 615.
(37) 8 M. I. A. 225; 3 W. R. (P. C.) 31.
(38) 6 C. 289; 7 C. L. R. 478.
(39) 9 C. L. R. 379.

Mimamsa, section 6, p. 53, Vyavastha Dharpana, page 967. The decided cases have all been collected in G. C. Sircar's work on Adoption, pages 395 to 397. Our conclusion is that the plaintiff's rights stand on the same footing as if he were an *aurasa* son of Lakshmana Rao. In the result, the decree of the lower Court awarding maintenance to plaintiff must be affirmed. We cannot agree with the contention that there is any admission of the plaintiff restricting the right to maintenance to three generations. We dismiss the appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 158 OF 1910.

January 8, 1912.

Present:—Mr. Justice Twomey.

MA HNIN U AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

OSMAN GANI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (a) & (c)—Mortgage by conditional sale—Test—Sale with condition of re-purchase—Revision.

A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right of re-purchase, is not on that account to be construed as if it were a mortgage. The test to apply is whether the relation of debtor and creditor subsists between the parties. If the relation does not exist, then the transaction does not fall within the general definition of a mortgage in section 58 (*a*) of the Transfer of Property Act, and, therefore, cannot be regarded as *a mortgage by conditional sale* within section 58 (*c*).

Bhagwan Sahai v. *Bhagwan Din*, 12 A. 387; 17 I. A. 98, followed.

Where the lower Court has not duly considered the law applicable to the matter and has committed an error which goes to the root of the matter, the Court has acted with material irregularity in the exercise of its jurisdiction and the High Court would be justified in interfering in revision.

Zeya v. *Mi On Kra Zan*, 2 L. B. R. 333, followed.

Application to revise the judgment and decree in Civil Appeal No. 24 of 1910, dated 15th August 1910, reversing that of the Township Court of Nyaunglebin, in Suit No. 460 of 1909.

Mr. *Palit*, for the Appellant.

Mr. *Ginwala*, for the Respondent.

JUDGMENT.—The defendants sold 20 cattle and a cart for Rs. 1,000 to the plaintiffs-petitioners on 15th February 1907. On the same date, the plaintiffs leased out certain land to the defendants and at the same time hired out the 20 cattle. The defendants remained in possession of the cart also. On the same date also, the plaintiffs signed a sparate agreement to re-sell the land, cattle and cart to the defendants for Rs 3,000 if the defendant showed desire to re-purchase their property. In the present suit, the plaintiffs alleged that the defendants had made default in the payment of rent, and that the plaintiff had recovered only some of the cattle. The suit was for the recovery of the remainder of the cattle, 9 in number, and the cart, or their value, Rs. 450.

The plaintiffs obtained a decree in the Township Court. But the District Court on appeal dismissed the plaintiffs' suit on the ground that the sale and the agreement to allow re-purchase formed a single transaction, namely, a mortgage by conditional sale, and that the plaintiffs were not entitled to sue for possession but only for relief from waste of the mortgaged property or for other security.

It is urged in revision that this decision is contrary to law. There can be no doubt, I think, that the matter is governed by the English leading case, *Alderson* v. *White* (1), which was followed by the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (2). It was laid down that a document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right of re-purchase, is not on that account to be construed as if it were a mortgage. The test to apply is whether the relation of a debtor and creditor subsists between the parties. If this relation does not exist, then the transaction does not fall within the general definition of mortgage in section 58 (*a*) of the Transfer of Property Act and, therefore, cannot be regarded as a mortgage by conditional sale within section 58 (*c*). There is nothing in the documents Exhibits A and I, to show that the relations of debtor and creditor were intended to subsist between the parties in the case. The sale was absolute and the parties entered into fresh relations as landlord and tenant by a separate

(1) 2 De G. and J. 97; 4 Jur. (N. S.) 125; 6 W. R. 242; 119 R. R. 38.

(2) 12 A. 387; 17 I. A. 98.

instrument. It must be held that the District Court's decision is erroneous. I also think the case is one in which this Court is justified in interfering in revision according to the principles adopted in *Zeya* v. *Mi On Kra Zan* (3), for the error of the lower Court is one which goes to the root of the case, and it is clear that the District Judge did not duly consider the law applicable to the matter. He gives no reason for his opinion that the two documents constitute a mortgage by conditional sale and was apparently influenced mainly by the fact that the two documents were executed on the same day. The District Court appears to have acted with material irregularity in the exercise of its jurisdiction.

There were other minor issues in the case besides the issue as to sale or mortgage. But the respondents in their appeal to the Divisional Court took no special exception to the findings of the Court of first instance on these minor issues. The appeal to the Divisional Court rested on the plea that the cattle, etc, had been mortgaged and not sold. In this Court, also the arguments of the Counsel have been confined to the legal question. In these circumstances, I see no reason to question the findings of the Township Court on the minor questions of fact. But I note that the defendants, who alleged that four of the cattle had died of cattle disease, produced no evidence in proof of this allegation.

The decree of the District Court is set aside and that of the Township Court is restored. The respondents will pay the costs of the petitioners in all Court.

Decree set aside.

(3) 2 L. B. R. 333.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 389, 467, 468, 474 TO 479 OF 1911.

April 3, 1912.

Present:—Mr. Justice Woodroffe and Mr. Justice Richardson.

Sheikh SAMDANI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KAMALAKANT JHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—*Joint family*—*All members minors*—*Certificate of guardianship whether valid*—*One member of age*—*Whether certificate of guardianship of minor members, valid*—*Bengal Cess Act (IX of 1880), s. 20, Sch. A, Part I*—*Tenant's name not entered in Part I or II*—*Whether rent suit maintainable.*

When all the members of a joint *Mitakshara* family are minors, an order appointing a guardian of the minors, is a good one. But when one of them comes of age, the guardianship ceases *ipso facto* as regards him, and as there cannot be a guardian of minors in a joint *Mitakshara* family in which there are also adults, the guardianship ceases also as regards the other minors, and the member who attains majority is competent to bring rent suits on behalf of himself and the minor members.

A landlord, in a return under Part I of Schedule A of the Bengal Cess Act, put down the names of his *batai jote raiyats*. Subsequently, he brought rent suits against them:

Held, that the return should have been made under Part II or Part III of the Schedule, as the case may be of Schedule A and not under Part I, and the names of the *raiyats* or tenure-holders, as the case may be, should have been mentioned; and there was, therefore, no proper return within the meaning of the Cess Act and section 20 was a bar to the suits.

Appeals from the orders of the District Judge of Mozaffarpur, dated May 22nd, 1911, reversing the decrees of the First Munsif of that place, dated January 30th, 1911, and remanding the suits to the lower Court for decision on the merits.

Babu *Baldeo Narain Singh*, for the Appellants.

Babus *Jotindra Nath Bose* and *Dwarka Nath Mitra*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—These appeals arise out of 15 rent suits; and the judgment now given governs all of them.

I am of opinion that the learned District Judge was right in his dealing with the objection relating to the appointment of a guardian of the minors. It is argued that the lower Appellate Court should have held that the plaintiff No. 1 was not competent to institute a suit on behalf of the minor plaintiffs, that the only person who could institute a suit on their behalf was the guardian appointed by the Court, and, that as the minors were alleged to be necessary plaintiffs in the case, the suit was void and should have been dismissed. I think, however, that although the order appointing a guardian of the minors was originally a good order, when one of these minors came of age then the guardianship ceased *ipso facto* as regards him. As there cannot be a guardian of minors in the case of a joint

Mitakshara family in which there are also adults, the guardianship ceased also as regards the other minors.

Upon the second question, I think that the learned Munsif was right and that his judgment should be restored. It has been argued before us that the appellants were not tenants at all. They are, it is said, cultivating the respondents' own *nigjote* land on the respondents' landlords' behalf, and not for themselves, and that, therefore, the return was strictly accurate and came within Part I to Schedule A of the Bengal Cess Act, the land being land in the actual occupation and cultivation of the person submitting "the return." In short, the contention was that these persons were not *raiyats*, that is to say, persons cultivating land for themselves, but were labourers working on the land for the respondents and receiving in return, as their wages, portion of the produce of their labour. Now, if this were so, then, as the learned Pleader for the appellant has pointed out, the whole of the argument of the lower Courts was thrown away, the case proceeded, in fact, on the assumption that the defendants were tenants and they were sued for rent as such.

This, I think, sufficiently appears in the face of the judgments themselves. That conclusion is corroborated by reference to the evidence of the first plaintiff, who described the defendants as ancestral tenants. The return after referring to *nigjote*, has these words, *batai jote raiyat*, and there is the *khatian*, which was filed by the plaintiff, in which it is said the tenants are described as occupancy tenants. Now, evidence was taken in this case, but having regard to the Munsif's findings upon issues Nos. 1 and 2, he did not come to any other finding upon the evidence in the case.

We, therefore, must not be undrstood to determine on this appeal what the exact nature of the appellants' tenancy was. What we do decide is that they were tenants, and not labourers; that is to say, they were persons who were cultivating the lands for themselves. This being so, the return should, in my opinion, have been made under Part II or Part III, as the case may be, of Schedule A, and not under Part I, and the names of the *raiyats*, or tenure-holders, as the case may be, should have been mentioned. There was, therefore, no proper return within the meaning of the Act, and section 20 is, as the Munsif has found, a bar to the suit.

It has been argued that even if the appellants were tenants, they were such tenants of land, which, according to the respondents' argument, was *nigjote*, or *zerait* land and that such land, whether it is in the actual occupation or cultivation of the landlord, or is let out to tenants, comes under, and should be entered under, Part I. In support of this construction, reliance is put upon the note appended to that Part. But this note must be read subject to what precedes it in the first part and to the provisions of Part II and III, and the preceding words of Part I show that the details of the lands, which are to be entered in that part, are lands in the actual occupation and cultivation of the persons submitting returns. If the land is held either by cultivating *raiyats* or by tenure-holders, paying, in either case, to the person submitting the return, then the return should be in the form of Part II and III to Schedule A.

For these reasons, I am of opinion that the decisions of the learned District Judge on this latter point with which I have dealt is wrong; and I would reverse his judgment and restore the judgment and decree of the Munsif with costs in all the Courts, the hearing fee in this Court being fixed at one gold *mohur* in each of the appeals.

RICHARDSON, J.—I agree.

Appeals allowed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 2 OF 1911.

January 31, 1912.

Present:—Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

MA THEIN MAY *alias* BAKIA BI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MA THAN MYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Succession Certificate Act (VII of 1889), *s.* 4—*Equity of redemption not a security—Letters of Administration not to be granted when proper remedy of petitioner is to file regular suit to recover property.*

MA THEIN MAY *v.* MA THAN MYA.

The respondents applied for Letters of Administration to the estate of a deceased person claiming to administer the estate as his daughters. The appellants denied the legitimacy of the respondents and claimed to be in possession for 30 years as the deceased's nieces. The property was alleged to be under a mortgage to another person:

Held, (1) that the equity of redemption was not a security or debt within the meaning of section 4 of the Succession Certificate Act and the respondents could file a suit for redemption without such a certificate or Letters of Administration;

Ma Pe v. *Ma Thein Yin*, 4 L. B. R. 287; 14 Bur. L. R. 280, distinguished.

(2) that the application for Letters of Administration was an attempt to obtain adjudication as to the status of the respondents and to obtain possession without filing a regular suit and should be rejected;

(3) that the proper remedy of the respondents was to bring a regular suit against the parties in possession of the property.

Appeal against the order of the District Court of Amherst, in Civil Miscellaneous No. 188 of 1910.

Mr. *Halka*, for the Appellants.

Mr. *Dantra*, for the Rspondents.

JUDGMENT.—The respondents applied for Letters of Adminstration to the estate of one Hashim who, they said, had died 20 years previously, alleging that they are his daughters. The only other relatives of his, they mentioned, was Ma Pwa Ohn, their mother. The assets of the estate were set out as being a house and ground which were subject to a mortgage or charge of Rs. 3,000. This property was valued by them at Rs. 1,600, but it was stated that the mortgagee had agreed to accept Rs. 1,500 in full satisfaction of the mortgage, and for this reason the amount of assets likely to come to the petitioners' hands was put down at Rs. 100 only.

A special citation was issued to Ma Pwa Ohn who was stated to be a consenting party to Letters being granted to her daughters, and who subsequently expressed her consent in Court. General citations were also issued and the appellants appeared to oppose the grant. They claimed to be niece and nephew of Hashim. They contested the legitimacy of the petitioners and the relationship of Hashim and Ma Pwa Ohn having been that of husband and wife. They alleged that the house and ground had been given to them and had been in their possession for over 30 years, and that one of them had spent large sums of money in improving the house, and they charged that the object of the applications for Letters was to oust them from the property.

The learned Judge received evidence as to the legitimacy of the petitioner, and deciding in their favour, granted them the Letters asked for.

He thought that the case was distinguishable from that of *Ma Pe* v. *Ma Thin Yin* (1), being apparently under the impression that they could not have recovered the property by redemption without Letters of Administration to Hashim's estate. In this, he was mistaken. If Ma Pwa Ohn was Hashim's wife and the petitioners were his daughters, on his death his equity of redemption over the property devolved upon them as his heirs. The right to recover immoveable property by paying off the amount due on a mortgage of it is not a security as defined in the Succession Certificate Act, and if they had to sue the mortgagee for redemption, he was not a debtor of the deceased man. Consequently, the prohibition in section 4 of the Act would not have applied.

The object of the application was obviously to get their status of daughters of the deceased declared in as cheap a method as possible with a view to further proceedings against the persons in possession if they should not give up the property willingly.

In the present case, even if the petitioners are the legitimate daughters of Hashim, they have admittedly been out of possession of the property, which they sought to obtain a title to, for 20 years. *Prima facie* all claim on their part to the property is barred by limitation : but whether this is so or not, the proper way for them to put forward claims they may have to the property, is by a regular suit against the parties in possession of it.

I would allow this appeal, and set aside the order of the District Court. The respondents should pay the appellants' costs in this Court and in the District Court. Advocate's fee in this Court allowed at 3 gold *mohurs*.

Appeal allowed.

(1) 4 L. B. R. 287; 14 Bur. L. R. 280.

DEOKALI KOER *v.* KEDAR NATH.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 202 OF 1911.
June 19, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice and Mr. Justice N. Chatterjea.

DEOKALI KOER—PLAINTIFF—APPELLANT

versus

Babu KEDAR NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), *s.* 42—*Declaratory decree—What sanctioned by section—Injunction, whether consequential relief—Device to evade payment of Court-fee, not to be encouraged—Court-Fees Act (VII of* 1870*), Sch. II, Art.* 17, *cl. (iii).*

Section 42 of the Specific Relief Act does not sanction every form of declaration; but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property.

An injunction is a consequential relief.

Marsh v. *Keith*, 1 Dr. & Sm. 342; 30 L. J. Ch. 127; 6 Jur. (N. S.) 1182; 3 L. T. 498; 9 W. R. 115; 127 R. R. 133, relied upon.

In a suit, the plaintiff sought for the following reliefs:—(1) that it may be declared that a certain mortgage-deed executed by one of the defendants in favour of another, is collusive and without consideration; that the decree passed on the basis thereof has been fraudulently obtained and it is ineffectual, and that for the satisfaction of that decree the mortgaged property mentioned in the decree cannot be sold; (2) that if the Court finds any obstacle in granting the above relief, then it may be declared that without the deduction of the fair value of 3-annas share of each of certain *mouzas* named and excluding the same, the defendant has no right to lay the whole charge on the remaining property in claim and to bring about the sale of the said property; and (3) that any other relief which the Court may find the plaintiff entitled to, be granted to her:

Held, that the suit is not such as is contemplated by section 42 of the Specific Relief Act, and, therefore, not "a suit to obtain a declaratory decree where no consequential relief is prayed" within the meaning of clause (*iii*) of Article 17 of Schedule II of the Court Fees Act.

The history of decrees merely declaratory traced.

The device to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape, does not merit encouragement or favour.

Appeal from the decree of the Sub-Judge of Shahabad, dated February 21st, 1911.

Babus *Lakhmi Narain Sinha* and *Raghu Nath Singh*, for the Appellants.

Dr. *Sarat Chandra Basak* and Babu *Chandra Sekhar Banerjea*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This appeal raises the question whether the lower Court has rightly held that sufficient Court-fee has not been paid on the plaint. Holding that it has not, the Subordinate Judge dismissed the suit. On the appeal being opened, a preliminary objection has been raised that the memorandum of appeal is insufficiently stamped. The considerations involved in this objection are substantially those which govern the appeal.

The suit has been treated by the plaintiff as one to obtain a declaratory decree where no consequential relief is prayed: and so, she contends, the proper fee both on the plaint and the memorandum of appeal is ten rupees.

The prayers to her plaint are framed in these terms:

"RELIEFS SOUGHT FOR"

"(1) That it may be declared that the registered deed, dated 1st June 1896, for Rs. 14,000, executed by defendant No. 9 in favour of the father and ancestors of defendants Nos. 1 to 8, is collusive, nominal, invalid, fraudulent and without consideration; that the decree passed on the basis thereof, which is pending execution in No. 83 of 1909 in the first Court of Subordinate Judge at Arrah, has been collusively and fraudulently obtained and it is ineffectual, inoperative and invalid, and that for the satisfaction of that decree, the mortgaged property in question mentioned in the said decree cannot be sold.

"(2) That if the Court finds any obstacle in granting the above relief, then it may be adjudicated and declared that without the deduction of the fair value of 3-annas shares of each of the *Mauzahs* Sudhia, Baradhi Sirihira, Ainlasi Khurd, Pakdihar, Pipra Shankarwar, Amarba Sadusa and Bhadandra and excluding the same, the defendants Nos. 1 to 8 have no right to lay the whole charge on the remaning property in claim and to bring about the sale of the said property and that such decree is not fit for execution and it is invalid, ineffectual and inoperative.

"(3) That any other relief, which the Court may find the plaintiff entitled to, be granted to her against the defendants and that the costs of this suit with interest till realisation may be awarded against defendants Nos. 1 to 9."

In the view of the Subordinate Judge, the prayer in the plaint, though it is in form a mere declaration, practically asks for consequential relief, and it is as a result of this view that he arrived at the decision that is now impugned.

It is a common fashion to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful, it cannot be

touched, but the device does not merit encouragement or favour.

The history of decrees merely declaratory is interesting, and a consideration of it may help to a solution of the question involved in this appeal. Such decrees are an innovation, and they first obtained authoritative sanction in England by section 50 of the Chancery Procedure Act, 1852. Before this, it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer (Seton on Decrees).

Seven years later, India followed suit with section 15 of the Civil Procedure Code 1859, where it was enacted that no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief. By Act X of 1877, the Civil Procedure Code of that year, this section was repealed, but its place had been already taken in anticipation by section 42 of Act I of the same year, the Specific Relief Act. That section provides as follows:—"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character a right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief:

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

It is in this section (apart from particular legislative sanction) that the law as to merely declaratory decrees, applicable in the circumstances of this case, is now to be found.

The terms of the section are not a precise reproduction of the provision contained in the Act of 1859 and the English law; in one direction they are more comprehensive, in another more limited. It is common tradition that the section was designed to be a substantial reproduction of the Scotch action of *declaration*; but whether this be so or not, is of no great moment. We have to be guided by its provisions as they are expressed. The section does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property:" it is the disregard of this that accounts for the multiform and at times eccentric declarations which find a place in Indian plaints.

If the Courts were astute—as I think they should be—to see that the plaints presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases, would no longer arise. Nor would plaintiffs be unduly hampered if the provisions of section 42 were enforced, for it would be easy to frame a declaration in such terms as would comply with the provisions of the section where the claim was one within its policy.

Now what are the declarations that are sought in this case? None relate to the plaintiffs' legal character, so only those are permissible which relate to "any right as to any property." Of the declarations in the first prayer of the plaint, none as expressed is a declaration of this character; it may be that the proposition at which the plaintiff aims is in some measure involved in those declarations, but that is not what is sanctioned by section 42.

The second prayer is open to the same comment. The third prayer expressly seeks relief, though it is general in its terms. I fail then to see how this is such a suit as section 42 of the Specific Relief Act contemplates, and if it is not, then it is not a "suit to obtain a declaratory decree where no consequential relief is prayed," as sanctioned by law.

The proceedings of this suit confirm this view, for the plaintiff has successfully sought an *interim* injunction restraining the defendants, and at this moment the defendants are restrained by an injunction from pursuing the rights they assert to be theirs.

That an injunction is consequential relief is, I think, clear; the language of the Specific Relief Act favours that view, and it is one that has the sanction of Indian decisions and also of the Court of Chancery in *Marsh* v. *Keith* (1).

I would only add this, that the limit imposed by section 42 is on decrees which are merely declaratory, and does not expressly

(1) 1 Dr. & Sm. 342; 30 L. J. Ch. 127; 6 Jur. (N. S.) 1182; 3 L. T. 498; 9 W. R. 115; 127 P. R. 133.

extend to decrees in which relief is administered, and declarations are embodied as introductory to that relief. For such declarations, legislative sanction is not required: they rest on long established practice. But for all that, the Court should be circumspect and even chary as to the declarations it makes: it is ordinarily enough that relief should be granted without the declaration.

The result then is that the preliminary objection to this appeal must prevail. But we will give the appellant an opportunity of making up the deficiency of Court-fees, provided she pays the required balance within one month from this date. If that be done, then it will be open to the appellant to ask us to make a similar order in reference to the plaint.

N. CHATTERJEA, J.—I agree.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 261 OF 1910.

February 2, 1912.

Present:—Mr. Justice Twomey.

MA LON MA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAUNG TUN U—PLAINTIFF—RESPONDENT.

Costs—Appeal, second—Discretion—Civil Procedure Code (Act V of 1908), s. 35.

In a second appeal, the Court cannot interfere with an order as to costs unless the order is illegal. The Court connot examine the reasons and review the exercise of the discretion of the lower Court in the matter of costs.

Even if the discretion is exercised wrongly, that is not a sufficient reason for interfering in second appeal.

Second appeal against the judgment and decree of the Divisional Court of Toungoo, reversing that of the Sub-Divisional Court of Pegu, without granting costs to the appellants.

Mr. *McDonnell*, for the Appellants.

Mr. *Palit*, for the Respondent.

JUDGMENT.—The defendants-appellants succeeded in both the lower Courts. In the Court of first instance they were allowed their costs. But the lower Appellate Court directed that each party should pay his own costs and it is only against this part of the decree that the present second appeal has been preferred. The plaintiff, Tun U. sued to redeem for Rs. 300 part of the land which descended to him and his co-heirs from their parents. From the documentary evidence, it appears that the four co-heirs sold their interest in the undivided land outright to their brother, Aung Bon for Rs. 1,000 on 18th August 1902; that Aung Bon on the same date mortgaged the land for Rs. 1,000 to a Chetty, and that on 14th September 1904, Aung Bon sold the land outright to another Chetty, the 4th defendant, for Rs. 1,200 paying off the first Chetty's mortgage. The Sub-Dvisional Court held that Aung Bon was ostensible owner when he sold to the 4th defendant, that the land had never been partitioned and that there was no mortgage transaction between Tun U and Aung Bon in respect of Tun U's undivided share. But the Sub-Divisional Judge's ultimate reason for dismissing Tun U's suit was that the plaintiff has needlessly attempted at filing a suit for redemption of a share only. It is not clear why the Sub-Divisional Judge did not base his decision on the finding that there was no mortgage transaction at all.

The Divisional Court on appeal seems to have regarded the transaction of 18th August 1902 between the co-heirs and Tun U as a mortgage, though it was ostensibly a sale, and he seems to have regarded the ostensible sale of 14th September 1904 to the 4th defendant as also a mortgage. He dismissed the appeal on the same ground that the Sub-Divisional Court dismissed the suit, namely, a suit for piecemeal redemption of an undivided share could not succeed. But he would not allow the respondents their costs because they denied the mortgage set up by the plaintiffs-appellants.

It is not necessary, in my opinion, to go into the question whether there is any foundation for the Divisional Court's finding that a mortgage was proved.

This is a special appeal under section 100 of the Civil Procedure Code. In the matter of costs, the Divisional Court had complete discretion under section 35 of the Code. The Judge recorded his reasons as required by sub-section (2). If this were a first appeal, I might examine the reasons and review the exercise of the discretion of the lower Court in the matter of costs. But in special appeal, this Court cannot interfere unless the order as to costs is illegal. The leading case on the subject is *Girdhari Lal* v. *Sunder Bibi* (1). The case of *Futeek*

(1) B. L. R. Full Bench Rulings, p. 497.

S. N. DAR, B. A. LL. B., SRINAGAR (KASHMIR)

Paroose v. *Mohendro Nath Mojoomdar* (2) may also be referred to. Whatever opinion may be formed as to the soundness of the Divisional Judge's reasons for refusing the present appellants their costs, I think it is clear that the order is not illegal. It was within his discretion to refuse costs and even if he exercised his discretion wrongly, that is not a sufficient reason for interfering in second appeal.

The appeal is dismissed with costs.

Appeal dismissed.

(2) 1 C. 385: 25 W. R. 226.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1243 OF 1909.

June 13, 1912.

Present:—Mr. Justice Brett and Mr. Justice Sharfuddin.

YUSUF GAZI—PLAINTIFF—APPELLANT

versus

ASMATULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 167—Incumbrance, annulment of—"Date of sale," whether means actual date of sale or date of confirmation—"Has notice", whether means has received notice or has knowledge or "information"—Incumbrance annulled from what date.

In section 167 of the Bengal Tenancy Act, the words "date of the sale" mean the actual date of the sale, and not the date of the confirmation of sale.

In the same section, the words "has notice" mean, has knowledge or information "and not has received a notice."

It is provided by the section that the incumbrance shall be annulled from the date on which the notice is served on the incumbrancer. It cannot mean the date on which the application for service of notice is made to the Collector.

Appeal from the decree of the Sub-Judge of Jessore, dated April 22nd, 1909, modifying that of the Munsif of Jessore, dated July 21st, 1908.

Mr. *Z. R. Zahed*. Counsel, and Moulvi *Nuruddin Ahmed*, for the Appellant.

Babus *Narendra Kumar Bose* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.—In support of this appeal, the following points have been raised:—*first*, that, in section 167 of the Bengal Tenancy Act, the words "date of the sale" mean not the actual date of the sale but the "date of the confirmation of the sale". To support this contention, we have been referred to the provisions of section 169 of the same Act and we are also informed that the provisions of the Sale Law go to support this view. It is only necessary to point out that section 169 was amended by the introduction of the words "date of the confirmation of the sale" for "date of the sale" and that, in the section referred to, section 167, the date expressly mentioned is the "date of the sale" and not the "date of the confirmation of the sale". In the Act XI of 1859, section 33, the period within which a suit must be brought is expresaly stated to be "within one year from the date of the sale becoming final and conclusive". No other authority has been laid before us to support the contention that the words "date of the sale" in section 167 must be read as the date of the confirmation of the sale and we see no reason to differ from the finding of the lower Appellate Court on this point.

Next, it has been urged that the Judge of the lower Appellate Court was in error in supposing that the plaintiff had notice of the encumbrance before the month of June in the year in which the notice was served. The learned Subordinate Judge, on reviewing the facts, has come to a finding of fact that it is clear that the plaintiff had information that persons other than the debtor were cultivating the land and, in such circumstances, it was certainly necessary for the plaintiff to ascertain in what capacity those persons were cultivating the land so as to ascertain whether or not there was any encumbrance on the land. The learned Counsel for the appellant seems to suggest that the words "has notice" in section 167 mean "has received a notice". We think there is no justification for that suggestion and that "has notice" means has knowledge or information. In this case, the lower Appellate Court has found that the plaintiff had knowledge or information that there was an emcumbrance on the holding more than a year before the service of the notice and we see no reason to differ from it.

Lastly, it has been suggested that the responsibility for the service of the notice under section 167 of the Tenancy Act rested with the Collector and not with the plaintiff, the purchaser, and that, after he had presented to the Collector his application for service of the notice, from that date the

encumbrance must be considered to have been annulled. This is not in accordance with the provisions of the Act nor is it, in our opinion, an argument which can be maintained. The notice was presented to the Collector for the purpose of service on the encumbrancer; but, at the same time, it was the duty of the person presenting the notice to give the Collector such assistance as was necessary to enable him to serve it on the person for whom it was intended. The law expressly provides that the encumbrance shall be annulled from the date on which the notice is served on the encumbrancer and not from the date on which the application is made to the Collector.

These are the three main points taken in support of the appeal and, in our opinion, they fail. The lower Appellate Court appears to have gone carefully into the case and we see no reason whatever to differ from the conclusion at which that Court has arrived. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION No. 181 OF 1910.
January 26, 1912.
Present:—Mr. Justice Twomey.
MAUNG SAN MYAING—PLAINTIFF—APPLICANT
versus
MAUNG PO HMAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bailment—Specific property—Debtor and creditor—Liability of a goldsmith—Contract Act (IX of 1872), ss. 148, 151—Revision—Material irregularity.

Where some precious stones and lumps of gold of special quality and three sovereigns were given to a goldsmith to convert into jewellery and were lost by theft, not caused by want of proper care:

Held, (1) that as the intention was to convert the identical stones and lumps of gold into jewellery, the ownership did not pass to the goldsmith and the transaction being one of bailment, he was absolved from liability for the loss under sections 148 and 151, Indian Contract Act, but that as regards the three sovereigns, as the identical sovereigns were not intended to be melted and turned into jewellery, the property had passed to the goldsmith and he was indebted to the owner thereof and was liable to make good the loss;

(2) that as the above distinction had escaped the attention of the lower Court, there had been material irregularity in the exercise of jurisdiction.

Petition for revision of the judgment and decree of the District Court of Hanthawaddy, in Civil Appeal No. 94 of 1910, setting aside that of the Township Court of Kungyangon, in Civil Regular Suit No. 150 of 1910.

Mr. *S. N. Sen*, for the Applicant.
Mr. *Doctor*, for the Respondent.

JUDGMENT.—The respondent in this case is a goldsmith and it had been found by the lower Appellate Court that the contents of his safe were robbed. The contents included various articles, gold and precious stones, which had been given to the respondent for the purpose of being made into jewellery and the respondent on being sued by the owners for the return of these articles, has been absolved by the lower Appellate Court on the ground that he had not been negligent, *i.e.*, that he had exercised the ordinary care required by section 151 of the Contract Act. This decision cannot be impugned in the case of the precious stones, or of the lumps of gold of a particular quality, for it was clearly the intention that those identical articles should be turned into jewellery, and then returned to the owners. In the case of these articles, therefore, the contract was one of bailment as defined in section 148 of the Contract Act. The property in the articles remained with the original owners. But where, as in the present case, the articles made over to the respondent were sovereigns, which he was required to make into a watch chain, the contract was, I think, not one of bailment. The respondent was under no obligation to use these particular sovereigns for making the chain. He might have spent them and afterwards melted down other sovereigns for this purpose. It should be held that the property in the sovereigns passed to the respondent, who thereupon became indebted in a like amount to the original owner of the sovereigns. As this distinction escaped the notice of the Divisional Judge, who treated the case of the soverigns on exactly the same footing as the case of the precious stones, it must be held that there had been a material irregularity in the exercise of the jurisdiction of the District Court.

In re KAYA RAMAKRISHNA.

I shall make no order as to the claim for Rs. 10, the amount paid for workmanship, as it appears that, besides the three sovereigns referred to above, two more sovereigns were given by the plaintiff to the respondent and were converted into a charm by another goldsmith and were actually returned to the plaintiff. It is not clear that the workmanship on this charm was worth less than Rs. 10. The decree of the Divisional Court is set aside. There will be a decree in the plaintiffs' favour for Rs. 45 and costs on this amount in all Courts.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1806 OF 1911.

May 2, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re KAYA RAMAKRISHNAMMA AND OTHERS—APPELLANTS.

Landlord and tenant—Permissive occupation—Agreement to execute a lease not carried into effect—Claim for use and occupation—Madras Rent Recovery Act (VIII of 1865)—Compromise in prior suit, effect of.

Where a person gets into possession of another's land on an oral agreement to execute a lease in the latter's favour and continues in such possession without executing the lease, no tenancy is created, and the person who is in such permissible occupation is liable in a suit by the owner for damages for use and occupation.

The fact that a prior suit by the owner for use and occupation was compromised by the plaintiff accepting a certain amount from the defendant should not alter the previous relation of permissive occupation and create a legal tenancy between the parties.

Ali Khan v. *Appadu*, 7 M. 304, distinguished.

Second appeal against the decree of the Temporary Subordinate Judge of Masulipatam, in A. S. 293 of 1909, preferred against that of the District Munsif of Gudivada, in O. S. No. 54 of 1909.

Mr. *T. Prakasam*, for the Appellants.

JUDGMENT.—The plaintiff instituted this suit for compensation for use and occupation of his land by the defendants in *Faslis* 1316 and 1317. Both the Courts have passed a decree in his favour. The facts found are, that the defendants originally entered into possession of the land under an oral agreement to take a lease for *Faslis* 1313 to 1317. A *khat* was to be executed subsequently. But the defendants did not execute any such instrument but continued to be in possession of the land. It is contended that the defendants must be regarded as the plaintiff's tenants, and the suit being for rent for a period prior to the enactment of the Estates Land Act, the plaintiff could not maintain the suit without having tendered a *patta* for each of the years. But the finding is that the defendants did not in fact become the tenants of plaintiff. They came into possession, no doubt, with plaintiff's permission, but what was legally required to make them tenants, namely the execution of a *khat* was not done by them. Reliance is placed on the fact that plaintiff instituted a previous suit for compensation for use and occupation for *Faslis* 1313 to 1315, and that suit was settled between the parties by payment of a certain sum to the plaintiff. The District Judge finds that the compromise did not recognize the defendants as tenants and that the amount was not accepted by the plaintiff as rent. The legal effect of the compromise, therefore, merely was that the defendants being bound to pay compensation for occupying plantiff's land, satisfied their liability by payment of a certain amount. This did not alter the relation which previously existed between the parties, namely, that of permissive occupation by the defendants without the creation of a legal tenancy, that is exactly the kind of case, where an owner of land would be entitled to compensation for use and occupation. Mr. Prakasam relies on a case reported in *Ali Khan* v. *Appadu* (1). There the defendant was admittedly the plaintiff's tentant and a suit instituted for rent had failed. He then instituted another suit claiming compensation for use and occupation. It was held that compensation for land occupied by defendant as a tentant was in reality rent due by him as tenant and no suit could be instituted to enforce his obligation without satisfying the requirements of section 7 of the Rent Recovery Act by tendering a proper *patta*. That case has no application to the circumstances of this case, where, according to the finding, the defendants never became the

(1) 7 M. 304.

tenants of the plaintiffs at law. I reject the second appeal.

Appeal rejected.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL NO. 242 OF 1910.
January 5, 1912.
Present:—Mr. Justice Twomey.
SABEID ALI—DEFENDANT—APPELLANT
versus
M. N. N. SWAMINATHEN CHETTY—
PLAINTIFF—RESPONDENT.

Burma Land and Revenue Act (II of 1876), s. 48—*Burma Municipal Act (III B.C. of* 1898), s. 206—*Fraud—Auction-purchaser's title—Fraud vitiates all judicial acts.*

Certain property was mortgaged to plaintiff but was in the occupation of the mortgagors, who failed to pay the Municipal taxes and allowed it to be sold for arrears of revenue. The auction-purchaser, who had acted in collusion with the mortgagors, was, in the plaintiff's suit for a mortgage-decree, made a co-defendant. Both the lower Courts found that he had colluded with the mortgagors in order to defraud the mortgagee, the plaintiff:

Held, that the auction-purchaser had not acquired a good title free from the plaintiff's incumbrance and section 48 of the Land and Revenue Act was no reply to plaintiff's action. It was open to the plaintiff to show that in conferring a title free from incumbrance, the Revenue Officer was misled by the fraud of the mortgagor and the purchaser acting in collusion.

Nawab Sidhee Nazir Ali Khan v. *Rajah Ojoodhyaram Khan*, 10 M. I. A. 540; 5 W. R. (P. C.) 83, followed.

Appeal against the judgment of the Divisional Court of Tenasserim in Civil Appeal No. 101 of 1910, dated 18th July 1910, upholding that of the Sub-Divisional Judge, in Civil Suit No. 29 of 1909, dated 23rd November 1909.

Mr. *Auzum*, for the Appellant.

Mr. *F. C. Brown*, for the Respondent.

JUDGMENT.—Ma Su and Hamu mortgaged their house and land to the plaintiff Chetty firm for Rs. 400, retaining possession. Subsequently, as the mortgagors failed to pay the Municipal tax on the house, which they were bound to pay on the principle contained in section 65 (*c*) of the Transfer of Property Act, the property was, therefore, sold by the Municipal authorities under section 206 of the Municipal Act, which provides that arrears of taxes may be recovered as if they were arrears of land revenue under section 48 of the Land and Revenue Act. The purchaser at an auction-sale acquires a title free from all incumbrances except such as are expressly reserved. There was no reservation in this case. The purchaser was Sabeid Ali and the price paid by him was Rs. 20. Sabeid Ali's wife is the daughter of Hamu and granddaughter of Ma Su.

The suit was brought by the plaintiff firm on the mortgage. The auction-purchaser, Sabeid Ali, was made co-defendant with Hamu, the surviving mortgagor, and it was alleged in the plaint that the mortgagors had acted fraudulently and colluded with their relative, the purchaser Sabeid Ali, in allowing the property to be sold for arrears of taxes with intent to defeat the plaintiff firm's mortgage.

Both the lower Courts have found in favour of the plaintiffs. The purchaser Sabeid Ali appeals on the grounds—*first*, that fraud and collusion were not proved and, *secondly*, that by the operation of section 48 of the Land and Revenue Act, the appellant obtained a good title free from the plaintiff respondent's incumbrance.

On the first point, the concurrent finding of the lower Courts is one of fact and cannot be disturbed here. Moreover, I think that there can be no doubt as to its correctness. The near relationship of the appellant to the mortgagors and the absurdly low price which he paid, raise a very strong presumption that the sale was collusive.

As regards the second point, it is sufficient to cite the Privy Council case *Nawab Sidhee Nazir Ali Khan* v. *Rajah Ojoodhyaram Khan* (1). In that case, the party who was defrauded by a revenue sale was a mortgagor. It was held that the parties who brought about the sale were precluded by their acts from setting up, as against a third person, the mortgagor, the object of their fraud and a stranger to the collusive agreement between them, the illegality of that agreement itself. Their Lordships decided that the sale under the Revenue Laws being "a devise—part of the machinery as it were—to effect a fraud," the sale should be considered as between the parties a private sale.

Similarly, the appellant Sabeid Ali cannot be allowed to enjoy the benefit of his own fraud. The sale as between him and the prior mortgagees must be treated as a mere

(1) 10 M. I. A. 540; 5 W. R. (P. C.) 83.

private sale by the mortgagors to Sabeid Ali, and notwithstanding the statutory bar contained in section 48 of the Land and Revenue Act, it must be held that Sabeid Ali took the property subject to the mortgage. As was said in the *Duchess of Kingston's case* (2), "fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, Ecclesiastical or Temporal." When property is sold for arrears of revenue under the Land and Revenue Act, it is not permissible to show in a Civil Court that the Revenue Officer was mistaken but it is permissible to show, as in this case, that in conferring a title free from incumbrance he was misled by the fraud of the original owner and the purchaser acting in collusion.

Appeal dismissed with costs.

Appeal dismissed.

(2) 20 How. State Trial 544; 1 Leach C. C. 145; 1 East P. C. 468;2 Sm. L Cas. 713.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1787 OF 1910.

April 24, 1912.

Present:—Mr Justice Sundara Aiyar and Mr. Justice Ayling.

AKKU—APPELLANT

versus

RAMAPPA RAJU AND OTHERS—RESPONDENTS.

Judgment—Court adopting reasons in previous judgment between same parties where evidence was almost the same—Such a judgment, whether in accordance with law.

Where a Court, in its judgment, states that it adopts the reasons given by it in a judgment in a previous suit between the same parties, the evidence being almost the same, this does not amount to using the previous judgment as evidence in the case, and the judgment is one in accordance with law.

Second appeal against the decree of the Temporary Subordniate Judge of South Canara, in A. S. No. 168 of 1909, presented against that of the District Munsif of Puttur in O. S. No. 520 of 1908.

Messrs *K. Narain Rao* and *H. Bala Krishna Rao*, for the Appellant.

Mr. *B. Sitarama Rao*, for the 1st Respondent.

JUDGMENT.—Both Courts have found that the property sued for was not set apart to 2nd defendant's branch for maintenance

The Subordinate Judge's judgment on this point is very short. We understand him to accept the reasons given by the District Munsif. With regard to the Munsif's judgment, two points have been raised, *viz.*, that he has really not written a proper judgment in accordance with the requirements of law, and, *secondly*, he regarded the judgments in the previous Suits Nos. 90 of 1896 and 276 of 1905 as evidence in this case.

With regard to the second point, we are prepared to assume, for the purpose of this decision, that the previous judgments were not legally admissible in evidence. The Munsif says that the evidence adduced in the previous case and that adduced in the present suit are the same, with the exception that certain additional witnesses were examined in this suit. He then refers to the conclusions that he came to in the previous suit, the evidence being the same. He says that he is not able to arrive at a different conclusion from what he had found in the previous suit. The effect of this is, in our opinion, that he adopts the reasons which he himself had given in the previous judgment. These reasons were based on evidence which was adduced in the previous case, which was the same as the evidence in this case. He, therefore, comes to the same conclusion in this case as he did on the evidence in the previous case. This, we think, does not amount to using the conclusions arrived at in the previous case as evidence in this case. If, as we understand the judgment, he adopted the reasons given in the judgment in the former case, those reasons are practically incorporated in his judgment in this suit, and it cannot, therefore, be said that the judgment is not in accordance with the requirements of the law in that it does not fully state the reasons for his conclusion. We, therefore, think that both these objections must fail. We dismiss the second appeal with costs.

Appeal dismissed.

DALIP SINGH *v.* BAHADUR RAM.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 5 OF 1912.

April 10, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

DALIP SINGH AND OTHERS—APPELLANTS

versus

BAHADUR RAM—RESPONDENT.

Mortgage, essentials of—Interpretation of deed—"Muakhiza", *meaning of.*

In order that there may be a simple mortgage, there must be (*a*) a transfer of an interest in specific immoveable property, (*b*) a personal undertaking by the mortgagor to pay the mortgage-money, and (*c*) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold.

The word '*muakhiza*' is not commonly employed to denote a simple mortgage. The root meaning of *muakhiza* is taking and the word is generally used in the sense of taking satisfaction or calling to account.

First appeal from an order of the District Judge of Azamgarh.

Mr. *Muhammad Ishaq*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the respondent for the recovery of Rs. 563 odd by the sale of a share in a village. The suit is based upon a document, dated March 31st, 1891, which, according to the respondent, effected a mortgage of the share, but which, according to the appellants effected only a charge on the share. If there was a mortgage, the suit is maintainable, and the order of the lower Appellate Court remanding the suit for trial on the merits is correct. If there was only a charge, the suit is barred by limitation as was held by the Court of first instance, and this appeal must be allowed.

The deed opens with a recital that the executant has borrowed Rs. 991, then follows a promise by him to pay that amount with interest at the rate of 2 per cent. per mensem within a certain time, and after that there are the following words:—

Muakhiza asl o sud ta yom-ul-wasul upar [description of the share] *haqiat man muqir .....qaim rahega.....lihaza..... ...batarik tamassuk muakhaza.....i-jaidad ka likhdya.*

If it is a mortgage at all, it is a simple mortgage. In order that there may be a simple mortgage, there must be (*a*) a transfer of an interest in specific immoveable property, (*b*) a personal undertaking by the mortgagor to pay the mortgage-money, and (*c*) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold. The second requirement is satisfied. There is no express transfer of an interest in property, and there is no express agreement that in case of default the mortgagee may bring the property to sale. But in a simple mortgage, the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred, the first and third requirements are satisfied. We are asked to infer such an agreement from the use of the word *muakhiza*. It is conceded that this is not a word commonly employed to denote a simple mortgage. The words commonly used are *rihn*, *kifalat*, and *mustughraq*, and their grammatical variations. The root meaning of *muakhiza* is "taking," and the word is generally used in the sense of taking satisfaction or calling to account. Thus *muakhizadar* is a man who is responsible or called to account. There is nothing in the word which necessarily imples taking and selling. For what it may be worth, we note that the word *muakhiza* is used in the authorised translation of section 100 of the Transfer of Property Act for the word *charge* in the original. The words ordinarily used to denote a mortgage were well known in 1891, when the deed in question was executed. The word *muakhiza* does not necessarily imply a power of sale, and there is nothing else in the deed from which an intention to give a power of sale can be inferred. We are unable to hold that the deed conferred upon the creditor a power to bring the property to sale. In our opinion, the deed is not a mortgage. We allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the first Court. The appellants must pay the respondent's costs in all the three Courts.

Appeal decreed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 3428 OF 1911.

December 1, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

BENI MADHAB ROY—DECREE-HOLDER—PETITIONER

versus

BISSESWAR BHARATI—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), ss. 153, 174—Appeal—Rent decree—Sale—Order setting aside or refusing to set aside sale—Question relating to title to land between conflicting parties—Effect of explanation to section 153—Question, whether judgment-debtor complied with section 174—Decision whether appealable—Poundage fee, whether judgment-debtor bound to deposit—Execution proceedings, whether decree may be challenged.

A decree for rent under Rs. 50 in value was made by a Munsif with final jurisdiction under section 153 of the Bengal Tenancy Act. An appeal was preferred against that decree and heard without jurisdiction. The decree was modified. In execution of that decree the holding was sold and purchased by the decree-holder. The judgment-debtor brought into Court a sum for the reversal of the sale under section 174 of the Bengal Tenancy Act. An application to set aside the sale was refused on the ground that the poundage fee had not been deposited. This order was made by a Munsif who had final jurisdiction under section 153. The judgment-debtor appealed to the District Judge who overruled an objection to the competency of the appeal. On the hearing of the appeal, it was held that the judgment-debtor was not bound to deposit the poundage fee as under the High Court Rules, the decree-holder, upon reversal of the sale, would be entitled to a refund of the sum he had deposited on that account. The sale was consequently reversed. The decree-holder moved the High Court against that order.

Held, (1) that an order of this description made under section 174 of the Bengal Tenancy Act is ordinarily appealable.

Sital Rai v. *Nanda Lal*, 1 Ind. Cas. 304; 13 C. W. N. 591; 11 C. L. J. 202, followed.

(2) That an order setting aside or refusing to set aside a sale held in execution of a rent-decree is an order which decides a question relating to title to land as between parties having conflicting claims thereto.

Kali Mondul v. *Ram Sarbeswar Chakrabutty*, 32 C. 957; 9 C. W. N. 721 (F. B.); 1 C. L. J. 476, relied upon.

(3) That the effect of the explanation newly added to section 153 of the Bengal Tenancy Act is not to practically supersede the Full Bench case of *Kali Mondul* v. *Ram Sarbeswar Chakrabutty*, 32 C. 957; 9 C. W. N. 721 (F. B.); 1 C. L. J. 476, although the effect of the explanation is to restrict considerably the effect of the Full Bench decision.

Sheo Parsan Rai v. *Bishun Paryash Narain*, 10 Ind. Cas. 539; 15 C. W. N. 760, referred to.

(4) That where the question is, whether the judgment-debtor has complied with the requirements of section 174 for reversal of the sale, the case is not covered by the explanation and the rule laid down in the Full Bench governs the matter.

(5) That the appeal to the District Judge was competent.

Obiter dictum:—(1) The judgment-debtor was not bound to deposit the poundage fee.

Raghubar Dayal v. *Jadu Nandan Misser*, 13 Ind. Cas. 365; 15 C. L. J. 89; 16 C. W. N. 736, referred to.

(2) It was not open to the judgment-debtor to challenge the validity of the decree in execution proceedings after that decree had been executed without objection and the sale had actually taken place.

Rule to show cause why the order of the District Judge of Darbhanga should not be set aside on the ground that the appeal to that Court from the order of the First Munsif of Darbhanga was incompetent and the order in question was consequently made without jurisdiction.

Babu *Shorashi Charan Mitra*, for the Petitioner.

Babu *Buldeo Narain Singh*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order made by the Court of appeal below on the ground that the appeal to that Court was incompetent, and the order in question was consequently made without jurisdiction.

It appears that the petitioner obtained a decree for rent on the 30th November 1908. The claim was under Rs. 50 in value and the Munsif who tried the suit was invested with final jurisdiction under section 153 of the Bengal Tenancy Act. An appeal was preferred against that decree notwithstanding these circumstances, and was apparently heard without objection. The appeal was allowed in part and the decree of primary Court was varied in favour of the appellant on the 22nd February 1910. In execution of that decree, the holding was sold on the 20th June following and was purchased by the decree-holder. On the 16th July 1910, the judgment-debtor brought into Court a sum adequate in his estimation for the reversal of the sale under section 174 of the Bengal Tenancy Act. Objection was taken to the sufficiency of this sum and was upheld by the Court as the poundage fee had not been deposited. The result was that the application under section 174 was refused and the sale was confirmed on the 15th August 1910. This order was made by a Munsif who was invested with final jurisdic-

tion under section 153 of the Bengal Tenancy Act. The judgment-debtor then preferred an appeal to the District Judge. An objection was taken, on behalf of the decree-holder auction-purchaser respondent, to the competency of the appeal but was overruled. The learned Judge then heard the appeal on the merits and allowed it. He held that the judgment-debtor was not bound to deposit the poundage-fee, as under the rules of this Court, the decree-holder upon reversal of the sale would be entitled to a refund of all the sums he had deposited on that account. The District Judge accordingly reversed the sale. We are invited to set aside this order on the ground that the appeal to the Judge was incompetent.

In answer to the Rule, it has been contended, *first*, that the appeal was competent, *secondly*, that, as laid down in *Kishori Mohun* v. *Saradamani Dasi* (1), this Court ought not to interfere because the order which has been made by the District Judge is right on the merits and should not be disturbed; and *thirdly*, that as the decree under execution was made without jurisdiction, the sale is a nullity and the reversal of such a sale does not operate to the prejudice of the auction-purchaser.

In so far as the question of competency of the appeal is concerned, we are of opinion that the view taken by the District Judge is well founded. It has not been disputed that an order of this desciption made under section 174 of the Bengal Tenancy Act is ordinarily appealable as explained by this Court in *Sital Rai* v. *Nanda Lal* (2), notwithstanding the contrary view taken in *Kishori Mohun Roy* v. *Saradamani* (1), which does not give effect to the decision of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3). But it is argued on behalf of the petitioner that the appeal is barred by the provisions of section 153 of the Bengal Tenancy Act because the Munsif who made the order was invested with final jurisdiction under that section. In answer to this argument, it is pointed out by the learned Vakil for the opposite party that the case falls within the principle recognised by a Full Bench of this Court in *Kali Mondul* v. *Ram Sarbeswar Chakrabutty* (4), where it was ruled that an order setting aside or refusing to set aside a sale held in execution of a rent-decree is an order which decides a question relating to title to land as between parties having conflicting claims thereto. The learned Vakil for the petitioner, however, argues that the effect of the decision of the Full Bench has been competely nullified by the explanation subsequently added to section 153. No doubt, as pointed in the case of *Sheo Parsan Rai* v. *Bishun Pargash Narain* (5), the effect of the explanation is to restrict considerably the effect of the decision of the Full Bench. But we are unable to uphold the contention that the decision of the Full Bench has been practically superseded by the explanation. The explanation provides that a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. In the case before us, no question arises as to the regularity of the proceedings in publishing or conducting the sale. The question raised is, whether the judgment-debtor has complied with the requirements of section 174 for reversal of the sale. We are, therefore, of opinion that the case is not covered by the explanation and that the rule laid down in *Kali Mondul* v. *Ram Sarbeswar Chakrabutty* (4) governs the matter. We are consequently of opinion that the appeal to the Judge was competent.

In this view, it becomes unnecessary to consider whether the order of the Judge is right on the merits. But we may point out that his decision is in accordance with that of this Court in *Raghubar Dayal* v. *Jadu Nandan Missir* (6), and his conclusion cannot thus be successfully assailed by way of either revision or appeal.

In this view it is needless to consider the third ground urged by the learned Vakil for the opposite party; but we may add that we do not feel disposed to accept the soundness of the contention that it was open to the judgment-debtor to challenge

(1) 1 C. W. N. 30.
(2) 13 C. W. N. 591; 11 C. L. J. 202; 1 Ind. Cas. 304.
(3) 19 C. 683; 19 I. A. 166.
(4) 32 C. 957; 9 C. W. N. 721 (F. B.); 1 C. L. J 476.
(5) 15 C. W. N. 769; 10 Ind. Cas. 539.
(6) 15 C. L. J. 89; 13 Ind. Cas. 365; 16 C. W. N. 726.

the validity of the decree in execution proceedings after that decree had been executed without objection and the sale had actually taken place.

The Rule is, therefore, discharged with costs one gold *mohur*.

Rule discharged.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 776 OF 1911.

April 16, 1912.

Present:—Mr. Justice Chamier.

GHISSA LAL—APPELLANT

versus

RAM AUTAR LAL—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 167—Suit for possession against usufructuary mortgagee—Ex-proprietary tenancy—Jurisdiction of Civil or Revenue Court.

As the question whether a person lawfully in possession of land as a mortgagee must give up possession to his mortgagor when the latter becomes entitled to ex-proprietary rights in the land, *i.e.*, becomes ex-proprietary tenant of the land, is not a question reserved exclusively for the Revenue Courts, section 167 of the Agra Tenancy Act does not apply.

Maharaja of Vizianagram v. *Chhango Kurmi*, 7 A. L. 555, 6 Ind. Cas. 834, referred to.

Second appeal from a decree of the Additional Judge of Gorakhpur.

Mr. *A. H. C. Hamilton*, for the Appellant.

Mr. *Jang Bahadur Lal*, for the Respondent.

JUDGMENT.—The appellant was the owner of a 3-pies share in a village and, as such, was in possession of several plots of *sir* or *khudkasht*. Long before the passing of the Agra Tenancy Act, the appellant gave the respondent two usufructuary mortgages of the *sir* and *khudkasht* lands and placed him in possession. After that, the appellant gave the respondent a simple mortgage of the whole share. The respondent sued upon the simple mortgage and obtained a decree in execution of which he purchased the share himself. At the auction, the usufructuary mortgages were proclaimed as encumbrances upon the property. Shortly after the sale, the appellant sued the respondent for possession of the *sir* and *khudkasht* lands under section 79 of the Tenancy Act. The first Court threw the case out as barred by limitation because the respondent had been in undisturbed possession of the plots as mortgagee for many years. On appeal, the Commissioner held that the suit was not barred by limitition and he gave the appellant a decree for possession of the land holding apparently that the appellant as ex-proprietary tenant was entitled to possession as against his mortgagee. In another proceeding, the rent payable by appellant as ex-proprietary tenant was determined. The respondent then brought this suit. It was resisted on the ground that the Civil Court had no jurisdiction to entertain it. The Munsif overruled this defence and decreed the claim. On appeal, the Additional Judge set aside the decree for possession and gave the respondent a money-decree. In this Court appellant contends that the suit should be dismissed altogether, and the respondent who has filed cross-objections contends that the decree of the first Court was right.

The respondent as usufructuary mortgagee is not entitled to a money-decree. The question is whether he is entitled to a decree for possession. The appellant relies upon the decision in the case of *Maharaja of Vizianagram* v. *Chhango Kurmi* (1), but it appears to me that that case has no bearing whatever upon the present case. There a fixed rate tenant had mortgaged his land to the defendant's ancestor. On the death of the tenant, the *zemindar* brought a suit in a Revenue Court against the defendant which is described in the judgment as a suit under section 95 of the Agra Tenancy Act. The Revenue Court decided that the defendant was a fixed-rate tenant and was not liable to be ejected. The *zemindar* then brought a suit in a Civil Court for redemption of the mortgage alleging that the defendant was mortgagee of the land. It was held that it was not open to the Civil Court to hold that the defendant was in possession as a mortgagee. There, it will be observed, the Revenue Court, at the instance of the plaintiff, who at the time admitted that the defendant was his tenant, had inquired into the nature of the defendant's tenancy and had decided that the defendant was a fixed-rate tenant. The question was one reserved exclusively for the Revenue Courts.

(1) 7 A. L. J. 555; 6 Ind. Cas. 834.

RAHMATUL FATIMA *v.* ASHRAF ALI.

Here the question decided by the Revenue Court was, whether a person lawfully in possession of land as mortgagee must give up possession to his mortgagor when the latter becomes entitled to ex-proprietary rights in the land, *i.e.*, becomes ex-proprietary tenant of the land. That is not a question reserved exclusively for the Revenue Courts; therefore, section 167 of the Agra Tenancy Act does not apply. It was contended that *all* questions arising between a landlord and his tenant relating to the land are reserved exclusively for the Revenue Courts. Section 167 does not so provide, nor, so far as I am aware, has such a rule of law been laid down in any case.

In my opinion, the Civil Court has jurisdiction to try this suit.

On the merits, there is no doubt that the respondent is entitled to possession of the land. The mortgage when made was lawful and did not become unlawful by reason of the passing of the Agra Tenancy Act. The appellant cannot be permitted to hold possession as against his own mortgagee.

For the above reasons, I dismiss the appeal with costs. I allow the respondent's objection and restore the decree of the first Court with costs throughout.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 65 OF 1911.

May 22, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

Musammat Bibi RAHMATUL FATIMA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sheikh ASHRAF ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (V of 1908), ss. 4, 31(1)—"Prescribed" meaning of, in s. 4—General Clauses Act (IX of 1897), s. 10.

Where a suit, to which the two years' period of grace provided for by section 31 (1) was applicable, was instituted on the 8th August 1910, the 7th August 1910 being a Sunday, the suit was not barred by limitation.

Although in such a case the limitation would not be saved under section 4 of the Limitation Act, yet it would be so under the provisions of section 10 of the General Clauses Act.

Sheo Dass v. *Narain Asoji*, 13 Bom. L. R. 1153, 12 Ind. Cas. 811; 36 B. 268, not followed.

Hira Singh v. *Amarti*, 9 A. L. J. 439; 14 Ind. Cas 154, followed.

Appeal against an order of the District Judge, Fyzabad, dated 26th August 1911, reversing that of the Sub-Judge, Fyzabad, dated 4th April 1911.

Pandit *Gokaran Nath Misra*, for the Appellant.

Syed *Wazir Hasan*, for the Respondent.

JUDGMENT.—The facts, so far as it is necessary to state them, are set out in the order of the 12th March 1912, by which this case was referred for disposal to a Bench.

The point of law for determination is whether a mortgage suit, to which the provisions of section 31, sub-section (1), of the Limitation Act (IX of 1908) apply and which was instituted on the 8th August 1910, is or is not barred by limitation. The sub-section just mentioned lays down that in certain territories mentioned in the second Schedule to the Act, a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first.

Section 31 came into force on the 7th August 1908 and consequently the last day of the two years' period provided by section 31 (1) expired on the 7th August 1910, which was a Sunday.

The suit, with which we are here concerned, is one to which the two years' rule applied, and was, as already said, filed on Monday, the 8th August 1910.

The first Court dismissed the suit as barred by limitation. The lower Appellate Court reversed this order and held that limitation was saved by the provisions of sections 4 and 12 of the Limitation Act.

For the appellants, the contention is that the suit is barred and reliance has been placed upon two rulings of the Bombay High Court reported as *Dayaram Parashram* v. *Laxman Runja*(1); *Sheo Dass* v. *Narain Asoji* (2) respectively. Since the date of the

(1) 13 Bom. L. R. 284; 10 Ind. Cas. 910.

(2) 13 Bom. L. R. 1153; 12 Ind. Cas. 811; 36 B. 268.

referring order in this case, a decision of the Allahabad High Court in *Hira Singh* v. *Amarti* (3) has been reported which supports the case for the respondents that the suit is not barred.

According to the view of the High Court of Bombay, the special statutory provisions of section 4 of the Limitation Act and of section 10 of the General Clauses Act (X of 1897) do not apply to cases governed by section 31 (1) of the Limitation Act. According to the Allahabad view they do. If the decision of the question now before us turned solely upon the point whether or not section 4 of the Limitation Act applies to cases covered by section 31 (1) of the same Act, we should have no difficulty in accepting the Bombay view as being a correct interpretation of the law, for we are satisfied that the expression "prescribed" which is found in section 4 must be construed as meaning "prescribed by the first Schedule"—the words which are to be found in section 3.

As the provisions of section 3 are declared to be subject to the provisions of section 4 (and other sections), it appears to us that the two sections must be read together and that the term "prescribed" as used in the latter section cannot be construed in any wider sense than that in which it is used in section 3, that is to say, "prescribed by the first schedule". The special rule of limitation laid down for suits covered by section 31 (1) is not prescribed by the Schedule.

There remains, however, the question whether section 10 of the General Clauses Act can be called in aid to save limitation in cases where section 31 (1) of the Limitation Act applies: and after a careful consideration of the various rulings and of the arguments addressed to us, we have come to the conclusion that it can.

Section 10 will clearly apply unless it can be shown that the case before us falls within the purview of the proviso to that section.

In this connection, regard must be had, in the first place, to the language of section 1 of the present Limitation Act and, in the next place, to the wording of section 31, sub-section (1) itself. In section 1 it was declared that section 31 was to come into force at once, that is, with effect from the 7th August 1908 when the Act was passed. Section 1 also came into force on the same date. The rest of the Act did not become law till the 1st of January 1909. Turning now to the language of section 31, sub-section (1), we find that the provisions of that sub-section are to take effect "notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877". So long, therefore, as the Limitation Act of 1877 and section 31, sub-section (1), of the new Act were in force together, that is to say, for the period between the 7th August 1908 and the 1st January 1909, it seems clear that the provisions of section 31, sub-section (1) were not affected by the former Act. Since the repeal of the Act of 1877, that is, since the 1st of January 1909, the provisions of section 31 (1) were not touched by the other provisions of the present Limitation Act up till the time section 31 became spent.

Can it be said, therefore, that the filing of a suit under section 31 (1) of the new Act was an act or proceeding to which the Indian Limitation Act, 1877, applied? Obviously not: for as has just been shown, that Act while it lasted never applied to proceedings under section 31 (1).

How then is it argued that the proviso to section 10 of the General Clauses Act operates to exclude the present case from the application of the section itself? The argument as stated is that because the Act of 1877 has been repealed, the proviso to section 10 of the General Clauses Act must now be read as referring to the new Limitation Act of 1908, and the terms of section 8 of the General Clauses Act are referred to as justifying this method of interpretation.

But section 8 when carefully construed does not appear to lay down any rule for the interpretation of the General Clauses Act itself in cases where there is a repeal and a re-enactment with or without modification. What section 8 appears to say is this, namely, that when a repeal and re-enactment has resulted from the passing of the General Clauses Act (X of 1897) or from the passing of any subsequent Act or Regulation, then references "*in any other enactment*" or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted. It seems obvious that the words "*any other enactment*" must exclude the General Clauses Act itself and any subsequent Act or Regulation which repeals and re-enacts.

(3) 9 A. L. J. 439; 14 Ind. Cas. 154.

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If we were to read the proviso to section 10 of the General Clauses Act as containing a reference to the Limitation Act of 1908, we should be construing a reference to the former Act contained not "*in any other enactment*" but in a section of the General Clauses Act itself.

We are unable, therefore, to yield to the argument that the repeal of the Limitation Act of 1877 necessitates a new interpretation of the proviso to section 10 of the General Clauses Act in the sense contended for by the appellant's learned Counsel.

This view of the matter has not been referred to in the Allahabad ruling above cited. But in any case we should agree with the opinion of Chamier, J. that section 31 of the Limitation Act of 1908, being an entirely new provision, cannot be regarded as a re-enactment with or without modification of any provision contained in the Act of 1877 and this being so, section 8 of the General Clauses Act would not apply.

Had section 31 been enacted not as a portion of the present Limitation Act but as a separate Act, as it well might have been, there could have been no room for the argument that a case to which it applied fell within the proviso to section 10 of the General Clauses Act.

We are of opinion, therefore, that we should follow the Allahabad ruling to the extent of holding that section 10 of the General Clauses Act does apply to cases governed by section 31 (1) of the present Limitation Act and for this reason we hold that the suit filed by the plaintiffs-respondents in this case was instituted within limitation.

We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM THE ORIGINAL CIVIL SIDE.

February 29, 1912.

Present:—Sir Lawrence Jenkins, KT, K. C., Chief Justice, and Mr. Justice Woodroffe.

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Calcutta Municipal Act (III of 1899), s. 38, Sch. IV, rr. 4(4),9, 10 sub-r. (9)—Whether stranger can represent body corporate, joint Hindu family or firm to be entered on the list of voters—Specific Relief Act (I of 1877), s. 42—High Court's power to issue mandamus on public officer.

Rules 9 and 10, sub-rule (9), of Schedule IV of the Calcutta Municipal Act, taken together, merely authorise a person, who is a member of an association, etc., to be entered on the list of voters.

Therefore, a person foreign to the body corporate, joint Hindu family or firm, as the case may be, cannot be authorised by such corporation, etc., to represent them.

Appeal from the order of Mr. Justice Fletcher.

The judgment of Mr. Justice Fletcher dated February 27th, 1912, was as follows:—

FLETCHER, J.—This is a Rule issued under section 45 of the Specific Relief Act calling on the Chairman of the Corportation of Calcutta to show cause why he should not prepare and publish the revised list of voters for Ward No. 22 under Rule 10 of Schedule IV of the Calcutta Municipal Act, 1899, by rejecting the application filed by Priya Nath Mullick, a candidate for election as a Comissioner for the said Ward No. 22 on the 1st day of January 1912, and why he should not pay the costs of this application. Cause has been shown by the Chairman of the Corporation and by Priya Nath Mullick. The point which I have to decide is a short one, but it is not easy to determine. The point has only to do with a Hindu joint family. (Mr. Chakravarti interposes: It is not confined to joint families, but relates also to associations). However that may be, the case has really been argued on the footing of a Hindu joiut family, but the real point is on the construction of rule 9 of Schedule IV of the Calcutta Municipal Act as amended, whether in the case of a company, body corporate, firm, Hindu joint family or other association of individuals whose name has been entered in the list, the "one individual person" duly authorised in this behalf by such company, body corporate, firm, Hindu joint family or association, to apply to have his name entered in the list as the person qualified to vote or to be elected in behalf of such company, body corporate, firm, Hiudu joint family or association, must be a member of the association, or otherwise. It is said that Priya Nath Mullick has obtained a large number of votes under that rule. The sole question is whether the Chairman is authorised to place Priya Nath Mullick on the list of electors under that rule in respect of all these votes. In most of the sections of the Act and the Schedule thereto, the language is difficult to construe. The rule in question runs:

"If the name of a Company, body corporate,

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firm, Hindu joint family or other association of individuals has been entered in the list, any one individual person duly authorised in this behalf by such company, body corporate, firm, Hindu joint family or association may, by written notice sent to the Chairman, on or before the said first day of January, apply that his name be entered in the list as the person qualified to vote or to be elected in behalf of such company, body corporate, firm, Hindu joint family or association."

The other rule that applies is rule 10, sub-rule 9 which runs,—

"If no individual person has applied to the Chairman under rule 9 to have his name entered in the list in behalf of a company, body corporate, firm, Hindu joint family, or other association of individuals, the Chairman may determine what individual person shall be entitled to represent such Company, body corporate, firm, Hindu joint family, or association, and shall enter his name in the list as the person qualified to vote or to be elected in behalf of such company, body corporate, firm, Hindu joint family, or association."

These are the two rules which are material and it really turns on what meaning is to be attached to the word "individual." On the one side the agrument on behalf of the Chairman and Priya Nath Mullick is that "individual" means "single;" on the other side, the argument is that "individual" indicates that the person belongs to the "association, etc."

It has been pointed out by Mr. Mitter that if "individual" means "single", then the word "one" is unnecessary in the drafting and that the words "one," "individual person" and "one individual person" all have the same meaning.

The matter is of considerable difficulty, more especially having regard to the proviso of section 38, but I come to the conclusion that the two rules taken together only authorise a person, a member of the association, etc. to be entered on the list of voters. It seems to me that if you take rule 10, sub rule 9, to mean that the Chairman has statutory power to put in the list any man he may meet in the street in respect of a Hindu joint family who has not claimed but who has not authorised any individual to be placed on the register, such a proposition would require extraordinarily strong words in the statute. The matter is of considerable doubt, but the meaning of "individual" as a person belonging to a class is one of the ordinary natural meanings of the word, and, I think, that when we take the rule which mentions "associations of individual" and in which then follows the expression "any one individual person", the rule although unscientific in drafting must be read as intending by the words "any one individual person" to refer to a member of the association, etc. As regards "company and body corporate", the case may be more difficult. I cannot think, however, that the statute ever intended to authorise the Chairman to place on the list of voters as a person qualified to vote or to be elected an 'individual' who had no connection with the association he was to represent and who had not even heard of the association or family. I think, as I have already said, the matter is one of considerable doubt, but, having heard the matter yesterday and to-day, I have come to the conclusion that unless you can find clear words in the statute which would authorise the Chairman under rule 10 (9) to place any person he thought fit on the register as representing a Hindu joint family, then rule 9 must bear a corresponding meaning, that is, that the "individual" has got to be a member of the family association, etc.

In my opinion, that is the only reasonable construction to be put on the rules, though the language of these rules is, as I have already said, exceedingly obscure.

The other question which has been raised is as regards section 50 of the Act which provides that no person shall give more than eleven votes in any one Ward. That I don't think can be gone into on the present application. This application relates to the electoral roll. As to how many votes a person who gets on the electoral roll is entitled to give at any particular election is not now necessary to decide. Whether that person can vote in different Wards or in the same Ward for more than eleven votes under different qualifications obviously is a matter to be decided by the returning officer, if the question arises. It seems to me, after giving the best consideratian I can to the matter, that the statute did not intend in the case of a Hindu joint family or other association, that one gentleman should get hundreds, or perhaps of thousands, of votes in any one Ward, but it was intended by the statute

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that a member of a Hindu joint family or association might be placed on the electoral roll as representing the association or family, and if that was not done a further provision was given by Schedule V authorising a company or firm to vote by power-of-attorney which might be given in favour of a person who is either a member of the family, or association or not. It seems to me that in this case, the Rule ought to be made absolute, and I make it also absolute, with costs.

From the above judgment, Babu Priya Nath Mullick appealed.

Messrs. *B. Chakravarti* and *C. C. Ghosh*, for the Appellant.

Mr. *B. C. Mitter*, for the Respondent.

Messrs. *N. C. Sen*, and *S. P. Sinha*, for the Chairman, Calcutta Corporation.

JUDGMENT.

JENKINS, C. J.—Mr. Nisith Chunder Sen, a candidate for election as a Commissioner for Ward No. 22 at the coming Calcutta Municipal election, obtained a Rule calling on the Chairman of the Corporation of Calcutta to show cause why he should not prepare and publish the revised list of voters for Ward No. 22 under rule 10 of Schedule IV of the Calcutta Municipal Act by rejecting the application filed by Babu Priya Nath Mullick, a candidate for election as a Commissioner for Ward No. 22 on the 1st January 1912.

It was ordered that a copy of the order be served on Babu Priya Nath Mullick, but no Rule was in express terms issued against him.

The application made by Babu Priya Nath Mullick was that his name be entered in the list as the person qualified to vote on behalf of a large number of companies, firms, and Hindu families.

The Rule was heard by Mr. Justice Fletcher, who made it absolute with costs.

From this order, Babu Priya Nath Mullick alone has appealed. The Chairman of the Corporation has not appealed, nor has his Counsel addressed the Court in support of the appeal or complained of the order made by Mr. Justice Fletcher.

It is objected by the respondent at the outset that Babu Priya Nath Mullick has no right to appeal, as the order was not against him, but against the Chairman of the Corporation.

But it is further urged that whether an appeal lies or not, the order of Mr. Justice Fletcher was correct, and it is on this, that an expression of our opinion has been specially invited.

The proposition for which Mr. Nisith Sen contends is formulated in paragraph 5 (*a*) of his petition in these terms: "That the said Priya Nath Mullick being a person, foreign to the body corporate, joint Hindu family or firm as the case may be, could not be authorised by such corporations, Hindu joint family or firm to represent such corporation, Hindu joint family or firms, inasmuch as such authorisation contravenes the provision of rule 9 of Schedule IV of the Calcutta Municipal Act."

He further urges that if Babu Priya Nath Mullick's application be upheld, he will be considerably prejudiced at the ensuing Municipal election.

Nor can there be any doubt as to this, for if Babu Priya Nath Mullick's contention be upheld, then he will, according to his contention, be armed with no less than 571 votes which he will be entitled to use in favour of his own candidature at the coming election. This, if the true view, is a concentration of voting power in one person which it is impossible to regard with favour, and it is difficult to suppose that the framers of the Act and the rules under the Act could have intended such a result.

But do the rules on their true construction support Babu Priya Nath Mullick's contention? Mr. Justice Fletcher has held, not, and I see no sufficient reason for dissenting from this view.

The governing rule is the 9th of those in Schedule IV to the Act, and I think it may fairly be said that the expression "any one individual person" there found should be read together with, and controlled by the expression "association of individuals" which immediately precedes it.

So read, the field of selection for representation would be limited to those individuals of which the several associations there indicated are composed.

This view of the rule would account for the somewhat unusual expression "any

one individual person," which would have been unnecessary had the words borne the unlimited significance for which Babu Priya Nath Mullick contends.

It, moreover, gains support from other portions of the rules, and at any rate, provides a safeguard against that plurality of votes claimed by Babu Priya Nath Mullick.

In the view I take, it is unnecessary to pronounce any opinion on the competence of the appeal, for in any case it must fail; the costs to be paid by the appellant.

WOODROFFE, J.—The point appears to me to be clear, though doubtless it might have been rendered more so by the insertion of the word "members" as has been done in rule 4 (4) in which case the question before us would not have arisen. The question turns upon the meaning of the words "any one individual person" in rule 9. The words "any person" would have satisfied the construction for which the appellant contends unless, as it is also urged on his behalf, the words "an individual" were necessary to exclude the juristic or artificial persons included in the term "person" by rule 1. Under that rule, the word "person" includes a company, body corporate, firm, Hindu joint family and other association of individuals. I stop here to point out in connection with the words "other association of individuals" that throughout the rules, companies, bodies corporate, etc., are, whether they be correctly defined as such, or not, treated as associations of individuals. And the marginal note of rule 9 under discussion runs "representation of association of individuals." As the word "individual" is used in the rules correlatively with association, it appears to me to be a strong argument against the appellant that the words "one individual" should appear in rule 9 unless it can be shown that they were necessary to exclude the wider meaning assinged to the term 'person' by rule 1. Under that rule, however, "person" only includes a juristic person if there be no repugnancy in the context. The words "one individual" were clearly not necessary to exclude juristic persons. In the first place, if there were nothing else, one company or body corporate cannot vote for another. Further, we find the words "any one individual person" may "apply that his name be entered", wording which is obviously inapt if the person previously spoken of includes bodies corporate. Further, the application is that the name be entered not only as the person qualified to vote but also to be elected, a circumstance which goes to show that the person spoken of is a member of the association to be represented. In my opinion, therefore, the words "one indvidual" were not necessary to exclude juristic person under rule 1 and are, therefore, surplusage unless some other force be given to them. They were, in my opinion, used to show that the person who was competent as a representative was a person who was an individual or member of the association to be represented. It has been said that difficulties might arise on this construction with reference to companies and bodies corporate. It is not necessary to decide that case, but dealing with the argument before us, I do not see that creates a difficulty. For the members of a company would be its shareholders and of a corporate body such persons as are defined as such by the Act or Statute incorporating it. Further, I consider it to be a strong argument against the appellant's contention that the term 'individual' in rule 9 and in rule 10 (9) must be read in the same sense, and, if so, the incongruous results follow which are indicated in Fletcher, J.'s judgment. Lastly, it is of great weight against the appellant's construction that it is contrary to public policy and detrimental to the public interest. It is not in conformity with such interest that persons should give their votes without reason to some stranger before even the nomination of candidates and that such candidate should go to the poll with a large number (in this case nearly 600) of votes in his pocket to be cast by him in favour of his own candidature. I reserve my opinion on the question of the right of appeal as it is not necessary to deal with the point. I agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 36 OF 1910.

April 25, 1912.

Present:—Sir Arnold White, KT., Chief Justice, and Sir Ralph Benson, Judge, and Mr. Justice Wallis.

M. CHENGIAH—APPELLANT

versus

UMADAI RAJAH RAJA DAMARA KUMARA THIMMA NAYANIM BAHADUR AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 111, 112, 116—Lease—Forfeiture condition—Election by landlord to avail himself of forfeiture, whether revocable—Subsequent agreement to revive the tenancy—Lessee again put in possession—Compensation for use and occupation.

Where, under the terms of a lease, a right of forfeiture accrues to the lessor, he is put to his election, and, if he manifests and communicates to the lessee his intention to enforce the forfeiture, that is an election to determine the tenancy, the election is irrevocable and the parties cannot, by a subsequent agreement, revive the old tenancy.

Similarly, if he elects not to enforce the forfeiture and manifests and communicates to the lessee his intention accordingly, that is, elects to waive the forfeiture, his election is irrevocable.

If lessees are re-admitted, after the determination of tenancy by exercise of the right of forfeiture, the old tenancy is not revived and the lessees are liable to pay compensation for use and occupation.

Sheo Karan Singh v. *Maharajah ParhbuNarain Singh*, 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347; 2 Ind. Cas. 211, followed.

Appeal, under section 15 of the Letters Patent, against the decree and judgment of the Hon'ble Mr. Justice Abdur Rahim in Appeal No. 203 of 1905, dated 10th March 1910 (O. S. No. 13 of 1903), on the file of the District Court of North Arcot.

The facts of the case are clear from the following judgments of Munro and Abdur Rahim, JJ., when the case was first heard on appeal:—

MUNRO, J.—The first question with which I propose to deal is whether, as contended by the appellant (2nd defendant) and by the 1st defendant in his memorandum of objections, the leases of 1894 evidenced by Exhibits A and B were determined in 1897. Exhibit XXIX of the 26th September 1897 shows that the 1st defendant, in whose favour Exhibits A and B were executed, had fallen into arrears, and that the Tahsildar proposed to the Dewan that the leases should be cancelled for breach of the condition to pay the rent according to the *kists*. This was followed by Exhibit X, which is dated the 24th October 1897. This is from the Tahsildar to the 1st defendant and informs the latter that, as he had fallen into arrears and was raising unnecessary disputes, a *hukum* had been issued on the 22nd October 1897—this was a *hukum* issued by the Dewan as appears from Exhibit XI—cancelling his *Izara* in accordance with the last term in Exhibits A and B, and directing the villages comprised in the leases to be taken under estate management, and that *takids* have been written to the people of the villages informing them of these matters. The 1st defendant was, therefore, given to understand that he should not thereafter collect money or do anything else in the villages. The 1st defendant then appears to have asked the Dewan to re-consider the matter and the result appears in Exhibit XI, dated the 12th December 1897. This document which is from the *Tahsildar* to the 1st defendant refers to the cancellation of the *Izara* by the *hukum* of the 22nd October, and then goes on to say that as the 1st defendant had agreed to a certain arrangement, the Dewan had issued a fresh *hukum*, on the 10th December 1897 stating that "the *Izara* that had to continue according to the previous *Izarakhat* had again been sanctioned", and that *takids* had been written to the villagers accordingly. The only other document which need be referred to is Exhibit H, a petition sent by the 1st defendant to the Tahsildar, in which the 1st defendant says "the Dewan... ..... restored our *Izara* villages to us whose *Izara* had been cancelled". Coming to the oral evidence, we find the 1st defendant stating that leases were cancelled in *Fasli* 1307, that the cancellation was proclaimed in the villages by beat of tom-tom, and that the villages were under estate management for two months after the cancellation. He is supported by defence witness No. 4 who is Monegar of one of the villages; by defence witness No. 5, a chief *ryot* of the same village; by defence witness No. 6, Monegar of another of the villages who says that he received a *takid* to the effect that the *Izara* was cancelld and that he published by beat of tom-tom that *kist* should not be paid to the *Izaradar*; by defence witness No. 7, chief *ryot* of one of the villages; and by defence witness No. 8,

Kurnam of all the villages. The District Judge has dismissed all this oral evidence with the remark that it is interested. What the witnesses speak to is, however, highly probable, for it is only what would in ordinary course have happened. Exhibit X states that *takids* had been written to the people of the villages regarding the cancellation, and tom-toming is a usual way in this country of making such a matter generally known. Further, the evidence is entirely uncontradicted, and this although the plaintiff's witnesses were examined later. An attempt was also made to show that some rent was collected on behalf of the Rajah during the period between Exhibits X and XI. The evidence regarding this is not very satisfactory. But the collection of rent on behalf of the Rajah during that period is not essential for the purpose of showing that the leases were determined and it has not been suggested that anything was collected by the 1st defendant or by the 2nd defendant's father. On the evidence, I have no hesitation in holding that the leases were determined. Under section 111 (*g*) of Transfer of Property Act, a lease of immoveable property determines by forfeiture if there is a breach of a condition which entitles the lessor to re-enter and if the lessor does some act showing his intention to determine the lease and both these conditions are amply fulfilled in the present case. It is pointed out in the *Zemindar of Vizianagaram* v. *Behara Suryanarayana Patrulu* (1), that "according to the common law of the land which specially prevails in *zemindaris* and similar estates, the delivery of possession, when the owner transfers the estate or a portion thereof, by sale, gift, lease or otherwise, is by the issue of orders or notices to the *kurnams* and other village officers whose duty it is to collect rents from the persons in occupation of the land, and also, though not invariably, by a general proclamation addressed to the *ryots* and other persons in occupation of the land giving intimation of the transfer in question and requiring them to attorn and pay rents to the transferee." The same would apply *mutatis mutandis* to the case of a lessor taking possession after cancellation of a lease like those in suit and there can, therefore, in my opinion, be no doubt as to the intention of the lessor in this case. The District Judge is of opinion that "if there was cancellation and forfeiture, there was also a waiver of forfeiture as evidenced by Exhibit XI and the subsequent enjoyment by the lessees and payment of rent." Section 112 of the Transfer of Property Act deals with the question of waiver of forfeiture. It states that a forfeiture under section 111 (*g*) is waived by any act on the part of the lessor showing an intention to treat the lease as subsisting, provided that the lessor is aware that the forfeiture has been incurred. That is to say, if the lessor is aware that an event has occurred which entitles him to determine the lease, he may show by his acts that he does not intend to take advantage of it. But if he has already taken advantage of it and determined the lease, section 112 can, in my opinion, have no application. The leases under Exhibits A and B having been cancelled, the suit as based on Exhibits A and B must fail. It is contended, however, for the plaintiff, relying on *Sheo Karan Singh* v. *Maharja Parbhu Narain Singh* (2), that he is entitled, at any rate, to recover compensation for use and occupation as the defendants were again let into possession under the circumstances already set out, and that the rent fixed in the leases is a fair basis for the amount to be decreed. To this it is replied that no such relief was asked for in the plaint, and that, therefore, it cannot be granted. *Rachhea Singh* v. *Upendra Chandra Singh* (3) is relied upon. That case follows *Surendra Narain Singh* v. *Bhai Lal Thakur*, (4) and *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker*, (5), and in all these cases the facts were very different from the facts in the present case. It was observed in *Surendra Narain Singh* v. *Bhai Lal Thakur* (4) that the suit, if tried as one for use and occupation, would raise issues of an entirely different character, and would necessitate a new trial of the case upon fresh evidence. The same remark is applicable in the case of *Lukhee Kanto Das Chowdhury* v. *Sumeeruddi Lusker* (5) and *Rachhea Singh* v. *Upendra Chandra Singh* (3). The facts in the present case raise no such obstacle. I would, therefore, follow *Sheo Karan Singh* v. *Maharaja*

(1) 25 M. 587 at p. 592; 12 M. L. J. 249.

(2) 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347; 2 Ind. Cas. 211.

(3) 27 C. 239.

(4) 22 C. 752.

(5) 13 B. L. R. 243; 21 W. R. 208.

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Parbhu Narain Singh (2) and find that the plaintiff is entitled to compensation for use and occupation. The further question arises as to the period for which compensation can be granted. The limitation is three years under Article 115 of Schedule II of the Limitation Act, and this being so, the claim for use and occupation is barred save in respect *faslis* 1310 and 1311 which are the last two *faslis* for which claim is laid. The amount to be paid for use and occupation for *faslis* 1310 and 1311 has now to be determined. Under Exhibits A and B, money rent is fixed in. In addition to this, a road cess is to be paid and a certain quantity of straw delivered. The road cess claimed is calculated at the usual rate on the lease amount, and this, in my opinion, is correct. There are no claims for remission in *faslis* 1310 and 1311. The lease amount *plus* road cess and the value of the straw may, therefore, be taken as the reasonable amount, payable for each *fasli* for use and occupation. I do not think the plaintiff should be allowed interest prior to suit. The total demand shown in the schedule of account annexed to the plaint for *faslis* 1310 and 1311 may, therefore, be accepted as the amount for which the defendants are liable for those *faslis*. That schedule, however, shows that collections were made from the defendants for those *faslis*, and the defendants are, therefore, now liable for only the balances shown. These amount to Rs. 665-2-3, and for this amount, I would give the plaintiff a decree with interest at 6 per cent, per anuum from date of suit till payment. For the decree amount the defendants are jointly and severally liable as it is abundantly proved that each of them was interested in the occupation of every portion of the suit property. There will be proportionate costs throughout.

ABDUR RAHIM, J.—The suit in which this appeal arises was instituted on the 29th June 1903 by the *zemindar* of Kalahasti for recovery of Rs 8,057-8 2 as rent due under two *Izara* leases with respect to three villages, Adaram, Brahmanapalli and Kandalur, for *faslis* 1305 to 1311. The lease of Adaram and Brahmanapalli was granted on the 15th February 1894 and of the village of Kandalur on the 9th March 1894, both for a term of 9 years to the 1st defendant under registered *cowle* deeds; the 1st defendant executed corresponding *muchilikas* in the *zemindar's* favour. The 2nd defendant was impleaded on the 7th October 1903 as respresentative of his father who, in February 1898, by an arrangement entered into between him and the 1st defendant and sanctioned by the plaintiff, was let into possession of the three villages. The suit was contested by the defendants on various grounds but the District Judge, having regard to his findings on the different issues raised at the trial, has given a decree to the plaintiff for a sum of Rs. 5,305-12-3 to be recovered from the 1st defendant and for Rs. 4,242-15-11 out of the above sum to be recovered from the 2nd defendant thus holding both the defendants to be jointly and severally liable in respect of the latter sum. The decree also provides for the usual interest to be paid on the amount decreed and directs each party to pay costs to the other in proportion to the claim allowed or disallowed.

This appeal has been preferred by the 2nd defendant, and the 1st defendant has also filed a memorandum of objections. Some of the objections taken to the judgment of the District Judge are common to both the defendants.

One of the questions discussed before us is the effect of the arrangement by which the 2nd defendant's father entered into possession of the three villages. The fact that he had such possession since the 7th February 1895 has not been contested before us by the learned Vakil for the appellant. What is contended for is that there has been surrender of a moiety of the 1st defendant's interest in the leases by operation of law by reason of what happened between the parties, and, thus the leases were determined so far at least as one moiety of the villages is concerned. What then was the nature of the transaction by which the 2nd defendant was let into possession? The most reliable evidence on this point is furnished by Exhibits C, I and XXXV and the conduct of the parties. These documents show that the 2nd defendant's father had arranged with the 1st defendant that the former should have a half share in the *Izara* leases and this arrangement was submitted to the *zemindar* for sanction which apparently became necessary as the leases contained a clause prohibiting assignment. The arrangement was approved by the *zemindar* apparently because the 1st defendant as stated in Exhibit C

was unable to bear the whole burden of the rent and *takids* were accordingly issued to the *zemindary* officials, informing them that the 2nd defendant's father had been recognised as having a half share in the *Izara* leases granted to the 1st defendant. But there is nothing to show that it was ever intended to divide the tenancy into two halves and I do not attach any weight to the evidence of the 1st defendant where he seeks to make out such a case. Neither the leases nor possession of the villages was delivered by the 1st defendant to the landlord, and no new lease was taken. The 1st defendant himself and not the *zemindar* let the 2nd defendant's father into possession and the *zemindar* never granted any lease to the 2nd defendant. The *zemindar* was no party to any change of possession with respect to the demised premises and he throughout treated the 1st defendant as liable for the entire rent and the 1st defendant himself never disputed such liability. Demands for rent were issued to the 1st defendant alone and not to the 2nd defendant. It is true that some instalments of rent were remitted to the *zemindar's* office by the 2nd defendant but such payment, it is contended by the respondent, is attributable to the arrangement by which the 2nd defendant became an assignee of the lease-hold interest and is in no way incompatible with the liability of the 1st defendant under the demise. On these facts, therefore, the proposition which must be established in order to make out a case of implied surrender or surrender by act and operation of law, in the language of English cases, is that, if a landlord accepts any payment of rent from a person who acquired an interest in the lease under an agreement with the tenant who let him into possession with the assent of the landlord, this by itself operates as surrender of the lease. I do not think that the cases cited by Mr. S. Srinivasa Iyengar bear out any such proposition. The doctrine of surrender by act and operation of law, as established by *Thomas* v. *Cook* (6) and recognised in other cases, is as stated in *Davison* v. *Gent* (7), that where a lessee assents to a lease being granted to another and gives up his own possession to the new lessee, that is a surrender of his term by act and operation of law. In *Hamerton* v. *Stead* (8), the landlord, defendant in the action which was one for trespass, had demised the premises in question to the plaintiff as tenant from year to year and thereafter agreed to let the same premises to the plaintiff and one Moore jointly and the latter entered and occupied jointly with the plaintiff under the agreement; held that the suit could not be maintained as that was a new contract determining the sole tenancy of the plaintiff and creating a new joint tenancy by the plaintiff and Moore. In *Laurence* v. *Faux* (9), Laurence, having entered into agreement with the defendant Robert Faux, to let certain premises to him afterwards agreed, and with the consent of Robert Faux, to let a portion of the same premises to Edward Faux and accepted rent from the latter. Blackburn, J., held that in these circumstances the receipts for rents received from Edward Faux were strong evidence of a change of tenancy with the consent of the landlord amounting to a surrender by operation of law. The law on this subject was again recently considered by Chitty, J., in *Wallis* v. *Hands* (10). There a new lease in possession was granted to a third person with the oral assent merely of a person in possession under a prior subsisting lease, but the old tenant did not give up possession to the new tenant at the time of the grant of the new lease: it was held that there was no surrender by operation of law so as to take the case out of the Statute of Frauds. It will be seen then that in all the cases relied on by the learned Vakil for the appellant, there was either a lease granted by the landlord to the new tenant or a valid agreement to grant such lease, so that there was an acceptance on the part of landlord of a change in the tenancy. But in the present case it was not within the contemplation of the parties that the 2nd defendant should become a tenant of the plaintiff in place of the 1st defendant. Further, so far as the 2nd defendant is concerned, it is difficult to ap-

(6) 2 B. & Ald. 119; 20 R. R. 374; 2 Stark. 408.

(7) (1857) 26 L. J. Ex. 122; 1 H. & N. 744; 3 Jur. (N. S.) 342; 5 W. R. 229; 28 L. T. (O. S.) 291; 108 R. R. 804.

(8) (1824) 3 B. & C. 478; 5 D. & R. 206; 3 L. J. (O. S.) K. B. 33; 27 R. R. 407.

(9) (1861) 2 F. & F. 435.

(10) (1893) 2 Ch. 75; 62 L. J. Ch. 586; 3 R. 351; 68 L. T. 428; 41 W. R. 471.

preciate his position with reference to the question of implied surrender. If there was an implied surrender at all, it must be by the substitution of a new tenancy for the old. But the 2nd defendant's case is that no relation of tenant and landlord has been created between him and the plaintiff. It may also be pointed out that neither the issues nor the memorandum of appeal or objections raised any question of implied surrender and apparently no such plea was urged before the District Judge. In my opinion, however, upon the facts which have been proved, there was no surrender, either express or implied. Even if there was no surrender, the defendants undoubtedly remained in possession afterwards and section 116 would, in my opinion, be a sufficient answer to an attempt on their part to escape liability for rent under the covenants in the leases. In the circumstances of this case, I attach no importance to the beating of tom-tom in the village and I do not think that by what happened on the occasion there was an eviction of the defendants. In this view of the transaction, it is not necessary to consider the question raised by the respondent whether there can be surrender, by operation of law, of an undivided share of a lease-hold term.

The next point for consideration is whether the 2nd defendant is liable as assignee of a moiety of the 1st defendant's lease-hold interest in the absence of a registered deed of assignment. Section 9 of the Transfer of Property Act clearly lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by the law. The onus is, therefore, upon the appellant to make out in the first place that the transaction by which the 2nd defendant acquired an interest in the leases is required by the law to be in writing. The view which I am inclined to take of the arrangement between the two defendants, is, as disclosed in the evidence, that they intended to enter into contract of partnership with respect to the *Izara* leases, each party taking half of the profits and sharing half of the burden. We find that the 1st defendant and the 2nd defendant's father are actually spoken of as partners; for instance, in Exhibit D, which is a power-of-attorney executed by the 2nd defendant's father, it is recited "as regards the rental of three villages, Brahmanapalli, Adaram and Kandalur, *jointly had with our partner* Chintalapalli Venkata Narasiah (*i. e.*, the 1st defendant), etc." Such a contract is not one of those transactions which must be embodied in a registered instrument and as the 2nd defendant entered into possession and enjoyment of the villages as partner of the 1st defendant, he would certainly be liable for rent to the plaintiff.

Then it is contended that Exhibits C and I not being registered should not have been accepted in evidence. But the agreement between the 1st and the 2nd defendants was independent of these documents. They only recite the arrangement which had already been arrived at.

It is also argued on behalf of the appellant that the endorsement on Exhibit C and Exhibit I, by which the landlord waived his objection to the assignment, is required, by section 17 of the Registration Act, to be registered. But I fail to see how such an endorsement can be said to create, declare, assign, limit or extinguish any interest in, or right to, immoveable property. The prohibition against transfer of the *Izara* was intended for the benefit of the lessor and all that the latter purported to do was to give his assent to the transfer when made by the 1st defendant.

Such an act can hardly be said to be creation of an interest in immoveable property within the meaning of the action. The cases which lay down that a transaction purporting to be a sale of immoveable property and evidenced by a registered deed as required by the law cannot be proved to have been intended to operate only as a mortgage by adducing evidence contained in unregistered writings: [See *Achutaramaraju* v. *Subbaraju* (11) and *Mutha Venkatachalapati* v. *Pyanda Venkatachalapati* (12)], or that an unregistered document cannot be admitted in evidence to affect mortgaged property by fettering the equity of redemption, have no bearing, in my opinion, on the present question.

The next question is whether there was a determination of the leases by forfeiture in October 1897. What happened then was: the rent fell into arrears and according to the power reserved in the leases, the lessor sent a notice to the 1st defendant (Exhibit X) stating that he cancelled the *Izara* and that the villages would henceforth be managed under

(11) 25 M. 7; 11 M. L. J. 370.
(12) 27 M. 348.

Amani. And it also appears from the evidence that this fact was proclamied in the villages by beat of tom-tom and *takids* were issued to the *zemindari* officials informing them of the cancellation of the leases.

An attempt was further made to prove that a sum of Rs. 30 was collected from the *ryots* by the *zemindar* himself after the issue of Exhibit X, but I do not think that this has been satisfactorily proved. The man who actually collected the amount has not been examined and it has not been shown that the sum was remitted to the *zemindar's* office. On the other hand, although the *zemindar* determined to put an end to the lease, the 1st defendant never acquiesced in the act of the *zemindar* but prayed for 'continuance of the *Izara* according to *mamool*.' And the *zemindar* acceded to this prayer and issued a fresh order on the 12th December 1897 to the effect that 'the *Izara* would continue'. The lessees continued in possession of the villages and as the District Judge holds there is no reliable evidence to show that between the 24th October and the 12th December, an interval of a month and a half, the defendants' connection with the villages ceased for any practical purpose or that the plaintiff assumed direct management of them. Upon these facts I have no hesitation in accepting his conclusion that the lease was never determined. There was no cessation of the relation of landlord and tenant between the parties though there might have been a temporary suspension of such relations. The leases were never delivered to the landlord and there was no actual change of possession. I am further unable to accede to the view that the landlord having once declared his intention to exercise the right of forfeiture and communicated that intention to the lessee and to his own servants and the *ryots*, he could not, if he so chose, waive the forfeiture, in response to the protests or representations of the lessee. I do not find anything in sections 111 and 112 of the Transfer of Property Act which oblige me to adopt such a narrow construction of the law. It is, no doubt, not a necessary condition of the validity of an act of forfeiture that it should have the consent of the tenant, but, at the same time, since forfeiture necessarily alters the position of the tenant, the question whether the tenant has or has not acquiesced in it must affect the landlord's right to waive forfeiture. If the landlord has elected to take advantage of the condition relating to forfeiture and communicated his intention to the tenant and the tenant acquiesces in it, it stands to reason that the landlord cannot afterwards treat the tenancy as still subsisting. To this effect is the decision in the case of *Serjeant* v. *Nash Field & Co.* (13), and in other similar cases cited by the appellant's Pleader. But, on the other hand, if the tenant never acquiesced in the landlord's act, and the landlord afterwards changes his mind at the request of the tenant himself, I do not see why he should not be able to waive the forfeiture so long as the question is one exclusively between him and the tenant. I would hold, therefore, that there was no determination of the leases by forfeiture.

I now come to the question of limitation. It is argued that the proper Article applicable to this suit is Article 110, which provides 3 years for a suit for arrears of rent, and not Article 116, which allows 6 years for a suit for compensation for the breach of a contract in writing registered. Article 110, it is argued, is specifically applicable to a suit like this, and therefore, recourse cannot be had to a general Article like Article 116. A recent decision of the Allahabad High Court of *Ram Narain* v. *Kamta Singh* (14), no doubt, supports this view. But this Court has held a different view in *Vythilinga Pillai* v. *Thetchanamurti Pillai* (15), and this is the view also of the Calcutta High Court [see *Umesh Chunder Mundul* v. *Adarmoni Dasi* (16)], and I am not persuaded that it is wrong. Article 110 is applicable to suits for rent generally but Article 116 specially provides for a suit which is based on a contract in writing registered including a lease.

On behalf of the 2nd defendant, it is further contended that, he being liable by reason of privity of estate and their being no privity of contract between him and the plaintiff, Article 116 has no application at least in his case. No doubt the liability of an assignee of a term for rent arises out of

(13) (1903) 2 K. B. 304; 72 L. J. K. B. 630; 89 L. 112; 19 T. L. R. 510.
(14) 26 A. 138; A. W. N. (1903) 210.
(15) 3 M. 76.
(16) 15 C. 221.

privity of estate existing between him and the lessee, so that his liability ceases on the termination of such privity, as by relinquishment of possession or transfer. But the assignee's liability is based all the same on the covenant for rent which in law runs with the land. There is, therefore, no ground for saying that the period of limitation would be different, so far as the claim against the 2nd defendant is concerned.

It has been also argued that each of the defendants would be liable for half the rent and not jointly and severally liable for the entire rent. But if the 2nd defendant entered into possession under a contract of partnership, whatever the nature of the arrangement between him and his partner as regards the share of each in the profits and losses, it cannot bind the landlord and would not affect his (the latter's) rights upon the covenants.

As regards the contention in connection with the liabity for road cess and the claim for straw, I agree with what the learned District Judge says on those points, and as to claim for remission for *shavi*, though I think, as contended for by the appellant, each year must be considered on its merits, I am unable to find on the evidence that the claim has been substantiated. The evidence shows that in every year, with respect to which remission is claimed, there was at least one good crop and there was sufficient supply of water in the tanks for 2 or 3 months.

In the result, I would confirm the judgment of the District Judge and dismiss both the appeal and the 1st defendant's memorandum of objections with costs.

MUNRO, J.—As my learned brother would confirm the decree of the Court below, this appeal is dismissed with costs of the 1st respondent. The memorandum of objections is dismissed with costs of the 1st respondent.

Messrs. *S. Sreenivasa Aiyangar* and *T. Narasimhachariar*, for the Appellant.

Mr. *V. C. Seshachariar* and the Hon'ble Mr. *L. A. Govindaragava Iyer*, for the Respondent.

JUDGMENT.

WHITE, C. J.—I cannot accept the view of the District Judge that what was done by the lessor's agents was done with the intention of bringing pressure to bear upon the lessees and should be treated as an intimation by the lessor to the lessees that he intended to determine the tenancy.

I agree with Munro, J., and I am of opinion that the lessor, in this case, by an unequivocal act intimated that he had elected to avail himself of the forfeiture. This intimation of the lessor's election, having been communicated to the lessees, was irrevocable, and the parties could not, by a subsequent agreement, revive the old tenancy. See *Jones* v. *Carter* (17), *Evans* v. *Wyatt* (18) and Smith's Leading Cases, notes to Dumpori's case, Volume I, page 32.

I also agree with Munro, J., that 2nd defendant is liable to the plaintiff for use and occupation.

It may be that, during the subsistence of the lease, the plaintiff, notwithstanding that the 2nd defendant was in occupation with the plaintiff's permission, could only look to the 1st defendant, the lessee, for rent and could make no claim for use and occupation as against the 2nd defendant.

But, as has been pointed out, the lease was determined. The occupation by the 2nd defendant for which the plaintiff now claims compensation for use and occupation was after the determination of the lease. There appears to be evidence that, after the determination of the lease, the 2nd defendant was in occupation with the express permission of the lessor. But, even if this were not so, it is not disputed that the 2nd defendant was in possession before the determination of the lease with the permission of the lessor, and the evidence is that, after the determination of the lease, all parties were desirous that the *status quo ante* should be restored. From this, I am prepared to infer as a fact that, after the determination of the lease, the 2nd defendant was in possession with the plaintiff's permission. As regards the amount of compensation the fact that all parties appear to have been desirous that, after the determination of the tenancy, the tenancy should be treated as subsisting, goes to show that the rent reserved under the lease may be taken as a fair criterion of the amount payable by way of compensation for use and occupation.

Mr. S. Srinivasa Iyengar has contended that it is not open to us in this suit to award compensation for use and occupation against his client I agree with the decision of the

(17) 15 M. & W. 718.
(18) 43 L. T. 176; 44 J. P. 767.

Allahabad High Court in *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (2) and am prepared to follow it.

I set aside the decree of this Court and the District Court and I give decree in the terms of the judgment of Munro, J. The plaintiff must pay to the appellant (defendant) the costs of this Letters Patent Appeal. As regards the costs in the Court of first instance, there will be proportionate costs, one set. As regards the costs of Appeal No. 203, there will be proportionate costs of the appeal and the memorandum of objections.

BENSON, J.—I agree.

WALLIS, J.—I agree and will only add that I do not think that the framers of the Transfer of Property Act intended to depart from the well-established rule of English law that where a right of forfeiture accrues to the lessor, he is put to his election, and if he manifests his intentien to enforce the forfeiture, that is an election to determine the tenancy and the election is irrevocable. *Jones* v. *Carter* (17); *Bendy* v. *Nicholl* (19); *Grimwood* v. *Moss* (20); *Evans* v. *Wyatt* (18); *Clough* v. *London and North Western Railway Company* (21). Similarly, if he elects not to enforce the forfeiture and manifests his intention, that is an election to waive the forfeiture and his election is also irrevocable. The case of an election to determine is dealt with in section 111 (*g*) and the case of an election to waive in section 112.

In this case, the lessor elected to determine; the election was irrevocable and the lease was at an end and could not be revived. If the tenants had been left in possession, a tenancy from year to year might have arisen under section 116, but here the evidence is that they were put out of possession and re-admitted subsequently. There is evidence that both defendants subsequently had the use and occupation of the land with the permission of the lessor, and the only remaining question is whether they can be liable in the present suit. I think they can.

Appeal allowed.

(19) 4 C. B. (N. S.) 376; 27 L. J. C. P. 220; 6 W. R. 502.

(20) L. R. 7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 208; 20 W. R. 972.

(21) L. R. 7 Ex. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.

CALCUTTA HIGH COURT.

CIVIL RULE No. 4740 OF 1909.

March 21, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

CORPORATION OF CALCUTTA—PETITIONER

versus

PEARY MOHAN ROY—OPPOSITE PARTY.

Calcutta Municipal Act (III B. C. of 1899), s. 162—Appeal—Question of valuation—Jurisdiction of Small Cause Court—How land is to be assessed, if question within jurisdiction.

In appeals preferred under section 162 of the Calcutta Municipal Act, it is competent to the Small Cause Court Judge to deal with the question of valuation and that question alone.

Corporation of Calcutta v. *Bhupati Roy*, 26 C. 74; 3 C. W. N. 70, relied upon.

As to the manner in which land is to be assessed after the valuation has been settled, whether it is or is not to be assessed as vacant land, is a question entirely beyond the jurisdiction of the Small Cause Court Judge.

Rule against the decree of the Small Cause Court Judge of Sealdah, dated the 15th September 1909.

Babus *Mahendra Nath Roy* and *Baranasibashi Mukerjee*, for the Petitioner.

Babus *Chandra Kant Ghose*, *Mohini Mohan Chatterjee* and *Sarat Chandra Dutt*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to modify an order of the Small Cause Court Judge of Sealdah, passed in an appeal preferred to him under section 162 of the Calcutta Municipal Act of 1899. The appeal related to the question of valuation of certain premises in this city. The Corporation had valued the land at Rs. 7,694. This valuation was based on the rate of Rs. 400 for an area of 14 *cottahs* of solid land and the rate of Rs. 300 for an area of 6 *cottahs* and 5 *chataks* treated as tank filled-up land. Upon appeal, the Small Cause Court Judge came to the conclusion that 5 *cottahs* ought to be treated as solid land and that area ought to be valued at the rate of Rs. 400, the remainder in his opinion comprising an area of 15 *cottahs* 5 *chataks* ought to be valued at the rate of Rs. 225. It was quite competent to the Small Cause Court Judge to vary the valuation as he did. But he proceeded to hold—and this is the portion of his judgment to which exception is taken—that it was but reasonable that a certain portion of the premises distinctly demarcated

should be separated from the remainder and assessed as vacant land, and he concluded his order with the following observations: "From the entire area of the holding, the portion fenced off should be excluded and assessed as vacant land." This part of the order is clearly without jurisdiction. In appeals preferred under section 162, it is competent to the Small Cause Court Judge to deal with the question of valuation and that question alone. *Corporation of Calcutta* v. *Bhupati Roy*(1). As to the manner in which land is to be assessed, after the valuation has been settled, whether it is or is not to be assessed as vacant land, is a question entirely beyond the jurisdiction of the Small Cause Court Judge.

The result, therefore, is that this Rule must be made absolute and the order of the Small Cause Court Judge modified. That portion of the order which directs that certain part of the premises has to be fenced off and should be assessed as vacant land must be expunged. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

(1) 26 C. 74; 3 C. W. N. 70.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1421 OF 1910.

January 12, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

PARBATTY DEBYA—PLAINTIFF—APPELLANT

versus

MATHURA NATH BANERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Enhancement of rent—Bengal Tenancy Act (VIII of 1885), ss. 3 (9), 30—Undivided share of howla *—Holding*—Res judicata—*Civil Procedure Code (Act XIV of 1882), s. 13—Suit for enhancement of rent—Decision that suit maintainable but suit dismissed on merits—Decision that suit maintainable, whether* res judicata *in subsequent suit.*

The plaintiff, the owner of a share of a tenure, brought a suit for enhancement against thedefendant, a tenant, who had taken a lease from the plaintiff of his share of the property. In that suit, it was decided that the plaintiff had the right to enhance the rent of the defendant, but the suit was dismissed on the ground that the rent paid by the defendant was not lower than that paid by tenants of adjoining lands. The plaintiff subsequently brought another suit for enhancement of the defendant's rent:

Held, that the rule of *res-judicata* was not applicable and the defendant was not debarred from questioning the soundness of the decision in the first suit that the plaintiff was entitled to bring the suit.

An undivided share of a *howla* does not come within the definition of 'holding', nor does it fall within section 30 of the Bengal Tenancy Act. The landlord of such a share is not entitled to maintain a suit for enhancement.

Haribole Brohmo v. *Tasimuddin Mondul*, 2 C. W. N. 680; *Hari Charan Bose* v. *Runjit Singh*, 25 C. 917 *note*; 1 C. W. N. 521; *Baidya Nath De* v. *Ilim*, 25 C. 917; 2 C.W. N. 44; *Ahadulla* v. *Gogan*, 2 C. L. J. 10, relied upon.

Appeal from the decree of the Sub-Judge of Dacca, dated January 6th, 1910, affirming that of the Munsif of Munshigunge, dated July 27th, 1909.

Babu *Harendra Narain Mitra*, for the Appellant.

Babu *Romesh Chandra Sen*, for the Respondents.

JUDGMENT.

HARINGTON, J.—This is an appeal by the plaintiff whose suit for enhancement of rent has been dismissed by both the Court of first instance and the lower Appellate Court. The facts are that the plaintiff and the defendant are *howladars*, the plaintiff having six-annas of the *howla* and the defendants ten-annas. The defendants took the undivided six-annas of the *howla* from the plaintiff as his tenants and it is in respect of this undivided six-annas of the *howla* that the plaintiff seeks to obtain an enhancement of the rent. The Munsif and the learned Judge of the lower Appellate Court held that the plaintiff was not, in respect of this undivided six annas, the landlord of a holding held at a money-rent by an occupancy-*ryot* within the terms of section 30 of the Bengal Tenancy Act and on that ground, amongst others, dismissed the suit of the plaintiff.

Now, on behalf of the appellant, it is contended, *first*, that this issue has been previously determined in favour of the plaintiff and, that, therefore, under the rule of *res judicata*, the Court was not entitled to dismiss his suit on this ground; and, *secondly*, it is argued that the plaintiff was the landlord of a holding within the terms of section 30 of the Bengal Tenancy Act.

Now, with regard to the first question, a suit was previously brought and it was held in that suit that the landlord was entitled to

bring his action; but the suit was dismissed on the ground that the rent which it was sought to enhance was not lower than that of the surrounding lands. Therefore, judgment was given in favour of the defendants, although the defendants' objection to the competency of the suit was in fact overruled. In my opinion, the rule of *res judicata* does not apply to such cases. The judgment was passed in favour of the defendants and it was not open to them to appeal against the view of the Munsif who overruled the contention urged by them. If we were to hold that the rule of *res judicata* applied, it would come to this that the defendants were bound by the decision of the first Court and were debarred from appealing against the view expressed against them because the decision was in their favour—the principal point which the Court decided against them not being a ground on which the suit was decided because the suit was decided in their favour. The defendants were, therefore, debarred from questioning the soundness of the decision. The rule of *res judicata*, cannot, therefore, be applied to this case.

Then, on the second point what is sought to be enhanced is the rent of an undivided six-annas share of the *howla* and my view is that an undivided six annas is not a holding within the meaning of section 30 of the Bengal Tenancy Act. Under that Act "holding" is defined as a parcel or parcels of land held by a *ryot* and forming the subject of a separate tenancy. I can understand no process of reasoning by which an undivided six-annas can be described as a parcel or parcels of land because the use of the word "parcel" implies that the land in question has metes and bounds. The result is that an undivided six-annas of the *howla* does not come within the definition of the word "holding" and, therefore, does not fall within section 30 of the Bengal Tenancy Act. The case is not without authority, because the case of *Haribole Brohmo* v. *Tasimuddin Mondul* (1) is a case in which this very same question arose and then it was decided that an undivided eight annas share was not itself a holding under section 30 of the Bengal Tenancy Act. On a consideration of the statute and the authority, it seems to me that the appeal ought not to succeed. It is conceded that there is no authority in support of the interpretation which the appellant wants to put on the statute: and it is a very significant fact, as my learned brother points out, that although this decision in the case of *Haribole Brohmo* v. *Tasimuddin Mondul* (1) was given so far back as 1898, there is no subsequent amendment of the Act so as to in any way derogate the effect of that decision.

For these reasons, I hold that the decree of the lower Court ought to be affirmed and this appeal dismissed with costs.

MOOKERJEE, J.—I desire to add a few observations, in view of the earnest endeavour made to upset what has been accepted as good law for at least fifteen years.

The plaintiff and the defendants are landlords of a property; the share of the plaintiff is six-annas and that of the defendants ten-annas. The defendants have taken a *ryati* lease from the plaintiff of his share of the property. The plaintiff now seeks, under section 30 of the Bengal Tenancy Act, to enhance the rent payable by the defendants. The Courts below have dismissed the suit. This decision is sought to be assailed by the plaintiff, appellant before this Court, on two grounds, namely, *first*, that the question of his right to enhance the rent of the defendants is *res judicata*; and, *secondly*, that upon a true construction of section 30 of the Bengal Tenancy Act, he has a right to enhance the rent of the defendants.

In support of the first contention, reference has been made to the decision in the earlier litigation between the parties when the plaintiff fruitlessly endeavoured to enhance the rent payable by the defendants. In that suit, it was decided in favour of the plaintiff that he had the right to enhance the rent of the defendants; but the suit was dismissed on the ground that the rent paid by the defendants was not lower than the rate at which rent was paid by tenants of adjoining lands. It has been argued, on the authority of the case of *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (2), that the decision in favour of the plaintiff upon the question of his right to enhance the rent is concluded by the judgment mentioned. That case, however, is clearly distinguishable. There it was ruled that when a decision has been based on two grounds, either of which is sufficient to support the decree, the deci-

(1) 2 C. W. N. 680.

(2) 24 C. 900.

sion upon each of the grounds is conclusive between the parties. Here, however, the decision upon the question of the right of the plaintiff to enhance the rent is not the basis of the decree ultimately made. Consequently, it cannot be maintained under section 13 of the Code of Civil Procedure, 1882, that the question was directly and substantially in issue between the parties or was finally decided. This view is in accord with that taken in the case of *Thakur Magundeo* v. *Thakur Mahadeo* (3). The first ground upon which the decision of the Court below is sought to be assailed cannot, therefore, be supported.

In support of the second ground, it has been contended that although the defendants held a share of the *howla* under the plaintiff, yet the plaintiff is the landlord of a "holding" within the meaning of section 30 of the Bengal Tenancy Act. Now the term 'holding' as defined in clause (9) of section 3 of the Act means a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy. Stress is laid, however, by the appellant on the introductory words of the section which provide that the definitions given are to apply unless there is something repugnant in the subject or context. But it has not been shown to us that there is anything in section 30 repugnant to the definition of the term "holding" given in clause (9) of section 3 of the Act. On the other hand, the cases of *Hari Charan Bose* v. *Runjit Singh* (4), *Baidya Nath De* v. *Ilim* (5), *Haribole Brahmo* v. *Tasimuddin Mondul* (1) and *Abdullah* v. *Gogin Mollah* (6), conclusively show that an undivided share in a parcel or parcels of land cannot be a holding. In fact, a parcel of land is land defined by metes and bounds and consequently a share in a parcel of land cannot be deemed to be a parcel of land within the meaning of the definition of the term 'holding'. Reference has finally been made to the terms of section 5, clause (2) and section 3, clause (5) of the Bengal Tenancy Act, where definitions aregiven of the terms '*raiyat*' and "rent" respectively; and it has been pointed out that a *raiyat* may hold a share of a parcel of land for which he may be liable to pay rent to the landlord. That need not be disputed. But it does not follow that, when a *raiyat* holds a share in a parcel of land, he has a 'holding' as defined in section 3 clause (9). The case of *Jardine Skinner & Co.* v. *Rani Surut Soondari Debi* (7), where their Lordships of the Judicial Committee held that a right of occupancy might be acquired in respect of an undivided share of land under the Bengal Rent Law of 1868, and the decision of this Court in *Baidya Nath Mondal* v. *Sudhoram* (8), where a similar view was taken, are clearly of no assistance to the plaintiff, because what he has to establish is that he is the landlord of a "holding" within the meaning of the Bengal Tenancy Act. In my opinion, he has failed to do so.

Both the points urged fail, and the appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(3) 18 C. 647.
(4) 25 C. 917 *note*; 1 C. W. N. 521.
(5) 25 C. 917; 2 C. W. N. 44.
(6) 2 C. L. J. 10.
(7) 3 C. L. R. 140; 5 I. A. 164.
(8) 8 C. W. N. 751.

CALCUTTA HIGH COURT.

APPLICATION FOR REVIEW OF JUDGMENT IN SECOND CIVIL APPEAL NO. 1981 OF 1909.

March 18, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

SAYERA BIBI—PETITIONER

versus

BHUTNATH HALDAR—OPPOSITE PARTY.

Review—Application filed on 90th day—Previous day, a Sunday—Court-fee, whether half or full to be paid—Court Fees Act (VII of 1870), s. 14, Sch. I, Arts. 4, 5—Limitation Act (XV of 1877), s. 5—General Clauses Act (X of 1897), s. 10.

Where an application for review of a judgment is filed on the ninetieth day, the eighty-ninth day being Sunday, it must be stamped with the full fee leviable on the plaint or the memorandum of appeal as the case may be.

Application for the review of a judgment of the High Court.

Babu *Nanda Lal Sircar*, for the Petitioner.

JUDGMENT.—This is an application for review of our judgment deliverd in an appeal from appellate decree on the 17th December 1909. The application was presented on the ninetieth day, but Court-fees were paid to the extent of half the amount leviable on the memorandum of appeal. The question,

therefore, requires consideration whether the application is sufficiently stamped. The answer depends upon the construction of Articles 4 and 5 of Schedule I to the Court Fees Act of 1870. Article 4 provides that an application for review of judgment, if presented on or after the ninetieth day from the date of the decree, must be stamped with the fee leviable on the plaint or memorandum of appeal. Article 5 provides that an application for review of judgment, if presented before the ninetieth day from the date of the decree, must be stamped with one-half of the fee leviable on the plaint or memorandum of appeal. The learned Vakil for the petitioner argues that as the eighty-ninth day was a Sunday and the Court was closed on that account, he has complied with the provisions of the law and is entitled to have his application heard although only half the Court-fees has been attached thereto. In support of this contention he has placed reliance upon the cases of *Shazada Woola Gowhur* v. *Shah Rukh Begum* (1) and *Narain Mundul* v. *Bance Madhub Sircar* (2). In our opinion, neither of these cases is of any assistance to the petitioner. In so far as the first of these decisions is concerned, it turned upon the construction of section 377 of the Code of 1859. That section provides that an application for review of judgment shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause to the satisfaction of the Court for not having preferred such application within the limited period; if the application be made within the period above-mentioned, it shall be written on the stamp paper prescribed for petitions to the Court where a stamp is required; but if made after the expiration of that period, it shall be written on the stamp paper prescribed for plaints. The learned Judges, who heard the case of *Shazada Woola Gowhur* v. *Shah Rukh Begum* (1), held that if the application was presented after the expiry of ninety days from the date of the decree, it might still be entertained upon payment of the stamp requisite for an application, provided the application was presented on the first open day after the expiry of a holiday which included the ninetieth day. It is not necessary for us to express any opinion as to the correctness or otherwise of this decision, because what we have now to do is to interpret Act VII of 1870, the provisions of which are materially different, because there was no provision in Act VIII of 1859 corresponding to section 14 of Act VII of 1870. This latter section provides that where an application for review of judgment is presented on or after the ninetieth day form the date of the decree, the Court, unless the delay was caused by the applicant's laches, may in its discretion grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day. This provision justifies the inference that the Legislature intended strict compliance with Articles 4 and 5 and laid down that if a case was made out for special action under section 14, the Court might pass necessary orders for relief of the party not in default.

In so far as the case of *Narain Mundul* v. *Bance Madub Sircar* (2), is concerned, it has clearly no application. No doubt, in that case the application for review as originally presented was insufficiently stamped, but the Court called upon the applicant to deposit the deficit fees, and this order was carried out. It does not appear to have been subsequently contended that the application, as it originally stood, was sufficiently stamped, and that was undoubtedly not the question referred for the decision of a Full Bench. We must consequently, hold upon a true construction of Articles 4 and 5 of the Court-fees Act, 1870, that the application presented to us is insufficiently stamped. The view we take is supported by the decision of this Court in the case of *In re Doorga Prosunno Ghosh* (3) and by that of the Madras High Court in the case of *In re Kota* (4). We see no reason whatever to dissent from the view taken in these two decisions.

We may add that section 5 of the Limitation Act of 1877 has obviously no application to cases under the Court Fees

(1) 6 W. R. 19.
(2) 12 W. R. 21; 4 B. L. R. 32 (F. B.).
(3) 9 C. L. R. 479.
(4) 9 M. 139.

In re KINTADU DALAPADU.

Act of the present description. It is equally clear that section 10 of the General Clauses Act of 1897, is of no assistance to the petitioner, because it is applicable only to Acts of the Governor-General in Council and Regulations made on or after the 14th January 1887. Nor can it be contended, in view of the provisions of section 14 of the Court Fees Act, that the general principle is applicable that a party may be taken to have done an act within the prescribed time if he has done it on the first day that the Court is open after the expiry of the holidays within which the prescribed time terminated. The petitioner must, therefore, deposit the deficit Court-fees in the course of this day.

Petitioner ordered to deposit the deficit Court-fee.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1628 OF 1911.

May 2, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re KINTADU DALAPADU AND OTHERS —APPELLANTS.

Vendor and purchaser—Agreement for sale—Subsequent execution of mortgage by vendor to third party—Execution of sale-deed subsequent to mortgage—Declaration that mortgage does not affect purchaser's rights—Maintainability of suit for.

A vendee of property in whose favour the vendor has executed an agreement for sale is entitled to maintain a suit for a declaration that a mortgage of the same property, executed by the vendor to a third party subsequent to the said agreement, does not affect his rights.

Second appeal against the decree of the District Court of Ganjam, in A. S. No. 259 of 1910, presented against the decree of the District Munsif of Chicacole, in O. S. No. 413 of 1909.

Mr. *K. V. L. Narasimham*, for the Appellants.

JUDGMENT.—In this case, the plaintiff obtained an agreement from the 2nd defendant, who was the owner of certain property, on the 29th April 1908 for the sale of the property to him. The 2nd defendant executed a mortgage document in favour of the 1st defendant, which was registered on the 2nd May 1908. The lower Appellate Court has found that it was not executed on the date it bears, namely, in January 1908, but subsequent to the agreement in plaintiff's favour. The plaintiff obtained a sale-deed from the 2nd defendant of the property on the 10th May 1908. The present suit is for a declaration that the mortgage executed in favour of the 1st defendant by the 2nd cannot affect the plaintiff's rights under the sale, it having been executed in order to defraud the plaintiff. The lower Appellate Court, reversing the finding of the Munsif, has found that the plaintiff's contention was made out that no consideration was paid by the 1st defendant for the mortgage and that he and 2nd defendant conspired and brought about the document subsequent to the agreement in plaintiff's favour with a view to defraud him by making the property liable for the mortgage debt. The District Judge granted the declaration asked for by the plaintiff. It is contended in second appeal that as the plaintiff had only a right *in personam* against the second defendant on the date that the mortgage-bond to 1st defendant was registered, namely 2nd May 1908, and as 2nd defendant admitted the receipt of consideration for the mortgage and the validity of he mortgage-bond, the plaintiff, who subsequently obtained a sale-deed on the 10th May 1908, could not claim a declaration that the mortgage was not binding on the property. This argument, in my opinion, is untenable. By virtue of the agreement obtained by the plaintiff from the 2nd defendant on the 29th April 1908, he became entitled to a conveyance of the property from the 2nd defendant, which would prevail over the right of any one who took a transfer from him subsequent to the date of the agreement. He would, for instance, have been entitled to specific performance of the agreement to sell against any subsequent transferee from the 2nd defendant, except a *bona fide* transferee for value without notice of the plaintiff's rights under his contract. There can be no doubt that an actual conveyance obtained by the plaintiff in pursuance of a contract would also entitle him to priority over every subsequent transferee from the 2nd defendant, except a *bona fide* transferee for value. Although the mortgage might be valid as between the 1st and 2nd defendants, the plaintiff was entitled to priority as he had an agreement for sale prior to the mortgage

and the District Judge was right in granting him a declaration that his rights under his conveyance are unaffected by the mortgage in 1st defendant's favour.

It is further argued that the onus of proof on the question whether the mortgage-deed was intended to defraud the plaintiff has been wrongly thrown on the 1st defendant. The question of onus is quite immaterial as all the evidence on record has been considered by the District Judge and he has come to the conclusion, on the whole evidence, that the mortgage-bond was the result of a fraudulent conspiracy between the 1st and 2nd defendant. I reject this second appeal.

Appeal rejected.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1337 OF 1907.
November 15, 1909.
Present:—Mr. Justice Caspersz and Mr. Justice Doss.
Maharaja MANINDRA CHANDRA NANDI—PLAINTIFF—APPELLANT
versus
KASHI CHANDRA BAKSHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Amalnamah—*Stipulation that tenant will not claim deduction of rent*—Pattah—Onus *of proof*—*Claim of abatement by tenant.*

In a rent suit, the tenants claimed abatement of rent. In an *amalnamah* granted by the landlord, the term fixed was five years with a stipulation that after that period there would be measurement of the *jote* and a fresh settlement entered into. The tenants asserted an interchange of *patta* and *kabulyat* but no *patta* was produced:

Held, that it was incumbent on the tenants to produce their *patta* and to make out the plea of abatement on the ground of diluvion, and as they did not do so, they were not entitled to any abatement.

Appeal from the decree of the District Judge of Rungpur, dated the 26th March 1907, affirming that of the Subordinate Judge of Rungpur, dated the 25th June 1906.

Babus *Ram Charan Mitra* and *Sarat Chandra Mitra*, for the Appellant.

Babu *Hara Chandra Chakravarti*, for the Respondents.

JUDGMENT.—This is an appeal in a suit by the plaintiff landlord to recover arrears of rent for the years 1309 to 1311 on the basis of an annual *jama* amounting to Rs. 1,005 8 for 1,292 *bighas*, $6\frac{1}{4}$ *cottas* of land.

The defence is that the quantity of land in the defendants' *jote* is far in excess of 1,292 *bighas*, $6\frac{1}{4}$ *cottas*, namely, that it amounts to 7,517 *bighas*, 4 *cottas*. The written statement further asserted that the *patta* and *kabuliats* had been exchanged between the parties and that the *jotedars* defendants were entitled to a considerable reduction of rent on account of diluvion so much so that the annual rental could not be reckoned at more than Rs. 300.

On the application of the defendants, a Commissioner was appointed, and his report has been accepted in the judgments of both the Courts below; in other words, he found that the defendants' *jote* had suffered very considerable diminution on account of diluvion. Both the lower Courts have given effect to the plea of diluvion and passed a decree in general accordance with the defence.

In second appeal, it has been urged, on behalf of the plaintiff landlord, that in terms of the *amalnama*, dated the 25th *Sravan* 1269, the defendants are not entitled to claim any abatement whatsoever; *secondly*, that the Courts below have made out a new case for the defendants; *thirdly*, that the non-existence of one of the *mouzas* included in the defendants' *jote*, namely, Bazar Gopinathpur, long before the date of the *amalnama* having been proved and admitted, the defendants are not entitled to any further reduction of rent in respect of that *mouza*, and, *lastly*, that the plaintiff has been unjustly saddled with the costs of the local inquiry.

We have examined the *amalnama* in detail, and it is certainly impossible to resist the conclusion that as regards the period of 5 years then in contemplation between the parties, it was stipulated that the tenants should not be entitled to claim any deduction whatever and that the lessees should not be able to raise any objection to the *abadharit* (settled) *jama*. With the exception of this *amalnama*, there is no sort of written agreement in evidence between the parties. The tenants having asserted an interchange of *patta* and *kabuliat*, it was incumbent on them to produce their *patta* and to make out the plea of abatement on the ground of diluvion. The *amalnama* mentions that settlement is granted for five years only; but

there is a stiplulation that there will be measurement of the *jote* and that a fresh settlement will be entered into on the basis of the area so ascertained. The document also supports the statement made by the defendants that *patta* and *kabuliat* have been exchanged; and, if so, there must have been some proviso in the later agreements dealing with the question of diluvion by the river Teesta. But owing to the non-production of these papers, we are led to the conclusion that the defendants have not succeeded in showing that, in respect of the three years in suit, they are entitled to any relief on the ground of diluvion.

It is, consequently, unnecessary to discuss the second and third contentions raised in second appeal.

With regard to the item of costs, both the lower Courts are clearly in error in thinking that the local inquiry was made at the instance of the plaintiff. The application was made by the defendants, and, having regard to their plea, it could not have been made by any other party.

The appeal must, therefore, succeed and the suit for the rents of 1309 to 1311 must be decreed with costs in all the Courts including the costs of the local investigation. The claim for damages at Rs. 25 per cent. is not pressed, but, in lieu thereof, interest is allowed at 12 per cent. per annum on the arrears of rent.

Appeal allowed: Suit decreed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2396 OF 1908.

May 9, 1912.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

TARINI CHARAN SARKAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

FAKARANNISSA CHOWDHURANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Second appeal—Finding of fact—Finding based upon inadmissible evidence—Map prepared by Kanungo—Proceeding before Collector—Question whether land belongs to zemindar or to Government—Use of map—Map whether admissible—Public Record—Evidence Act (I of 1872), ss. 35, 36.

A finding of fact may be challenged in second appeal, when, in coming to it, the lower Court has proceeded illegally in relying upon evidence which is irrelevant and inadmissible.

In a certain proceeding before a Collector, the question was raised whether certain land, the subject-matter of the proceeding, was the property of the owners of certain *mouzah* or whether it was land which formed part of no settled estate and to which the Government were, therefore, entitled. In that proceeding, a map prepared by a Kanungo was used:

Held, that the map did not fall within section 35 or 36 of the Evidence Act and was inadmissible.

Appeal from the decree of the Sub Judge of Pabna and Bogra, dated June 24th, 1908, affirming that of the second Munsif of Pabna dated January 28th, 1907.

Mr. *Sinha*, Counsel, Babus *Joyesh Chandra Roy*, *Shyama Charan Roy*, and *Prokash Chandra Majumdar*, for the Appellants.

Babus *Mohendra Nath Roy* and *Heera Lal Sanyal*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—The first Court found that the *kaimi jote*, which is called *kotibari jote*, belonged to Mr. Bray and had been purchased by the plaintiffs, and that there was no rebutting evidence, and it accordingly held that the plaintiffs, the appellants before us, had acquired good title to this *jote*. It then proceeded to deal with what is the real issue in this case, namely, whether the disputed lands are included in this *jote*. The manner, however, in which this question has been dealt with has raised some confusion. I would point out here that the question whether the land belonged to *Mouzah* Ramchandrapore or to *Mouzah* Deara Ramchandrapore is not material. If the disputed land covers Mr. Bray's *jote*, it is not material to inquire as to who the plaintiffs' landlords may be. The question is, did the lands in dispute form part of Mr. Broy's *jote*? Now, it has been contended that this is a question of fact, and that we are concluded by the findings of the lower Appeilate Court. Those findings are challenged, and it is said that in coming to them the lower Court has proceeded illegally in relying upon evidence which is irrelevant and inadmissible. This ground is stated in the second of the grounds of appeal to this Court, in which it is said that the only evidence on the record, on which the lower Appellate Court relies in holding that the proprietor of *Mouzah* Ramchandrapore obtained abatement of revenue in respect of the lands diluviated, is a remark made by a

Kanungo in Exhibit I, which is not admissible in law, and that it could not be used as evidence against the plaintiffs who were no parties to the proceedings in which it was made.

Now, the only question before us in this appeal is this, namely, whether the map upon which this remark occurs is or is not admissible in evidence. Some faint attempt was made to show that the case might fall within the provisions of section 36 of the Evidence Act. But I am of opinion that that is not so, that the map was not one which was prepared for public purposes and, therefore, of that character which the map must have to fall within the terms of that provision. And the proceedings upon which this map was used raise the question whether the land, the subject-matter of these proceedings, was the property of the owners of Deara Ramchandrapore or whether it was land which formed part of no settled estate and to which the Government were, therefore, entitled.

Then it was further argued that if it does not fall under section 36, it falls under section 35 of the said Act. Section 35 deals with entries in public records. That is the general section dealing with public records, section 36 deals with particular classes of public documents, namely, maps, charts and plans. In my opinion, this map does not fall within the provisions of section 35; nor has any authority been produced before us in support of this contention. It follows, therefore, upon this that the document was inadmissible and should not have been referred to in coming to the conclusion in this case.

I may mention here that it has been further contended that even if the document were *admissible*, it was used to show that the land fell with the ambit of Deara Ramchandrapore, a fact which, as I have explained, does not affect the real question before us, namely, whether it was Mr. Bray's *jote* or not.

It has been further contended that the result of the Collector's proceedings was to release the land, which, it was suggested, belonged to the Government, and that, therefore, in fact the map has been used to prove something which the proceedings in which it was used negatived. This, however, has been denied by the learned Pleader for the respondent and is rather a question of fact than a question of law with which we are concerned. What we are concerned with is not what the result of these proceedings was but what was their nature and what was the nature of the documents to which objection has been taken. I merely mention this point in order that it may be considered by the lower Appellate Court when the case goes back for re-hearing. It has been further pointed out in connection with these documents that neither the tenants nor the owners of Ramchandrapore were parties to the proceedings.

We observe that the learned Subordinate Judge who tried this appeal did not come to a clear finding upon the issue before him, that is, whether the disputed land is included in Mr. Bray's *jote*. The judgment and decree of the lower Appellate Court must, therefore, be reversed and the case remanded to that Court for re-hearing and for determination of this issue, after excluding from the evidence Exhibit I, to which objection has been taken and which we hold to be inadmissible.

The costs of this appeal will abide the result of the decision on remand.

COXE, J.—I agree.

Appeal allowed ; Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3256 OF 1909.

March 7, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

GOPAL CHANDRA CHAKRAVARTI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SURENDRA KUMAR ROY CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Document—Alteration of date to secure registration—Mortgage-deed—Consent of mortgagee—Subsequent lessee of mortgagor—Suit upon mortgage—Mortgagor and his lessee whether competent to object to mortgage on ground of alteration—Estoppel—Fraud.

A mortgage-deed was presented for registration more than four months after its execution, and to enable it to be registered, the date was altered by the mortgagor. The mortgagee consented to the alteration. In a suit by the mortgagee on the mortgage:

Held, (1) that the mortgagor was estopped from setting up the alteration as an answer to the claim of

the mortgagee; the mortgagor's lessee who took the lease subsequent to the alteration being equally estopped.

(2) that the matter would have been different if the lessee had been defrauded.

Appeal from the decree of the Sub-Judge of Mymensingh, dated September 18th, 1909, affirming that of the Munsif of Tangail, dated April 27th, 1909.

Babu *Nares Chandra Sen Gupta*, for the Appellants.

Babu *Harendra Narain Mitter* and *Rajendra Chandra Guha*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a mortgage suit. The mortgage was executed by defendant No. 1 who is not a party to the appeal. The appellants are two persons, one of whom took a lease of some property comprised in the mortgage and the other took a *putni* lease of properties equally encumbered. The plaintiffs sued on their mortgage and recovered judgment. The objection taken by the defendants is that the mortgage-deed was presented for registration more than four months after the execution, that to enable it to be registered under the law, the date was altered by the mortgagor and thereby registration was obtained which was not warranted by law. The mortgage was executed on the 24th April 1905. It was registered on the 21st September 1905, the date having been altered to the 25th June 1905. The lease taken by one of the appellants was not taken till September 1906, and the other some time after. The result, therefore, is that the leases were taken long after the registration of the mortgage-deed. Now, no question of fraud of any kind arises in the case because the mortgagor wrote on the deed an explanation pointing out that this change in the date of the deed had been made. The mortgagee accepted the deed with the altered date; so it must be taken that as between the mortgagor and the mortgagee the alteration was consented to; and as between them, the mortgage would take effect only from the later date to which the document had been altered. That being the state of things, in our opinion it is not open to the defendants, the lessees, to complain. Supposing it to be assumed for the purposes of argument that the deed was wrongly registered, there being no fraud, the mortgagor would be estopped from setting up this alteration in the deed as an answer to the claim of the mortgagee. In our view, the appellants having taken their leases subsequent to the alteration, in the absence of any fraud, cannot stand in any better position than the mortgagor and are equally estopped from taking the objection which they rely upon. The matter would have been different if in any way the appellants had been defrauded. As prudent men, they ought to have inquired at the registration office to see whether there was any encumbrance. If they had done so, they would have discovered that there was this mortgage before their leases. Under these circumstances, we must affirm the judgment of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1334 OF 1910.

April 30, 1912.

Present:—Sir Arnold White, KT., Chief Justice, and Sir Ralph Benson, Judge.

ARUNACHELLAM PILLAY, MINOR BY FATHER AND GUARDIAN, VADIVELU PILLAY AND ANOTHER—APPELLANTS

versus

VELLAYA PILLAY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Hindu Law—Suit by a widow for declaring adoption invalid—Death of plaintiff—Abatement of suit—Reversioners of last maleholder whether legal representatives of plaintiff.

A suit by a Hindu widow to have it declared that an adoption made by her son's widow is invalid abates on the death of the plaintiff, and the right to sue does not survive.

For the purposes of this question, there is no distinction between suits to set aside an adoption and suits to set aside an alienation.

Chiruvolu Punnama v. *Chiruvolu Perrazu*, 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307, explained.

Sakyahani Ingle Rao Sahib v. *Bhavani Bozi Sahib*, 27 M. 588; *Chinnaveeraya* v. *Lakshmi Narasimha*, 22 M. L. J. 375; 11 M. L. T. 184: (1912) 1 M. W. N. 442; 15 Ind. Cas. 213; *Muthusami Mudeliar* v. *Masilamoni*, 33 M. 342; 5 Ind. Cas. 42: 7 M. L. T. 17; 20 M. L. J. 49, referred to.

Premmoyi Chaudhrani v. *Preonath Dhur*, 23 C. 636 and *Rikhai Rai* v. *Sheo Pujan Singh*, 33 A. 15; 7 Ind. Cas. 97; 7 A. L. J. 960, distinguished.

Obiter:—Assuming that the cause of action survives, the reversioners of the last male owner are not the legal representatives of the plaintiff,

ARUNACHELLAM PILLAY *v.* VELLAYA PILLAY.

Second appeal against the decree of the District Court of Madura, in A. S. No. 841 of 1909, presented against that of the District Munsif of Dindigal, in O. S. No. 678 of 1906.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Appellants.

Messrs. *T. Rangachariar* and *M. K. Narayanaswami Aiyar*, for the Respndents.

JUDGMENT.—This is a suit by a widow (the mother of the last male-owner) for a declaration that an adoption by her son's widow is invalid. The plaintiff died before the suit came on for hearing in the Court of first instance. The reversioners of the last male-holder were made parties as the legal representatives of the deceased plaintiff. The only question argued on the hearing of the appeal was, can they continue the suit ? The Court below was of opinion that they could. We are unable to take this view.

The first question for consideration is, does the deceased plaintiff's right to sue survive ? (Order XXII, rule 3). If it does not, no question as to who are the legal representatives of the deceased plaintiff arises.

It appears to be well settled that a suit by a reversioner, who sues on his own behalf to set aside an alienatian by a widow, abates on the death of the plaintiff and that the right to sue does not survive to the next reversioners. See *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(1); *Kommeni Chinnaveeraya* v. *Lakshmi Narasamma* (2). In *Muthasami Mudaliar* v. *Masilamani* (3), where the suit was held not to abate, the plaintiff sued on behalf of all the reversioners as well as on his own behalf. The lower Courts were of opinion, in view of the decision in *Chiruvolu Punnomma* v. *Chiruvolu Perrazu* (4), that for the purposes of the question before us, a distinction should be drawn between a suit for a declaration to set aside an aliention and a suit for a declaration to set aside an adoption. What was actually held by the Full Bench in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (4) was that, in a suit to set aside an adoption, as distinguished from a suit to set aside an alienation, the presumptive reversioner ought, on principle, to be held to represent the remote reversioner, if the matter is decided after a fair trial. The respondent relied on an observation of the Court in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (4) that there was only one cause of action to be sued on. This observation was made with reference to suits to set aside alienations. Notwithstanding this, in *Chinnaveeraya* v. *Lakshmi Narasimmah* (2), the learned Judges held, as we think rightly, that in such a suit by a reversioner on his own behalf to set aside alienation, the right to sue does not survive. All that was decided in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (4) was that, if there had been a fair trial, an adjudication in a suit by a reversioner to set aside an adoption is binding on the other reversioners. This is not inconsistent with the rights of the reversioners being independent rights. The rights remain subject to the rule of law laid down in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(4). It is not a question whether there is a cause of action in the reversioners other than the deceased plaintiff, but whether the plaintiff's right to sue survives. In *Premmoyi Chaudhrani* v. *Preonath* (5), it was held that the right to sue survives. There, the claim was to recover possession of property. The Calcutta case may, perhaps, be distinguished on this ground. If it cannot, it apparently cannot he reconciled with the Madras decisions to which we have referred.

For the purposes of this question, it seems to us that no distinction should be drawn between suits to set aside an adoption and suits to set aside an alienation and we are of opinion that plaintiffs' right to sue did not survive.

It seems desirable to deal with the further question. Assuming that the cause of action survives, are the parties who have been added as plaintiffs, the reversioners of the last male owner, the legal representatives of the deceased plaintiff? In the strict sense of the words, of course they are not. The meaning of the words, however, has been extended by judicial decisions, and, in the Code of 1908, a definition of the words

(1) 27 M. 588.

(2) 22 M. L. J. 375; 11 M.L.T. 181; (1912) 1 M.W.N. 442; 15 Ind. Cas. 313.

(3) 33 M. 342; 5 Ind. Cas. 42; 7 M. L. T. 17; 20 M. L. J. 49.

(4) 29 M. 390, 1 M. L. T. 183, 16 M. L. J. 307.

(5) 23 C. 636.

was, for the first time, introduced, apparently with the object of embodying the effect of the judicial decisions. The definition is contained in section 2 (11) and is as follows:—"Legal representative means a person who, in law, represents the estate of a deceased person and includes any preson who intermeddles with the estate of the deceased, and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued."

Can the words 'deceased person', in the present case, be construed as meaning not deceased plaintiff but the last male owner? We do not think they can. We think the deceased person is the late plaintiff and although, in a sense, the deceased plaintiff represented the reversioners, it cannot be said that the reversioners of the last male owner, in law, represent the estate of the deceased plaintiff. Then, assuming that the deceased plaintiff issuing in a respresentative character, can it be said that the parties added as plaintiffs are the persons on whom the estate devolves on the death of the deceased plaintiff? Here, the "estate" apparently means the estate of the last male owner. We think 'devolves' means 'has devolved' and not 'would in course of time devolve,' in accordance with the line of succession, on the parties who have been added as plaintiffs, if they were alive.

In the present case, the estate will not devolve on the parties who have been added as plaintiffs till after the death of the son's widow.

In *Rikhai Rai* v. *Sheo Pujan Singh* (6), which was relied on by the respondents, the suit was for possession, and the estate devolved, on the death of the orignal plaintiff, on the reversioners who were added as parties.

We must set aside the decrees of the Courts below and dismiss the suit with costs throughout.

Appeal allowed.

(6) 33 A. 15; 7 Ind. Cas. 97; 7 A. L. J. 960.

PUNJAB CHIEF COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 668 OF 1909.

June 24, 1912.

Present:—Sir Arthur Reid, KT, Chief Judge,
Mr. Justice Robertson and
Mr. Justice Shah Din.

DYAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM RAKHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 10 (ii), 12 (ii)—Word "suit" in s. 10 (ii) includes 'appeal'—Question of sufficiency of Court-fee on plaint not expressly decided by first Court—Assumption—Consequences—Appeal to the first Appellate Court on insufficient stamp—Power of the Court of second or further appeal to order supply of deficiency—Consequences of non-compliance with such order.

The word "suit" in section 10 (ii) of the Court Fees Act includes appeal.

When a Court of first instance, whose duty it is to see that the Court-fee stamps affixed to a plaint are correct, proceeds to the trial of the suit, without expressly deciding that the plaint is correctly stamped, it must be assumed that the Court has *tacitly* decided that the amount of Court-fees paid is correct; and, acting on that assumption, it would be competent to the first Appellate Court, (though it would not be competent for the parties to the appeal to raise the question—*obiter*) to call upon the party, whose fee was in deficit in the first Court, to make good such deficiency within a reasonable time to be fixed by the Court and to dismiss the claim of the plaintiff, should it have been decreed, if he fails to do so. Similarly, a Court of second or further appeal is competent to call upon a party, who had appealed to the lower Appellate Court on insufficient Court-fee, to make good such deficiency, within a reasonable time to be fixed for that purpose, and, on his failing to do so, to dismiss his appeal to the lower Appellate Court, should it have been decreed; or, in case his appeal to the lower Appellate Court had been dismissed, to refuse to entertain his second or further appeal until the deficiency is made good within the time fixed, and, on his failure to comply with the order, to dismiss his appeal.

Madan Lal v. *Jai Kishan Das*, A. W. N. (1905) 277; 1 A. L. J. 392, followed.

Narain Singh v. *Chaturbhuj*, 20 A. 362; *Mohan Lal* v. *Nand Kishore*, 26 A. 270; 2 A. L. J. 839; A. W. N. (1905) 280, referred to.

Mela Mal v. *Harbhaj*, 115 P. R. 1884; *Kaka Ram* v. *Ram Saran*, 13 P. R. 1901; 137 P.L.R. 1901, overruled.

Second appeal from the order of the Additional Divisional Judge, Lahore, dated 12th March 1909, modifying that of the Subordinate Judge, 1st class, Lahore, dated 23rd December 1907, decreeing plaintiffs' claim.

DYAL SINGH v. RAM RAKHA.

JUDGMENT.

ROBERTSON, J.—The point referred to the Full Bench in this case is as follows:—

"When it is found in an Appellate Court that the Court-fee paid on a plaint or a memorandum of appeal as the case may be, in the Court below is insufficient and no dispute as to the amount has arisen and been specifically decided in such lower Court, with reference to section 12 of the Court Fees Act, what course ought the Court of appeal to adopt?

"Should it accept the action of the lower Courts in proceeding to try a case as involving a decision of the correctness of the Court-fee under the first part of section 12 and so take action under the second part; or should it hold that it is its duty to refer the matter back for decision of the Court which has allowed the case to proceed on insufficient fee; or is any other course the correct one to adopt?"

The judgments of this Court which deal with the subject appear to be only two in number. In *Mela Mal* v. *Harbhaj* (1), as far as we understand it, the view taken was that if no question had arisen in the first Court which was specifically decided by the presiding officer as to the proper amount of Court-fee payable, no action could be taken by an Appellate Court under the second paragraph of section 12 of the Court Fees Act. The words used by the learned Judges of the Bench which decided that case are as follows:—

"Upon examining the record of the first Court, it appears that no question arose in that Court upon the valuation of the suit for the purpose of determining the amount of fee chargeable. The plaintiffs ought, under the express terms of section 50 of the Civil Procedure Code, to have stated in their plaint approximately the amount sued for, and under para. (*f*) sub-section (IV) of section 7 of the Court Fees Act, they ought to have stated the amount at which they valued the relief sought. They did not do so, but no question arose in consequence. Under these circumstances, no question having been decided by the first Court, it appears that the second paragraph of section 12 was not applicable when the plaintiffs appealed to the Additional Commissioner; and that the Additional Commissioner was not competent to require from the plaintiffs an additional fee in respect of the first Court. It is only upon the ground of non-payment of the fee required for the first Court that the appeal to the Additional Commissioner has been dismissed, and on that ground his order cannot be sustained."

It will be seen that the point was not fully discussed, and we think that there is considerable doubt as to the correctness of the view therein expressed.

The only other judgment of this Court in which the point is noticed at all is *Kaka Ram* v. *Ram Saran* (2), where the matter is merely noticed incidentally at page 48, the previous ruling of 1884 being followed.

The question, however, has been more fully dealt with in various judgments of the Allahabad High Court. The first case is that of *Narain Singh* v. *Chaturbhuj Singh* (3). In that case, it was discovered on second appeal to the High Court that the respondent, when appellant in the lower Appellate Court, had not paid a sufficient Court-fee on his memorandum of appeal in that Court, and though he had been called upon to do so by the High Court, he had, up to the date of hearing of the appeal, not made good the proper Court-fee upon the memorandum of appeal in the lower Appellate Court. There appears to have been no question entertained for a moment of the competency of the High Court to call upon the appellant before them to make good the Court-fee required on the memorandum of appeal in the lower Appellate Court but it was held that the proper course was not to dismiss the respondents' appeal to the lower Appellate Court, but to stay the execution of the decree, if any, of the High Court in favour of the respondent until such time as the additional Court-fee due by him might be paid.

A somewhat similar case was dealt with in the appeal of *Madan Lal* v. *Jai Kishan Das* (4). In that case, similarly, it had been discovered in the High Court that the amount of Court fee payable upon the memorandum of appeal in the lower appellate Court had been deficient. The appellant had been called upon to make good the

(1) 115 P. R. 1884.

(2) 13 P. R. 1901; 137 P. L. R. 1901.
(3) 20 A. 362.
(4) A. W. N. (1905) 277; 1 A. L. J. 392.

deficiency. He neglected or refused to do so and the High Court dismissed the respondent's appeal to the lower Appellate Court and restored the decree of the first Court. This case was not followed, in so far as concerns the procedure of dismissal of the appeal, in a case decided by the Full Bench of the same High Court in *Mohan Lal* v. *Nand Kishore* (5). In that case, while the power of the High Court to call upon appellant in the lower Appellate Court to make good the deficiency in the Court-fee upon the memorandum of appeal in that Court was clearly presumed, it was held that the proper course was not to dismiss the appeal to the lower Appellate Court on the ground that the deficiency of Court-fee had not been made good but to withhold the execution of the decree in the respondent's favour in the lower Appellate Court until such deficiency had been made good. It is to be noted that in that case the appeal was remanded to the lower Appellate Court as the appeal had been decided upon a preliminary point.

It appears to me that the judgment in *Mohan Lal* v. *Nand Kishore* (5) was correct. When a Court of first instance, whose duty it is to see that the Court-fee stamps affixed to the plaint are of correct amount, proceeds to the trial of the suit, it must be assumed that the Court has decided that the amount of Court-fees paid is correct. It is, at any rate, a tacit decision and I think, though that point is not before us, that it would not be competent for either of the parties in the Appellate Court to raise any question as to the amount of fees paid in the first Court. But clearly under the second paragraph of section 12, it would be competent to the first Appellate Court to call upon a party, whose fee was in deficit in the first Court, to make good such deficiency, or, if the order were not complied with within reasonable time to be fixed by the Court in accordance with section 10 para. (*ii*) of the Court Fees Act, to dismiss the claim of the plaintiff should it have been decreed in the first Court. Similarly, as regards the Court of second appeal or further appeal, it will be competent to such Court to call upon a party, who had appealed to the lower Appellate Court after affixing an insufficient Court-fee upon his memorandum of appeal, to make good such deficiency on a penalty of having any decision in his favour in the lower Courts set aside.

I think the word "suit" in section 10 clause (*ii*) of the Court Fees Act clearly includes "appeal" and that similar results in regard to the decision in the first appeal would follow from the action taken in the Court of second or further appeal to those which would result as regards the original suit under the orders of the Court of first appeal. My answer, therefore, to the reference is: — when it is found in an Appellate Court that the Court-fee paid on a plaint or a memorandum of appeal, as the case may be, in the Court below is insufficient, and no dispute as to the amount has arisen and been specifically decided in such lower Court with reference to section 12 of the Court Fees Act, it must be held, if such lower Court has proceeded to the decision of the suit or appeal, that such Court has decided, under section 12 (*i*) of the Court Fees Act, upon the proper Court-fee to be levied. Such being the case, the provisions of section 12, paragraph (*ii*), of the Court Fees Act would apply, and the consequence of the action taken by such superior Court would be such as is provided for in section 10, paragraph (*ii*), *i. e.*, if the Court-fee paid on a memorandum of appeal, as in this case, to the first Court of appeal is insufficient, it is competent *in this Court* to call upon the appellant in the first Court of appeal to make good the deficiency in the Court-fee on the memorandum of appeal in that Court, and, on his failing to do so, to dismiss the appeal in that Court, should the appeal have been decided in his favour, after reasonable time has been allowed to make good such deficiency, or, in case the appeal in the lower Appellate Court of the party appealing to this Court has been dismissed, to refuse to entertain his appeal to this Court until the deficiency is made good, a reasonable time being allowed for such purpose, after which, should the deficiency not have been made good, the appeal to this Court would stand dismissed.

REID, C. J.—I concur in the answer proposed. In *Madan Lal* v. *Jai Kishen* (4), the Division Bench, Knox and Aikman, JJ., said:—"On the 26th November 1903 it was brought to the notice of the

(5) 28 A. 270; 2 A. L. J. 839; A. W. N. (1905) 280.

respondent's Counsel that there was a deficiency in the fee that should have been paid by his client, who was appellant in the Court below. Under section 12, clause (2), of the Court Fees Act, he was required to pay the additional fee. Time has been repeatedly given: on the last occasion, a Bench of this Court when allowing a fortnight more said:—'no more time will be allowed.' The fee has not been paid in. The result is that this appeal succeeds: the decree of the lower Appellate Court is set aside with costs and that of the Court of first instance restored."

This decision is, in my opinion, strictly in accordance with the provisions of section 12 (*ii*) and section 10 (*ii*) of the Court Fees Act.

In *Mohan Lal* v. *Nand Kishore* (5), the Full Bench held that the case of *Madan Lal* v. *Jai Kishan* (4) was not in accordance with the practice which previously obtained in the Court and *Narain Singh* v. *Chuttarbhuj Singh* (3) was followed.

The Full Bench remarked that it was unnecessary to recapitulate the reasons recorded in *Narain Singh* v. *Chuttarbhuj Singh* (3). The judgment in *Narain Singh* v. *Chuttarbhuj Singh* (3) ran thus:—

"I am unable to see that I am authorized so to act (to dismiss the respondent-defendant's appeal to the lower Appellate Court) under the second clause of section 10. That clause provides, with reference to the valuation of the properties referred to in section 7, paragraphs V and VI, of the Act that, when the Court-fees paid are insufficient under the circumstances laid down in the first clause of section 10, the Court shall call on the plaintiff to pay the deficient Court-fees and shall stay the suit until the additional fee is paid. It further provides that if the additional fee be not paid, the suit shall be dismissed. The second paragraph of section 12 makes the procedure set forth in the second paragraph of section 10 applicable to the case when a Court of appeal, reference or revision considers that the question decided under the first paragraph of section 12 has been wrongly decided to the detriment of revenue. The question then arises in the present case what is the *suit* which is to be stayed until the additional fee is paid, and it is to be noted that the staying of the suit is the act which the Court has to perform before it can dismiss the suit. There is no suit before me except in the sense that all proceedings in a suit up to decree are parts of the suit. What is before me is the appeal by the plaintiff against the decree of the lower Appellate Court dismissing the suit. The appellant is undoubtedly no way in fault. He has paid up all the Court-fees due from him in the lower Courts and in this Court. Does then the second clause of section 10 mean that because of the default of the respondent in the lower Court, the appellant is to have his appeal in this Court stayed, and can it be held that the second clause of section 12, read with paragraph 2 of section 10, means that if the respondent wilfully persists in refusing to pay, the appellant, who is not in fault, is to be punished by having his appeal dismissed? I cannot believe that it was intended by the Legislature to work any such injustice. In my opinion, the second clause of section 10, read with the second clause of section 12, cannot be worked in a case like the present. If it were the appellant who was in fault and failed to pay the full Court fee due from him in the lower Court, this Court certainly could stay the hearing of his appeal, and, if the deficient fees were not paid, could dismiss his appeal, and no doubt would do so. But where the appellant is not in fault, it would be most unjust that the respondent, by failing to pay the Court-fee due from him in the lower Court, should have it in his power to prevent the appellant from having his appeal heard.

"For these reasons, I decline in this case to take action under the second clause of section 10 and proceed to hear the appeal on the merits."

This judgment was delivered several years before that reported in the Allahabad Weekly Notes, and, with all deference to the learned Judge, for whose opinion I have always had the greatest respect, I am unable to find that any reasons have been recorded against the correctness of the course adopted in *Madan Lal* v. *Jai Kishan* (4), and it follows that the Full Bench recorded no reasons for differing from the decision in *Madan Lal* v. *Jai Kishan* (4).

Section 12 (*ii*) of the Act provides that the Court shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided and makes the provisions of section 10 (*ii*) applicable.

Those provisions are that the suit shall be stayed until the additional fee is paid and that if the additional fee is not paid within such time as the Court shall fix, the suit shall stand dismissed. I see no reason to doubt that "suit" includes "appeal" and that the appeal of the defaulting appellant in whatever Court must be dismissed on his failure to make up the deficiency of Court-fee when called on to do so.

I concur in so much of the case in *Narain Singh* v. *Chaturbhuj Singh* (3) as laid down that it must be assumed, under the 1st paragraph of section 12 of the Court Fees Act, that the lower Appelate Court finally decided between the parties that the fee paid was sufficient; and on this point I would overrule *Mela Mal* v. *Harbhaj* (1), which was merely followed in *Kaka Ram* v. *Ram Saran* (2), without any discussion, the point not having been seriously argued, no authority to the contrary having been cited and the cases of *Madan Lal* v. *Jai Kishan Das* (4) and *Mohan Lal* v. *Nand Kishore* (5) not having been pronounced.

SHAH DIN, J.—I agree.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REFERENCE CASE NO. 163 OF 1910-1911

October 18, 1911.

Present:—Hon'ble Mr. Meredith, Financial Commissioner.

TOLA SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

MUHAMMAD AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Punjab Tenancy Act (XVI of 1887), ss. 84 (3), 98—Revenue Record—Presumption of correctness of entries.

One Tola Singh sued certain tenants for arrears of rent in respect of a holding. The entries regarding the holding in the *jamabandi* were as follows:—

In the ownership column, *shamilat deh* and in the cultivators' column, certain tenants on behalf of Haidar Shah co-sharer $\frac{1}{3}$ and Tola Singh $\frac{2}{3}$.

The defendants pleaded that they had paid the entire rent to Haidar Shah. Haidar Shah was then joined as defendant and he repudiated Tola Singh's claim alleging that Tola Singh was out of possession altogether and that the entry in *jamabandi* was wrong.

The Assistant Collector, 1st grade, applied to the Collector under section 98 of the Punjab Tenancy Act for sanction to an order directing the defendant Haidar Shah to institute a suit in a Civil Court within two months to establish the fact that the entries in the Revenue papers were wrong, and that he was entitled to the proprietary possession of the whole area in suit. The Collector replied that the *onus* of suing in a Civil Court should be placed upon Tola Singh, the plaintiff, and not on Haidar Shah, the defendant. The Revenue Assistant passed order accordingly and Tola Singh's appeal against the orders was rejected by the Collector. On a reference under section 84 (3) of the Punjab Tenancy Act by the Commissioner:

Held, that a presumption of correctness attaches to Revenue Records and the proper course would have been to postpone the case for two months to allow Haidar Shah to prove his exclusive title if so advised. If no suit was brought, the Court should decide in favour of the plaintiff.

FACTS.—The facts of the case appear from the following order of reference of the Commissioner, Rawalpindi Division, dated 13th July 1911.

The order of the Assistant Collector, 1st Grade, dated 10th February 1911, passed in pursuance of the Collector's, dated 26th November 1910, and the Collector's appellate order, dated 11th May 1911, appear to be manifestly wrong. Tola Singh sued certain tenants for arrears of rent for the *rabi* and *kharif* of 1908, in respect of a holding comprising 8 *kanals*, 17 *marlas*, the entries regarding which in the *jamabandi* were as follows:—In the owership column, *shamilat deh*, and in the cultivators' column, certain tenants on behalf of Haidar Shah, co-sharer, $\frac{1}{3}$ and Tola Singh, co-sharer, $\frac{2}{3}$.

The tenants in question replied to the suit alleging that they had paid the entire rent to Haidar Shah. Haidar Shah was then joined as defendant and he repudiated Tola Singh's claim alleging that Tola Singh was out of possession altogether and that the entry in the *jamabandi* was wrong. He stated that Tola Singh had sold his share in the holding in question which originally comprised 13 *kanals* 16 *marlas*. The Revenue Assistant Collector, 1st Grade, applied to the Collector, under section 98 of the Tenancy Act, for sanction to an order directing the defendant, Haidar Shah, to institute a suit in a Civil Court within two months to establish the fact that the entries in the Revenue papers were wrong, and that he was entitled to the proprietary possession of the whole area in suit.

On this reference, the Collector replied that the onus of suing in a Civil Court should be thrown upon Tola Singh, the plaintiff, and not upon Haidar Shah, the defendant. In pursuance of this order, the Assistant Collector returned the plaint to Tola Singh and directed him to proceed in a Civil Court.

Tola Singh then appealed to the Collector who passed his order of 11th May 1911, rejecting the appeal. In that order, the Collector refers to the fact that Tola Singh had sold 5 *kanals* (4 *kanals* 19 *marlas* is the correct figure) out of the holding in respect of which he is shown in the *jamabandi* as owning a $\frac{2}{3}$rds share, and he calculated that Tola Singh on his own admission could own only $1\frac{1}{2}$ *kanals* at the most. This calculation was made on the assumption that Tola Singh did not own a $\frac{2}{3}$rds share of the original holding of 13 *kanals*, 16 *marlas* but only a $\frac{1}{2}$ share, this assumption being based on the fact that previous to the last Settlement, Tola Singh was recorded as owning a $\frac{1}{2}$ share and that there was no explanation as to how this was increased to 2/3rds at Settlement.

Tola Singh's claim, in spite of the record showing that he owns a $\frac{2}{3}$rds share of 8 *kanals*, 17 *marlas* (the residuum of the holding after he had sold 4 *kanals*, 19 *marlas*), is apparently in excess of anything to which he is entitled; so far as the Settlement Record entries go, he is entitled to $\frac{2}{3}$rds of 13 *kanals*, 16 *marlas*, equal to 9 *kanals*, 4 *marlas* less the area of 4 *kanals*, 19 *marlas* which he has sold, or to 4 *kanals*, 5 *marlas* in all. On the present entries, he is entitled to $\frac{2}{3}$rds of 8 *kanals*, 17 *marlas*, or to 5 *kanals*, 18 *marlas*.

If the Settlement entry was wrong, he is, in accordance with the previous record, entitled to a half of 13 *kanals* 16 *marlas*, less 4 *kanals*, 19 *marlas*, sold by him or to 1 *kanal* 19 *marlas*. The areas in question are small but it seems to me to be important that the presumption which exists in favour of the correctness of the Revenue Record as to the status of Tola Singh, the plaintiff, in respect of this land and of his relations towards the cultivators and towards his recorded co-sharer, Haidar Shah, should not be lightly disregarded and set aside as it has been by the Collector's order. The record shows that Tola Singh and Haidar Shah are co-sharers in the proprietary right in the land in suit and that the tenants have been and are cultivating under them. Since Haidar Shah has challenged the correctness of those and since *prima facie* Tola Singh must be entitled to some share in the proprietary right and to share in the rent (whether this share be equal to an area of 1 *kanal*, 19 *marlas* or of 4 *kanals*, 5 *marlas* or of 5 *kanals* 18 *marlas* as claimed), it is Haidar Shah and not Tola Singh who should have been referred to a Civil Court.

A reference is, therefore, made to the Financial Commissioner under section 84 (3) of the Tenancy Act with the recommendation that the order of the Assistant Collector, dated 10th February 1911, be set aside and that an order be passed directing Haidar Shah to bring a suit in a Civil Court for a decree declaratory of his exclusive proprietary right in the holding in question, failing the institution of which, the Assistant Collector should proceed to hear and dispose of the claim of the plaintiff Tola Singh.

ORDER.—I agree with the course proposed by the Commissioner. A presumption of correctness attaches to the Revenue Records and the proper course is to postpone the case for two months to allow Haidar Shah to bring a suit to prove his exclusive title, if so advised. At the end of that time, if no suit has been brought, the Court should decide in favour of plaintiff, in accordance with the entries in the Records. Application accepted and case remanded to the Court of first instance for compliance with the above order. No costs.

Application accepted; Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2116 OF 1910.

June 21, 1912.

Present:—Mr Justice Carnduff and Mr. Justice Chapman.

ISHAN CHANDRA NANDI AND ANOTHER —DEFENDANTS—APPELLANTS

versus

GOUR MOHAN PODDAR AND OTHERS— PLAINTIFFS—RESPONDENTS.

Putni *Regulation* (*Act VIII of* 1819), *s.* 11 *cl.* (3)—*Incumbrance, annulment of*--Raiyati *rights*—Khudkasht raiyat.

A *raiyat* is not protected from ejectment under section 11 clause (3) of the Putni Regulation by a purchaser at a sale under the Regulation unless he is a *khudkasht* or a resident cultivator.

Jogeshwar Mazumdar v. *Abed Mahomed Sirkar*, 3 C. W. N. 13, followed.

Appeal from the decree of the Sub-Judge of Tipperah, dated March 11th, 1910, affirming that of the Munsif of Comillah, dated March 31st, 1909.

TULSA SINGH *v.* NATHA SINGH.

Babus *Satish Chandra Ghose* and *Birendra Chandra Das*, for the Appellant.

Babu *Hirendra Narain Mitra*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the purchaser of a *putni taluk* under the Bengal Putni Taluk Regulation, 1819, for the recovery of *khas* possession of certain land within the *putni* from the appellants who are *mirasdars*.

The case for the appellant, is that, although they are holders of a *miras* tenure, they were *raiyats* before they obtained that tenure and, now that the tenure is avoided by the sale under the Regulation, are entitled to resume the status of *raiyats*.

It is, however, unnecessary for us to consider whether the *raiyati* rights of the appellants were affected by the creation of the *miras* tenure; for, even if the appellants are to be regarded as *raiyats* now, they are not protected from ejectment under section 11 of the Regulation unless they are *khudkasht* (that is, resident) *raiyats*. This was expressly decided by this Court in *Jogeshwar Mazumdar* v. *Abed Mahomed Sirkar* (1).

Now, the lands in suit are situated wholly in *Mauzah* Kacharitola, as is stated in the plaint and admitted in the written statement, and the finding of both Courts is that the appellants are residents of Paikpara, and not of Kacharitola. The appellants were, therefore, liable to be ejected, and the suit for *khas* possession against them was rightly decreed.

This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 3 C. W. N. 13.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 634 OF 1908.

June 9, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

Sardar TULSA SINGH—PLAINTIFF—APPELLANT

versus

NATHA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 139—Surety for debtor, discharge of—Remedy against principal debtor impaired owing to conduct of creditor—Costs.

Where the creditor had committed acts which were inconsistent with the rights of his surety and had also omitted certain acts which his duty to the surety required him to perform and as a result of these acts and omissions, the eventual remedy of the surety against the principal debtor was impaired:

Held, that the surety was discharged from liability under section 139 of the Contract Act to the extent that he was deprived from recovering from the principal debtor the amount claimed by the creditor.

The surety was allowed his costs for it was found that the plaintiff's suit against him was wholly unjustifiable.

Appeal from the order of the District Judge, Ambala, dated 31st March 1908, dismissing plaintiffs' claim.

Lala *Dwarka Das*, for the Appellant.

Messrs. *Pestonji Dadabhai* and *Herbert*, for the Respondent.

JUDGMENT.—A. C. Wingrove, respondent No. 2, is stated to have died more than six months ago, and no application has been made to bring his legal representatives on the record. That being so, the appellant's Pleader admits that the appeal abates as against the deceased respondent, and we direct that his name be struck out of the memorandum of appeal.

The facts of this case are briefly these. In the year 1903, the late A. C. Wingrove took contracts from the North-Western Railway Administration and the Resident Engineer, Patiala State, for the supply of a large quantity of stone ballast to them. He needed funds to carry on and complete those contracts, and S. Tulsa Singh, a Pleader, practising at Ambala, agreed to advance him a loan of Rs. 6,000 on the security of one Natha Singh on certain terms and conditions which are set out in the written agreement, dated the 5th September 1903, which was registered on the 23rd September 1903. As provided in that agreement, a cash credit account to the amount of Rs. 7,550 was opened with the Ambala Branch of the Alliance Bank of Simla, Limited, in the joint names of the said Wingrove and plaintiff, S. Tulsa Singh, on the 5th September 1903. Of this amount, Rs. 4,000 was contributed by Wingrove and Rs. 3,550 by S. Tulsa Singh. The above-mentioned agreement was signed by Natha Singh as surety on the 23rd September 1903, and on the 24th September, another sum of Rs. 2,450 was paid into the credit of the joint account by S. Tulsa Singh. The contract with the

North-Western Railway, for which Wingrove had borrowed the money from S. Tulsa Singh, was worked by him until March 1904, when, for some reason which it is unnecessary to explain, it fell through. Between September 1903 and March 1904, Wingrove paid S. Tulsa Singh Rs. 1,500, in three sums of Rs. 500 each, which S. Tulsa Singh claims was paid to him out of the bonus of Rs. 3,500, that had, according to him, been agreed to be paid by Wingrove in consideration of the loan of Rs. 6,000; nothing is said to have been paid to S. Tulsa Singh in liquidation of the principal debt, and Wingrove appears to have been declared insolvent and to have left the country after his contract with the North-Western Railway had come to an end.

The present suit was instituted by S. Tulsa Singh on the 7th December 1904 against A. C. Wingrove, as principal debtor, and Natha Singh, as surety, for recovery of Rs. 6,500 principal and interest, on the strength of the agreement, dated the 5th September, 1903 on the following allegations:—

(1). That on the 23rd September 1903, defendant No. 1 (Wingrove) had borrowed Rs. 6,000 from the plaintiff on the security of defendant No. 2 (Natha Singh) in order to carry on his (defendant's) contract for the supply of stone ballast to the North-Western Railway and the Resident Engineer, Patiala State; that the said amount was deposited with the Alliance Bank in the joint names of the plaintiff and defendant No. 1; that under the agreement entered into by defendant No. 1 with the plaintiff, the former was to pay to the latter Rs. 3,500 out of the profits of the concern and to pay him Rs. 500 out of each cheque received from the North-Western Railway, and that both the defendants had hypothecated to the plaintiff their properties as set out in the deed of agreement by way of security for the loan.

(2). That defendant No. 1 had paid Rs. 1,500 to the plaintiff out of the money received by him from the North Western Railway.

(3). That defendant No. 1 had not paid into the Alliance Bank the amount of the third cheque received by him from the North Western Railway and had in fact misappropriated the same; that the said defendant had transferred the contract to another person contrary to the conditions of the agreement in question; that the term of the contract with the Railway had expired in March 1904, and that the plaintiff was entitled to recover the whole amount advanced by him to Wingrove.

(4). That though the plaintiff was entitled to charge interest on the principal debt at the rate of two per cent. per mensem, he was content to receive interest at the rate of one per cent. at which rate the amount of interest due by the defendant came to Rs. 500. Upon these allegations the, plaintiff prayed for a decree for Rs. 6,500 against both the defendants personally and with a lien on the properties hypothecated under the agreement sued upon. Wingrove, defendant No. 1, did not appear in Court and the proceedings against him were, therefore, *ex parte*. In answer to the plaintiff's claim, Natha Singh, defendant No. 2, pleaded in substance that although he had stood surety for Wingrove under the agreement, dated the 23rd September 1903, he was discharged and was no longer liable on his contract of suretyship because,—

(1) the plaintiff had done certain acts inconsistent with his (defendant No. 2's) rights as surety, and

(2) the plaintiff had omitted to do certain acts which his duty to the surety required him to do.

By reason of these acts and omissions on the part of the plaintiff, it was pleaded, the eventual remedy of defendant No. 2 against the principal debtor defendant No. 1 had been impaired and on this ground defendant No. 2 was not liable as surety. It was further pleaded that the plaintiff was bound to give credit to defendant No. 2 for the sum of Rs. 1,500 which the plaintiff had admitted to have received from defendant No. 1, and that defendant No. 1 had as a fact, received only Rs. 5,300 out of the Rs. 6,000 which the plaintiff had agreed to advance to him, Rs. 700 having been re-paid by defendant No. 1 to plaintiff soon after the execution of the deed of agreement. On an objection being raised by the plaintiff's Pleader that the allegations of defendant No. 2 as to the acts that disentitled the plaintiff to relief against him were too vague and indefinite, defendant No. 2's Pleader put in a detailed written statement in which were set out the various grounds on which

defendant No. 2 claimed to be discharged from his contract of suretyship. Of these, the principal grounds, which it is necessary to notice for the purpose of this decision, were as follows:—

(1). The plaintiff had deposited in Bank only Rs. 5,300 instead of Rs. 6,000 as stipulated for in the deed of agreement, deducting a sum of Rs. 700 said to have been due to him from Wingrove on account of previous debts. This was a breach of the agreement between the parties, and defendant No. 2 was not liable to the extent of Rs. 700.

(2). According to the agreement, the amount of all the cheques to be received from the Railway authorities had to be deposited in the Bank to the credit of the joint account. In contravention of this stipulation, however, Wingrove had received from the Railway and converted to his own use a cheque for Rs. 2,200. The plaintiff did not take the necessary steps to prevent this being done and defendant No. 2's rights had thereby been prejudiced.

(3). A quantity of concrete which, was stored at the lime kiln in the Ambala Cantonment and which had been hypothecated with the plaintiff by Wingrove, had been allowed by the plaintiff to be sold by Wingrove contrary to the terms of the agreement.

(4). Mrs. Wingrove had got attached a sum of Rs. 500 out of the amount of the last cheque received from the Railway authorities by Wingrove, and an objection to that attachment had been filed in the Divisional Court, Ambala, by the plaintiff and defendant No. 2. The plaintiff, however, did not appear in Court to support his objection, and the Divisional Judge threw out the objection on the ground that defendant No. 2 had no *locus standi* to object to the attachment in question; through plaintiff's negligence, therefore, defendant No. 2 suffered to the extent of Rs. 500.

(5). Udhe Ram and Chhajju Mal, who had a decree against Wingrove, had realized Rs. 519-10-1 out of the security deposit of Wingrove which was lying in the office of the Examiner of Accounts Lahore, in Wirgrove's name, and the plaintiff had taken no steps to prevent this being done and to realize the money himself, though the said deposit had been hypothecated to the plaintiff under the agreement.

Upon the pleadings of the parties, the District Judge, framed six issues (page 28 of the record) which need not all be noticed at this stage. The most important of those issues is issue No. 2 with reference to which the plaintiff's suit has been dismissed and on which the decision of the present appeal turns. It runs as follows:—

Has plaintiff in any way, and, if so, in what way, acted contrary to the terms of the agreement? And is he, therefore, disentitled to relief against defendant No. 2? On this issue, the District Judge has held that plaintiff had done certain acts which were inconsistent with the rights of defendant No. 2 and had also omitted to do certain acts which his duty to defendant No. 2 required him to do, with the result that the eventual remedy of defendant No. 2 against Wingrove had been thereby impaired; and that that being the case, under section 139 of the Contract Act, defendant No. 2 was discharged. The plaintiff's suit has, therefore, been decreed *ex parte* against Wingrove, but has been dismissed against defendant No. 2; though, however, dimissing the suit against him, the District Judge has not allowed defendant No. 2 his costs, on the grounds that during the trial of the suit, his objection that plaintiff's brother, Devi Charan Singh, should be impleaded as a co-defendant was frivolous and that the objection thus raised had considerably delayed the decision of the case.

The plaintiff has preferred an appeal to this Court from the decree dismissing his suit against Natha Singh, defendant No. 2, while the latter has filed cross-objections impuguing that part of the decree which disallows him costs of the suit. Although several questions of a more or less controversial character have been discussed before us in the course of the argument advanced by the appellant's Pleader, it is only necessary to notice such of them as bear directly upon the question of the alleged discharge of the surety under the provisions of section 139 of the Contract Act. We may at once say that after giving every weight to the contentions raised by the learned Pleader, we think

that the view taken by the District Judge is correct, namely, that by reason of certain acts and omissions on the part of the plaintiff, the eventual remedy of defendant No. 2 against the principal debtor, Wingrove, was substantially impaired, and that, therefore, under section 139 of the Contract Act defendant No. 2 was discharged.

The material clauses of the written agreement, dated the 5th September 1903, on which the plaintiff's suit is based, and which bear more or less directly upon the argument advanced before us, are as follows:—

* * * * * *

"2. That all cheques or money, which are now or may hereafter become due or payable to the said Mr. A. C. Wingrove under the above contract, shall be paid into the credit of the said joint account with the Alliance Bank of Simla, Limited, Ambala.

"3. That all the cheques drawn against the said joint account with the said Bank shall be signed jointly by the said Mr. A. C. Wingrove and the said Sardar Tulsa Singh, and neither party is at liberty to withdraw from the said Bank any moneys standing at the credit of the joint account without the consent of the other party.

"4. That the said Mr. A. C. Wingrove shall write to the Examiner of Accounts, North-Western Railway, Lahore, requesting him to pay direct to the Agent, Alliance Bank of Simla, Limited, Ambala, all moneys that may be or become due to the said Mr. A. C. Wingrove under the above-mentioned agreement, and further the said Mr. A. C. Wingorve hereby agrees and undertakes not to write or give any other instructions as regards the payments due to him by the Examiner of Accounts, North-Western Railway, Lahore, during the continuance of this agreement between the parties hereto or until such time as the full amount of Rs. 6,000 together with a further sum of Rs. 3,500 (making a total of Rs. 9,500) has been fully re-paid to the said Sardar Tulsa Singh.

"5 That the said Mr. A. C. Wingrove also agrees to endorse all his bills for the supply of his stone ballast to the North-Western Railway as payable to the Agent, Alliance Bank of Simla, Limited, Ambala, during the continuance of this agreement.

"6. That as further security for the payment to Sardar Tulsa Singh of the amounts mentioned in paragraphs 4 and 7 of this agreement, the said Mr. A. C. Wingrove hereby assigns to the said Sardar Tulsa Singh all his interest and rights in all and every stack of stone ballast which are now, or may hereafter be, belonging to the said Mr. A. C. Wingrove at Rupar, Doraha and Patiala or in transit to Doraha or Patiala and also in his, the said Mr. A. C. Wingrove's, stacks of lime and kankar in Ambala and all cheques and security deposit due to the said Mr. A. C. Wingrove from the North-Western Railway and Patiala State and the said Mr. Wingrove further agrees not to in any way dispose of or mortgage such said stacks without the consent of the said Sardar Tulsa Singh.

"7. That in consideration of the said Sardar Tulsa Singh opening with the said Bank the cash credit of Rs. 6,000 as mentioned in the preamble of this agreement, the said Mr. A. C. Wingrove hereby agrees to pay to the said Sardar Tulsa Singh the sum of Rs. 3,500 (rupees three thousand five hundred) as a bonus, or remuneration, this said sum of Rs. 3,500 to cover all and every charges for interest or other charges incurred by the said Sardar Tulsa Singh and to be payable to the said Sardar Tulsa Singh out of the profits accruing to the said Mr. A. C. Wingrove from his above-mentioned contracts with the North-Western Railway, etc.; and further it is agreed that out of each and every payment received from the North-Western Railway and Patiala State, a sum of not less than Rs. 500 shall be paid to the said Sardar Tulsa Singh, such payment to go towards liquidation of the cash credit of Rs. 6,000 and the bonus of Rs. 3,500.

"8. That the said Mr. A. C. Wingrove shall not, without the permission of the said Sardar Tulsa Singh, draw from the monies of the business a greater sum than Rs. 500 a month for his own personal use and expenses and for monies required for the purposes of the business it is agreed that the said Mr. A. C. Wingrove shall intimate

to the said Sardar Tulsa Singh in writing, through either Babu Natha Singh or Babu Devi Charn Singh the object for which the monies are required.

"9. * * * * * *

"10. That as a further security for the cash credit opened with the Bank as hereinbefore stated, Babu Natha Singh, son of the late Bhai Hari Singh of Ambala city and of Patiala, also becomes a party to this agreement inasmuch as that he, the said Babu Natha Singh, bereby guarantees to the said Sardar Tulsa Singh the re-payment by the said Mr. A. C. Wingrove to the said Sardar Tulsa Singh of the said sum of Rs. 6,000 and as security therefor, he, the said Babu Natha Singh, grants and assigns to the said Sardar Tulsa Singh a lien to the extent of Rs. 6,000 on his, the said Babu Natha Singh's, properties situated in Ambala city and Patiala State as per details below:— * * * "

Although Natha Singh, defendant No. 2, signed the above agreement on the 23rd September 1903, it is ccmmon ground on both sides that the operation of the agreement was retrospective as regards his liabilities as surety and must be considered to have commenced on the 5th September 1903, when the said agreement was signed by the principal debtor, Wingrove. It is, we think, equally clear that if the surety's liabilities came into existence on the 5th September 1903, his rights as surety also vested in him as from the same date, and for the purposes of this case, the agreement must be considered to have been signed both by the principal debtor and by the surety on the 5th September 1903. The alleged acts and omissions of the plaintiff which are relied upon by defendant No. 2 as having resulted in impairing his eventual remedy against Wingrove and by reason of which he claims to be discharged from the contract of suretyship have already been set out above and it now remains to consider those alleged acts and omissions in detail in order to see whether they fall within the purview of section 139 of the Contract Act so that by reason of those acts and omissions defendant No. 2 is altogether discharged from liability.

(1). Defendant No. 2's first ground of complaint is that though the plaintiff had agreed to advance to Wingrove a loan of Rs. 6,000 for the purpose of carrying on the Railway contract, as a matter of fact he only advanced him a sum of Rs. 5,300, having taken from him a cheque for Rs. 700 in his own name in alleged payment of previous debts said to have been due by Wingrove to himself (plaintiff). A reference to the Cash Credit Account, Exhibit D. W. I. opened by the plaintiff and Wingrove with the Alliance Bank of Simla (page 10 of the record), shows that the account commenced on the 5th September 1903 by payment into the Bank of a sum of Rs. 7,550. Of this amount Rs. 3,550 was deposited by the plaintiff and Rs. 4,000 by Wingrove (see evidence of Kali Charn, page 32 of the record and of plaintiff himself—page 39). We further find that on the 7th September, a cheque for Rs. 700 drawn in favour of the plaintiff was cashed by him. For defendant No. 2, it has been contended that this sum of Rs. 700, was paid by Wingrove to the plaintiff himself in liquidation of a private debt which had nothing whatever to do with the Railway contract, and that as the plaintiff drew this sum against the joint account in contravention of the provisions of the written agreement, dated the 5th September 1903, he did an act inconsistent with the rights of the surety and that he cannot, therefore, hold the surety liable under that agreement at least to the extent of this amount. For the plaintiff, it has been argued that on the 5th September, Wingrove paid in Rs. 4,000 out of his own pocket, that this amount remained his own private property notwithstanding that it was treated as part of the joint account, that the sum of Rs. 700 aforesaid must be considered to have been drawn against the said amount of Rs. 4,000, and that, therefore, the rights of the surety under the written agreement were in no way jeopardised. We find ourselves unable to accept this argument. Under clause 2 of the agreement, Wingrove was bound to pay into the Bank to the credit of the joint account all monies which were due or payable to him under the Railway contract on the 5th September 1903; and a reference to the evidence of Mathra Das, (D. W. No. 5 p. 32 of the record), shows that on the 21st August 1903, a sum of Rs. 4,606 was found due by the Railway authorities to Wingrove on account of his stone ballast

contract, and that on that date, a bill for that amount was sent to the Examiner for payment. It is reasonable to suppose that this bill was duly paid and that it was Rs. 4,000 thus received by Wingrove from the Railway authorities that was deposited by him in the Alliance Bank of Simla on the 5th September 1903 as part of the joint account in pursuance of the 2nd clause of the agreement aforesaid. This sum of Rs. 4,000, therefore, ceased to be his own exclusive property as soon as it was deposited in the sense that he could not deal with it except for the purposes of carrying on the Railway contract; and it is quite clear that the sum of Rs. 700 drawn by cheque on the 7th September against the joint account was so much money paid to the plaintiff as private creditor of Wingrove in direct contravention of the letter and spirit of the deed of agreement. Plaintiff himself was a party to this breach of the agreement, and as he thus participated in the conversion of part of the joint funds to purposes unconnected with the Railway contract, he certainly did an act which was inconsistent with the rights of defendant No. 2 as surety. It has been urged for the plaintiff that of this sum of Rs. 700, Rs. 200 was due by defendant No. 2 himself to the plaintiff on a promissory-note, that that promissory-note was cancelled by this payment, and that, therefore, defendant No. 2, being aware of this payment and having benefited by it, is precluded from raising the objection that the act of the plaintiff in accepting the payment of Rs. 700 from Wingrove was inconsistent with his rights as surety. But there is no independent evidence on the record of Rs. 200 being due on a promissory-note by defendant No. 2 to the plaintiff, the latter's evidence on this point (page 40 of the record) being flatly contradicted by that of the former (page 44). We may note here that it was not until the 24th September 1903 that the plaintiff paid into the Bank the balance Rs. 2,450, which, together with the sum of Rs. 3,550 which he had paid in on the 5th September, made up the total amount of the loan, Rs. 6,000. As, however, between the 5th and the 24th September, the plaintiff had already drawn Rs. 700 from the Bank against the joint account in liquidation of a private debt due by Wingrove, it must be held that the plaintiff paid in only Rs. 5,300 and not the full amount of Rs. 6,000 which, under the agreement, he was bound to deposit in the Bank. We hold, therefore, with reference to the item of Rs. 700 that the objection of defendant No. 2 has been fully established.

(2). The facts bearing upon the second objection raised by defendant No. 2 are these:—

Mathra Das (D. W. No. 5) proves that the last bill submitted by Wingrove in respect of his contract was for Rs. 2,687-12-2. This bill was sent to the Examiner, Public Works Accounts, on the 3rd February 1904. Of the amount due on this bill, a sum of Rs. 500 was attached by order of Court for payment to Mrs. Wingrove, wife of Wingrove, (which attachment forms the subject of the fourth objection raised by defendant No. 2); and the balance, Rs. 2,187-12-2, was received by Wingrove himself but was never paid into the Bank to the credit of the joint account. Wingrove, however, sent Rs. 500 out of this amount in his hands to the plaintiff in pursuance of the stipulations contained in the 7th clause of the agreement, and the plaintiff accepted this sum. He never questioned Wingrove as to what amount of money he had received from the Railway authorities, nor did he take any steps to compel him to pay the balance in his possession (Rs. 1,687) into the Bank to the credit of the joint account, as provided by clause 2 of the agreement. The plaintiff, when examined as a witness, made the following statement with reference to this item (page 39 of the record):—

"Mr. Wingrove got a cheque in February 1904 for Rs. 2,600 for his Railway contract and it did not go into the account but that is the only instance I know in which he got money for the Railway contract and did not credit it to our joint account. He did not pay me any of this Rs. 2,600 directly, but Natha Singh, defendant, brought me Rs. 500 saying that it was part of this, Rs. 2,600 and was my part of this Rs. 2,600: Wingrove took the cheque for Rs. 2,600 from the Court of the District Judge, Ambala, and promised me to pay it into our joint account. As he went to Patiala, I did not take any steps to see that he did put this money in. This Exhibit D2 is the receipt I gave for this sum of Rs. 500."

Thus, from the plaintiff's own evidence, it is clear that he was aware of Wingrove having received a sum of Rs. 2,600 from the Railway authorities on account of his contract, that he (plaintiff) himself received Rs. 500 out of the said amount from Wingrove in pursuance of the agreement, but that he took no steps whatsoever to see that Wingrove paid the balance into the Bank to the credit of the joint account as he was bound to do under the said agreement. It cannot be seriously contended that this omission on the part of the plaintiff to enforce the terms of the agreement did not amount to gross negligence in the performance of his duty to the surety; and it is clear to our minds that by this negligence Wingrove was enabled to misappropriate the amount of Rs. 1,687, which was the balance remaining in his hands after Rs. 500 had been attached by Court at the instance of Mrs. Wingrove. The surety's rights were thus clearly prejudiced and his eventual remedy against Wingrove was certainly impaired. For the plaintiff it has been argued that after Wingrove had received direct from the Railway authorities Rs. 2,187 and had himself misappropriated the sum of Rs. 1,627 as aforesaid, the plaintiff could only protect his own rights and those of the surety by bringing a suit against him at once; and that all that he was, therefore, guilty of, was that he omitted to sue Wingrove immediately after his misappropriating the amount in question. Such omission, however, on the part of the plaintiff, it has been urged, does not, in the absence of any provisions of guarantee to the contrary, discharge the surety (section 137 of the Contract Act) and that the surety cannot thus claim to be discharged from the contract of suretyship. To this it is sufficient to reply that the complaint of defendant No. 2 against the plaintiff is, not that the plaintiff forebore to sue Wingrove in time to compel him to disgorge the amount which he had misappropriated, but that, owing to gross negligence on the part of the plaintiff, Wingrove did not carry out clauses 2 and 4 of the agreement and that when the plaintiff became aware of a cheque for Rs. 2,600 having been received by Wingrove from the Railway authorities, he did not take the very elementary precaution of calling upon him before receiving the sum of Rs. 500 for his own (plaintiff's) personal benefit to deposit the balance at once in the Bank, thus effectually preventing all chance of his misappropriating the money. We think that this complaint is well-founded, and we have no hesitation in holding that it was through the plaintiff's gross carelessness that Wingrove was enabled to receive and misappropriate the said sum of Rs. 1,687. Section 139 of the Contract Act clearly applies, in our opinion, to negligence of this kind on the part of the creditor, and the second objection of defendant No. 2 must, therefore, be held to have been established.

(3). As regards the third objection, the evidence of Sorabji (page 36) conclusively proves, that after the Railway contract had come to an end, a quantity of *kankar* belonging to Wingrove was purchased by the witness for Rs. 384, and that the money was taken credit for by Sorabji in part payment of a debt due to him by Wingrove. The *kankar* in question had been hypothecated by Wingrove to the plaintiff under clause 6 of the agreement, and immediately on the termination of the Railway contract, the plaintiff ought to have taken necessary action to sell this *kankar* and to receive its price in liquidation of part of the debt due to himself. The plaintiff admits that he knew about the sale of this *kankar* by Wingrove and yet he took no steps whatever to protect his rights and those of the surety.

(4). Defendant No. 2's position is equally clear with respect to the fourth objection. As has been stated above, Mrs. Wingrove got a sum of Rs. 500 attached out of the amount of the last cheque for Rs 2,687 received by Wingrove from the Railway authorities. An objection to that attachment was filed in Court by the plaintiff and defendant No. 2, but the plaintiff did not appear to prosecute the case, and the Court decided that defendant No. 2 had no *locus standi* to object to the attachment. The plaintiff admits all this; and yet his Pleader argues that the fact that the plaintiff did not appear in Court in support of his objection is perfectly immaterial and that defendant No. 2's rights as surety have not in any way been jeopardised in reference to the sum of Rs. 500 which Mrs. Wingrove had appropriated. We find ourselves unable to accept this extraordinary argument; for it is clear to our minds that *qua* this sum of Rs. 500, the plaintiff deliberately flung to the winds his own rights under the agreement and omitted

to do an act which his obvious duty to defendant No. 2 required him to do. He is not, therefore, entitled to call upon defendant No. 2 to carry out the contract of suretyship, seeing that the latter's remedy against the principal debtor has been impaired by plaintiff's gross negligence.

(5) As regards the fifth objection raised by defendant No. 2, namely that Udhe Ram and Chajju Mal had, owing to plaintiff's negligence, realised Rs. 519-10-1 out of the security deposit of Wingrove and that defendant No. 2 was not liable to the extent of that amount, we think that this objection must be held to have been made out. Under clause 6 of the agreement, the plaintiff had a lien on the security deposit of Wingrove, the plaintiff knew that Wingrove's contract with the Railway had come to an end in March 1904, and should, therefore, have taken steps at once to enforce his lien on the said security in the same way as Udhe Ram and Chajju Mal had managed to execute their decree against the same. He not only did not endavour to enforce his lien on the said security deposit but he preserved extraordinary silence and made no objection to Wingrove's decree-holders attaching it and realising Rs. 519 out of it. Such conduct on the part of the plaintiff clearly falls within the purview of section 139 of the Contract Act.

It follows from the above findings that in this case the plaintiff has done acts which were inconsistent with the rights of defendant No. 2 as surety and has also omitted to do certain acts which his duty to defendant No. 2 required him to do; and as a result of those acts and omissions, defendant No. 2 has suffered to the extent of Rs. 3,790 (Rs. 700 plus Rs. 1,687 plus Rs. 384 plus Rs. 519 plus Rs 500) inasmuch as to this extent his eventual remedy against the principal debtor has been impaired. The plaintiff admits in his plaint that he had received Rs. 1,500 from Wingrove, and since under clause 7 of the agreement, he was entitled to receive by way of bonus a sum of Rs. 3,500 only out of the profits accruing to Wingrove from the Railway contract, and as there is no evidence on the record that any such profits had accrued to Wingrove, the plaintiff clearly is not entitled to retain the said sum of Rs. 1,500 over and above the Rs. 6,000 sued for as the principal debt. He must, therefore, give credit to defendant No. 2 for this sum of Rs. 1,500, and after giving him this credit, he is only entitled to sue defendant No. 2, if at all, for a sum of Rs. 4,500 only. But, as we have seen above, defendant No 2 has suffered by reason of the acts and omissions of the plaintiff, which amount to gross negligence on his part, to the extent of Rs. 3,790; in other words, the eventual remedy of defendant No. 2 against the principal debtor was very substantially impaired. That being the case, under section 139 of the Contract Act, defendant No. 2 must be held to have been discharged.

We accordingly maintain the decree of the lower Court and dismiss the appeal.

As regards the cross-objection filed by defendant No. 2, we must hold, in view of the findings recorded above, that the plaintiff's suit against him was wholly unjustified, and the District Judge was not, therefore, right in disallowing costs to defendant No. 2. We, therefore, direct that the plaintiff should bear defendant No. 2's costs both in the lower Court and in this Court.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2632 OF 1908.

May 2, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

JARIP KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DURFA BEWA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 85 cl. (2)—Sub-letting by raiyat—Permanent lease—Registration effected in contravention of law—Effect of lease.

A sub-lease by a *raiyat* purporting to create a permanent tenancy, that is, to create a term exceeding nine years, even if registered in breach of section 85 clause (2) of the Bengal Tenancy Act, must be treated as though it was not registered, for it was a registration in contravention of law. The document, therefore, is inadmissible in evidence, and cannot affect the holding.

Manik Borai v. Bani Charan Mandal, 10 Ind. Cas. 469; 13 C. L. J. 649, referred to and distinguished.

Appeal from the decree of the Sub-Judge of Pabna and Bogra, dated August 24th, 1908, modifying that of the first Munsif of Pabna, dated December 23rd, 1907.

JARIP KHAN *v.* DURFA BEWA.

Babu *Brojo Lal Chakravarti*, for the Appellants.

Babus *Mohendra Nath Roy*, *Shyama Charan Roy* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a suit whereby the plaintiff prays that his *jote* and *dar-jote* rights may be declared to the lands in suit and that a decree for *khas* possession may be passed in his favour.

The plaintiff in this case does not rest his claim on any prior possession that has been established, but solely upon a document. That document is a sub-lease by a *raiyat* purporting to create a permanent tenancy. It, therefore, purports to create a term exceeding nine years. Section 85 sub-section (2) of the Bengal Tenancy Act provides that "a sub-lease by a *raiyat* shall not be admitted to registration, if it purports to create a term exceeding nine years." The duty, therefore, incumbent on the Registrar, when such a document is presented to him. is not to admit it to registration. This duty is brought pointedly to the notice of the Registrar by a rule of the Registration Department which prescribes that when a sub-lease executed by a *raiyat* purporting to create a term exceeding nine years is presented for registration, it shall be returned at once with a note to the following effect, recorded on its back, *viz.*, not admissible under sub section (2) section 85 of the Bengal Tenancy Act (VIII of 1885). Therefore, when this document, on which the plaintiff rests his claim to succeed in this suit, was presented, there can be no doubt as to what should have been done. Had the law been obeyed, the document would not have been registered. If it has not been registered, then under section 49 of the Registration Act, not only would it not affect any immoveable property comprised therein but it could not be received as evidence of any transaction affecting such property; so that for the purpose of this litigation, the document, if not registered, would have been as though it did not exist. Does it then make any difference that in contravention of the law it was registered? I think not. To hold any other view would mean this that if the Registrar could be deceived or induced into a breach of his duty, rights would be created which would otherwise not exist, and that cannot have been the purpose of the Legislature. Therefore, it appears to me that this document, though purporting to be registered in breach of section 85 of the Bengal Tenancy Act, in fact, must be treated as though it was not registered, for it was a registration in contravention of law. The result then is that we have no proof of this document, and as a consequence no proof of the title on which the plaintiff rests. More than that, as I have already pointed out, the plaintiff cannot fall back on any prior possession as tenant or otherwise, so as to attract in his favour that class of decisions of which the one, *Lala Surabh Narain* v. *Catherine Sophia* (1), is a type. Nor do I think that we can accept other evidence of this grant without contravening the provisions of section 91 of the Evidence Act, and, in fact, I do not understand that there has been in this case any evidence of the grant tendered other than the document which was improperly registered.

It has been brought to our notice that there are a number of cases in which the provisions of section 85 have come under consideration: but in none has this particular point been the actual basis of a decision. In this case, we have had the advantage of clear and pointed arguments and they appear to me to out-weigh the *dicta* brought to our notice. There is one case which calls for particular notice, the case of *Manik Borai* v. *Bani Charan Mondal* (2), which at the first blush presents some resemblance to the present, but its actual circumstances did not call for or elicit a decision on the precise point with which we are concerned. We have examined the record, and find that what was actually decided is to be found at page 653, where the Court pronounced its final conclusion in these words: "We must, therefore, hold that in the case before us, the suit ought not to have been dismissed on the ground that the plaintiff had acquired no valid title to the property because even though the instrument under which he claims be inoperative under section 85 of the Bengal Tenancy Act, he had a subsisting interest

(1) 1 C. W. N. 248.
(2) 10 Ind. Cas. 469; 13 C. L. J. 649.

when the action was commenced." Had it there been actually decided that section 85 clause (2) had the limited operation for which the appellant contends before us, we should, of course, have followed that decision. But our view rests upon this, that whatever may have been the intention of the Legislature, it saw fit to carry out the particular purposes indicated in sub-section (2) by a provision which must of necessity have been of universal application. In forbidding registration, it forbade for all purposes the production of that document as evidence, and withheld from it any ability to affect immoveable property.

The only other point which has been urged before us is that the Court of appeal below has erred in holding that the recognition of the plaintiff by the superior landlord as a tenant was of no avail to him. That is a matter on which both Courts are against the present plaintiff-appellant, and, in my opinion, rightly so. On the facts, I think the learned Judge of the lower Appellate Court decided rightly when he said that the fact that the plaintiff was recognized by the superior landlord as a tenant was of no avail to him.

The result, then, is that, in my opinion, the decree of the lower Appellate Court must be confirmed with costs.

N. CHATTERJEA, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 458 OF 1911.

December 21, 1911.

Present:—Mr. Justice Johnstone.

NARAYAN SINGH—DEFENDANT—PETITIONER

versus

LAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings—Compromise during suit—Court's duty to inquire if parties are bound by compromise set up by one of them—Decision on pleadings of parties.

The plaintiff sued the defendant for a certain sum, basing his claim on a balance of account struck by the latter. The claim was dismissed as not proved. In the course of the proceedings, the defendant put in applications stating that under pressure of people in the village, a certain compromise was arrived at between the parties. On appeal, the Divisional Judge, taking into consideration defendant's applications and without going into the merits of the case, decreed the claim for the sum settled by the said compromise:

Held, that the Appellate Court should have inquired as to whether the compromise was binding between the parties, and if the compromise was not binding, whether the plaintiff had proved his case on the merits.

Petition, under section 70(*a*) of Act XXV of 1899, for revision of the order of the Divisional Judge, Hissar Division, dated the 19th January 1911, modifying that of the District Judge, Hissar, dated the 27th October 1910, dismissing the claim.

Mr. *Beni Parshad Khosla*, for the Petitioner.

Mr. *Devi Dial*, for the Respondents.

JUDGMENT.—In this case, Kahn Singh, plaintiff, sued Narain Singh, defendant, for Rs. 999-14 principal and interest. He alleged that the defendant had had dealings with him for a long time and in the end, on 12th November 1905, struck a balance for Rs. 804-13 in plaintiff's favour, affixing a one anna stamp and his thumb impression and agreeing to pay interest at Re. 1 per cent. per mensem. Defendant denied having ever struck the balance. He admitted that he had dealings with the plaintiff, but stated that 10 years ago the account with the plaintiff was settled and it was decided that the debt due to him (plaintiff) would be paid by his brother. The first Court considered the evidence in the case and had the so-called thumb impression of the defendant examined by the F. P. B. of Phillour, whose report was to the effect that the thumb impression was so blurred that nothing could be made of it. On a review of the whole evidence, that Court came to the conclusion that the plaintiff had not proved his case and so dismissed the suit with costs.

In the course of the proceedings in the first Court, defendant had put in an application, dated the 18th May 1910, and another application, dated the 31st May 1910, in which he stated that acting under pressure of people in the village he had agreed to settle the claim by paying to plaintiff Rs. 200 in cash and by mortgaging with him 12 *bighas* of land for Rs. 300 thus admitting that he owed Rs. 500. When the case came up before the Divisional Judge on appeal, that Judge agreed with the Court below that the thumb impression was undecipherable, but that the evidence generally for the plaintiff was not interested or partial and that the claim was not a false one. Then taking up the two applications by

the defendant aforesaid, the Divisional Judge came to the conclusion that the parties were bound by the compromise aforesaid and that defendant was liable for Rs 500. He, therefore, gave the plaintiff a decree for Rs. 500, parties to bear their own costs. Defendant now comes up on the revision side and I have admitted the petition under clause (*a*). It seems to me that the lower Appellate Court has not dealt with the case correctly. There were really two issues before that Court.

(1). Was there a binding compromise between the parties? And

(2). If not, on the merits has plaintiff proved his case?

Now, as to the second issue, the lower Appellate Court has come to no definite finding. It has simply stated, in a general way, that the evidence for the plaintiff does not appear to it to be interested or partial, but it has not definitely found whether defendant really struck that balance or not. It seems to have gone no further than this that the defendant certainly did owe some money to the plaintiff at some time and that he has not proved that he ever paid it up. But this is not sufficient, for plaintiff clearly based his case upon the acknowledgment by defendant and the balance aforesaid. Further, as regards the first of these two issues, the Court has neither accepted the compromise nor rejected it. If it had accepted the compromise, it should have given a decree for Rs. 200 and 12 *bighas* of land in mortgage, but it gave a decree for Rs. 500 cash. It is neither a decision in accordance with the compromise nor on the merits of the case. I, therefore, set aside the decree of the Court below, and remand the case for re-trial of the appeal on the two issues stated above.

Stamp on this revision will be refunded and other costs will be costs in the case.

Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2392 OF 1909.

April 11, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Caruduff.

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—DEFENDANT—APPELLANT

versus

AHMED ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Decree for rent obtained before Bengal Tenancy Act—Execution after Act came into force—Rights of parties to be determined under what law—Purchase by zemindar *of tenure—No annulment of under-tenure—Right of under-tenure holder—Bengal Tenancy Act (VIII of* 1885*), s.* 167.

The legal effect of a transaction cannot be determined in all cases with reference to the law as understood or misunderstood at the time the transaction takes place.

Abdul Aziz Khan v. *Appayasami Naicker*, 31 I. A. 1; 27 M. 131; 8 C. W. N. 186 and *Khoda Baksh* v. *Sader Pramanik*, 10 Ind. Cas. 417; 14 C.L.J. 620, referred to.

A rent-decree was obtained before the Bengal Tenancy Act came into force; but the execution sale under the decree took place after the Act had come into operation:

Held, that the rights of the parties have to be determined with reference to the provisions of the Bengal Tenancy Act, and not to those of the Bengal Rent Act VIII of 1869 B. C.

Therefore, where the *zemindar* in the execution sale purchased a tenure but did not annul an under-tenure in the manner prescribed by section 167 of the Bengal Tenancy Act, which procedure it was obligatory on him to follow:

Held, that the *zemindar* did not acquire any valid title as against the under-tenure holder.

Appeal from the decree of the second Sub-Judge of Tipperah, dated June 28th, 1909, affirming that of the first Munsif of Comillah, dated April 22nd, 1908.

Babu *Tarak Chandra Chakravarti*, for the Appellant.

Babu *D. L. Kastgir*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the first defendant in an action for declaration of title to immoveable property and recovery of possession thereof. The plaintiffs-respondents allege that they are under-tenure-holders and have been deprived of the lands comprised in their tenancy by the appellant, the Maharajah of Tipperah, who obtained a decree for rent against the superior tenure-holder on the 29th February 1884 and in execution thereof purchased the properties on the 6th February 1888. The Courts below have found in favour of the plaintiffs upon the question of the existence

of the under-tenure. They have also found that it was necessary for the defendant to annul the under-tenure in the manner prescribed by the Bengal Tenancy Act and that he has not complied with the requirements of the statute. The sole point in controversy thus is, whether it was obligatory upon the defendant to follow the provisions of the Bengal Tenancy Act, and whether by reason of his failure to do so, the title of the plaintiffs remains unaffected. It has not been and cannot be disputed, in view of the decision of the Full Bench in *Titu Bibi* v. *Mohesh Chunder* (1), that if the sale be regarded as a sale under Act VIII of 1869 B. C., the under-tenure was voidable at the election of the auction-purchaser and no formal notice was necessary as required by section 167 of the Bengal Tenancy Act. The argument before us has, therefore, centred round the question whether the sale was under Act VIII of 1869 B. C. or under Act VIII of 1885.

The learned Vakil for the appellant has contended that although the execution sale took place on the 6th February 1888, the rights of the parties must be deemed to be regulated by the provisions of the Bengal Rent Act (VIII of 1869 B. C.), which was at the time generally, though erroneously, assumed to govern sales in execution of decrees obtained, as in the case before us, before the Bengal Tenancy Act came into force on the 1st November 1885. Reference has been made to the cases of *Lal Mohun Mookerjee* v. *Jogendra Chunder Roy* (2) and *Uzir Ali* v. *Ram Komal Shaha* (3), which were subsequently overruled by the decision of the Full Court in the case of *Jogodanund Singh* v. *Amrita Lal* (4), to show that when the appellant made his purchase in 1888, the provisions of the Statute of 1869 were understood to be applicable to proceedings in execution of decrees made before the commencement of the Bengal Tenancy Act. Reference has further been made to the case of *Abdul Aziz Khan* v. *Appayasami Naicker* (5), to show that the rights of the parties ought to be determined, not with reference to the true construction of the law but according to the erroneous interpretation prevailing at the time. In our opinion, there is no foundation for this contention. Let it be assumed that in 1888 it was erroneously supposed that a sale in execution of a rent-decree obtained before the 1st November 1885 was governed in its incidents according to the provisions of the Statute of 1869. It does not follow by any means that the defendant can resist the claim of the plaintiffs on the ground that he was under an erroneous impression in 1888 and did not take steps to have the notice under section 167 of the Bengal Tenancy Act of 1885 served within the time prescribed thereby. The decision of the Judicial Committee in *Abdul Aziz Khan* v. *Appayasami Naicker* (5) is, as explained in the case of *Khoda Baksh* v. *Sader Pramanik* (6), of no assistance to the appellant. That case is not an authority for the broad proposition that the legal effect of a transaction must be determined in all cases with reference to the law as understood or misunderstood at the time the transaction takes place. In fact, such a view is opposed to the elementary doctrine that judicial decisions merely expound the law and do not make new laws. We must take it, therefore, that the rights of the parties in this case have to be determined with reference to the provisions of the Bengal Tenancy Act. If that position is adopted, there is no room for controversy that the defendant has not acquired any valid title as against the plaintiffs. The notice served under section 167 was admittedly ineffectual to annul the interest of the plaintiffs. It is also conceded that no question of limitation arises, because it has been found by the Courts below that the defendant has not been in occupation for more than twelve years.

The result, therefore, is that the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 9 C. 683.
(2) 14 C. 636.
(3) 15 C. 383.
(4) 22 C. 767.
(5) 31 I. A. 1; 27 M. 131; 8 C. W. N. 186.
(6) 10 Ind. Cas. 417; 14 C. L. J. 620.

S. N. DAR, B. A. LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

KUNJA BHUNIYA *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 16 OF 1912.
March 13, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Sharf-ud-din.
KUNJA BHUNIYA AND ANOTHER—ACCUSED—APPELLANTS
versus
EMPEROR—OPPISITE PARTY.

Penal Code (Act XLV of 1860), *ss.* 147, 323, 325—*Right of private defence—Exceeding the right—Unlawful assembly—Acquittal by Court of Session under section* 325, *Indian Penal Code—Conviction by High Court under section* 323, *whether lawful.*

The fact of exceeding the right of private defence, which a man has, cannot make him a member of an unlawful assembly, and he can only be convicted and punished for the individual act which he himself has done in excess of the right of private defence.

Where the accused have been acquitted by the Sessions Judge of a charge under section 325, Indian Penal Code, the High Court can convict them under section 323.

Appeal against the order of the Sessions Judge of Midnapur, convicting the appellants under section 147, Indian Penal Code, and sentencing them to two years' rigorous imprisonment, on December 18, 1911.

Mr. *Monier*, Counsel and Babu *Hirendra Nath Ganguly*, for the Appellants.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is an appeal from the judgment and sentence of the learned Sessions Judge of Midnapur, who, agreeing with both the assessors, found the appellants, Kunja Bhuniya and Panchu Bhuniya, guilty of the offence of rioting under section 147 and sentenced them to two years' rigorous imprisonment each. There were charges under section 304 read with ss. 149 and 325, Indian Penal Code, read with s. 34 in respect of the injuries caused to one Bariar, who met his death in consequence of the assault. The learned Judge, finding that the fracture of the skull which caused the death, was an isolated act committed by one Srinibash and finding also that the charge under section 304 read with s. 149 was withdrawn, did not take the assessors' opinion on it, but he says in his judgment, and we think erroneously, considering the findings which we shall surely have to come to, that the same remarks really apply to the charge under section 325 read with s. 34 as none of the contusions found on Bariar were severe.

Now what is really found in this case is that the accused party were justified in going to the land with the peon who had a warrant in execution of a Civil Court decree, and that they were interfered with and one of their number, the drummer, was pushed or struck with a *lathi* by the deceased Bariar, who had come out from his house with a party of his adherents and opposed the lawful delivery of possession. This is what gave the appellants' party the right of private defence, and the Judge seems to change his mind more than once as to whether they had this right of private defence or not, and he finally seems to come to the conclusion that the assembly became unlawful by reason of the accused retaliating when they were obstructed in the lawful exercise of their rights, and he then seems to think that they made an independent attack upon the deceased's party and that the deceased's party then also had a right of private defence. We confess, we are unable to follow the reasoning of the learned Judge. Once an attack was made on persons in the lawful exercise of their right over the property in question, they were undoubtedly entitled to the right of private defence; and the only question which can arise after that is, whether any members of the party individually exceeded that right. People, who were in the exercise of lawful rights, cannot be held to have been members of an unlawful assembly, nor can that assembly become unlawful by reason of their repelling the attack made upon them, by persons who had no right to obstruct them, nor by reason of their exceeding the lawful use of the right they had. We have laid down before, and we desire to lay down again, that the fact of exceeding the right of private defence which a man has cannot make him a member of an unlawful assembly and he can only be convicted and punished for the individual act which he himself has done in excess of the right of private defence; and it is because we think that these two appellants, Kunja and Panchu, did exceed that right in that they continued to beat Bariar with *lathis* after he had been struck down with a fractured skull and was lying in the water in a practically moribund condition that we have to consider the question of law which we just now pointed out had been wrongly decided by the learned Judge with reference to the charge under section 325 read with

section 34. That charge includes the charge under section 323, and notwithstanding the finding of acquittal under section 325, we can, on the whole case being open to us on the charges originally framed, convict and punish any of these appellants on any fact which may be found against him under section 323. What they have been acquitted of is causing fracture to the skull of Bariar, but they have not been acquitted of causing simple hurt in a cruel and unnecessary manner after the deceased had fallen and was incapable of rising. For this, we think they deserve a severe punishment; and, while we are obliged to set aside the conviction and sentence under section 147 as being illegal, we think that it is within our power and also distinctly our duty to convict the appellants under section 323.

We accordingly direct that the appellants, Kunja Bhuniya and Panchu Bhuniya, be rigorously imprisoned for one year under section 323, Indian Penal Code.

With this modification, the appeals are dismissed.

Appeals dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 372 A OF 1911.

January 15, 1912.

Present:—Mr. Justice Hartnoll.

EMPEROR—PROSECUTOR

versus

C. E. ELLIS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 106—Surety, liability of.

A surety, under section 106 of the Code of Criminal Procedure, cannot be made liable for an amount larger than the one for which the principal has executed the bond.

JUDGMENT.—Under section 106 of the Code of Criminal Procedure, the bond is to be executed with or without sureties. The principal executing the bond is the person ordered to do so. The surety or sureties stand security for the principal. It follows that the surety or sureties only stand security for the sum in the bond executed by the principal.

In the present case, the bond executed by the principal was for Rs. 100, but the surety stood security for Rs. 200. This was wrong. It is ordered and directed that, if the conditions of the bond be broken, only Rs. 100 shall be collected from the surety in the event of the principal sum not being recovered from C. E. Ellis.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION NO. 357 OF 1912.

April 18, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

MANIRUDDIN SARKAR—COMPLAINANT

versus

ABDUL RAUF—ACCUSED—OPPOSITE PARTY.

Revision—Practice—Matters not urged before first Court of revision, if can be urged in moving High Court—Criminal Procedure Code (Act V of 1898), s. 195, 203—Dismissal of complaint, without recording reasons, bad—Complaint against Police officer—Government Circular that offence should be inquired into by first class Magistrate—Meaning of Circular—If case be made over to another Magistrate, that Magistrate to have jurisdiction to decide case finally and order sanction for prosecution—Penal Code (Act XLV of 1860), s. 211—Sanction to prosecute.

Matters which are not urged before the first Court of revision, may be urged in moving the High Court.

It is an imperative provision of law that a Magistrate shall briefly record his reasons for dismissing a complaint. There can be no question of irregularity where the provisions of the statute are imperative and are directly disobeyed.

Where a Magistrate did not record any reason for dismissing a complaint but directed that the complainant should be prosecuted under section 211, Indian Penal Code:

Held, that the order of dismissal was without jurisdiction and altogether bad, that there must be a further inquiry and that there cannot be any proceeding under section 211, Indian Penal Code, until such further inquiry has been made.

No Circular of the Government can authorize Magistrates to infringe or in any way alter the statute law.

The Government Circular, directing that when a Police officer is charged with a serious offence the offence should be inquired into at once on the spot by a Magistrate of the first class, does not mean that the Sub-Divisional Magistrate may send the case to a Subordinate Magistrate to hold a local investigation under section 202, Criminal Procedure Code, and then afterwards treat it as if the matter was still on his file. What the Circular means is that an experienced first class Magistrate should himself hold the inquiry, and if he is to depute it to another first

class Magistrate, the latter officer should from the first have seizin of the case and should investigate it and decide it finally. An order for the prosecution of the complainant for bringing a false case should be given by this latter officer; the former officer who deputes the case to the latter officer has no power to grant the sanction.

Rule against the order of the Sub-Divisional Magistrate of Tangail, dated February 7th, 1912, directing the prosecution of the complainant under section 211, Indian Penal Code, an appeal from which order was dismissed by the Sessions Judge of Mymensingh, on February 29th, 1912.

Babu *Narendra Kumar Bose*, for the Petitioner.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Mymensingh to show cause why an order for further inquiry in this case should not be made and why the order for prosecution under section 211 of the Indian Penal Code passed should not be set aside on detailed grounds which, after considering the general allegations of the petitioner we ourselves formulated with some care. The learned Judge takes exception to the Rule on the ground, that these reasons, which, as we have said, we ourselves formulated with some care, are not grounds which were urged before him and this is an infringement of the spirit of the High Court's order that in revision, matters must first of all be urged before the first Court of revision. We do not think it is so. The matter was put before us by the learned Vakil in precisely the same general way in which it was put before the learned Judge, the principal arguments being, *firstly*, that on the evidence, further inquiry should be ordered, and, *secondly*, that even if such further inquiry were not ordered, the evidence did not justify the proceeding under section 211. We found that there were rather more intricate and important points involved in this matter; and if the petitioner takes advantage of the superior intelligence and legal training of the learned Vakils of this Court, we cannot see why he should be debarred from arguing even new matter in moving this Court. It may very well be that the learned Vakil in the *mofussil* neither knew nor appreciated the points which might be raised in a case of this kind.

Now, coming to the merits of the matter; the learned Magistrate admits that he is out of Court, inasmuch as he did not record any reasons for dismissing the complaint. It is an imperative provision of the law, which has been specially enacted in the later amendment of that law in section 203, Criminal Procedure Code. The law says that in such cases, he shall briefly record his reasons for dismissing the complaint. There can be no question of irregularity where the provisions of the statute are imperative and are directly disobeyed. We need not go into the other points inasmuch as if the order of dismissal is without jurisdiction and altogether bad, there must be a further inquiry and there cannot be any proceeding under section 211 until such further inquiry has been made.

Having regard to the very unfortunate results, which a certain Circular of the Government of Bengal which is constantly being referred to before us with regard to inquiries which ought to be made into the conduct of Police officers when they are charged with any offence, we wish to point out that no Circular of the Government can authorize Magistrates to infringe or in any way alter the statute law. We have no doubt that this Circular was never intended to cause any modification in the procedure laid down by the Code of Criminal Procedure, nor does it appear to us to necessitate any alteration in the regular procedure of the Courts. The Government very properly have said that in their opinion when a Police officer is charged with a serious offence, *that* offence, should be inquired into at once on the spot by a Magistrate of the first class. That does not mean that the Sub-Divisional officer, if he has not got time to make the inquiry himself, can make use of the provisions of section 202, Criminal Procedure Code, and send it to a Subordinate Magistrate to hold a local investigation and examine both sides, and then afterwards treat it as if the matter was still in his file. What the Circular means and what the proper procedure is, is that an experienced first class Magistrate should himself hold the inquiry, if possible, and if he is to depute it to another first class Magistrate, that first class Magistrate should from the first have seizin of the case and should investigate the case in any way he thinks proper and should decide it finally. But the view which some of the lower Courts

have taken of the Circular has resulted in their holding a vicarious trial by means of another Magistrate hearing both sides and then ordering prosecution for bringing a false case without having disposed of the original complaint. All sorts of irregularities and failures of justice have followed in consequence. We hope that after this expression of our opinion, the procedure adopted will in future be in conformity with law. In this case, we think the best way to deal with it would be to summon the Sub-Inspector before the Magistrate having jurisdiction and call upon him to answer to those offences which the investigating Magistrate has found there is reason to believe he committed, so as to save all further necessity for inquiries under section 202 or any other preliminary investigation.

The Rule is made absolute in these terms and there will be further inquiry in the manner we have indicated.

Rule made absolute.

[See the next case.—ED.]

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE NO. 25 OF 1912.
April 18, 1912.
Present:—Mr. Justice Holmwood and
Mr. Justice Imam.
EMPEROR—PROSECUTOR
versus
BHIKA HOSSEIN—ACCUSED.

Police officer, complaint against—Government Circular, meaning of—If case be made over to another Magistrate, the latter to have jurisdiction to decide case finally and order sanction for prosecution—Criminal Procedure Code (Act V of 1898), ss. 203, 476, 529—Penal Code (Act XLV of 1860), s. 211.

When a complaint is made against a Police officer the Magistrate, who entertains the complaint, under section 202 of the Criminal Procedure Code, must, either go to the spot and make inquiry himself and issue process if he finds it necessary to call upon the accused to answer to anything, or if he makes it over under section 192 to any other Magistrate of the first class, that Magistrate must be vested with full seizin of the case and must continue the inquiry upto the necessary order of discharge, acquittal or conviction, as the case may be.

The Government Circular, with regard to inquirie into complaints against Police officers, does not refer to any kind of local investigation under section 202, Criminal Procedure Code, and the local investigation which it mentions, is a full and complete judicial inquiry on the spot after issuing process issued, hearing witnesses on both sides, and taking the explanation of the accused person.

A complaint was made before a District Magistrate against a Police officer. He allowed the complainant to make his complaint before a Deputy Magistrate at the head quarters. That Deputy Magistrate transferred the investigation to the Sub-Divisional officer, at B. After inquiry by the Sub-Divisional officer he found the case to be false. Then the Deputy Magistrate at the head-quarters re-called the case and passed an order under section 476, Criminal Precedure Code, directing the trial of the complainant under section 211 of the Indian Penal Code:

Held, that the order for prosecution under section 476 was without jurisdiction, that the erroneous order of transfer to the Sub-Divisional Magistrate may be cured by section 529 and give jurisdiction to the Sub-Divisional Magistrate, but the Deputy Magistrate at the head quarters can have no jurisdiction to re-call the case and deal with it under section 203 or pass any orders under section 476.

This was a Reference under section 438, Criminal Procedure Code, from the Sessions Judge of Dinajpur, recommending that so much of the order of the Deputy Magistrate of Dinajpur, dated January 18th, 1912, as directs the trial of the accused under section 476, Criminal Procedure Code, for an offence under section 211, Indian Penal Code, be set aside.

Mr. *J. N. Roy*, Counsel and Babu *Manmotha Nath Mukerjee*, for the Accused.

Mr. *Kenrick*, K. C., Advocate-General, and Mr. *Monier*, Counsel, for the Crown.

JUDGMENT.—This was a Reference made by the learned Sessions Judge of Dinajpur recommending that the order passed by the Deputy Magistrate at head-quarters under section 476, Criminal Procedure Code, directing the trial of the complainant under section 211 and sending the case to the District Magistrate for orders should be set aside. At the same time, he informed us that there was a motion before him to order further inquiry into the matter. He did not think it proper to deal with it himself because it might prejudi our order in regard to the matter under section 476, Criminal Procedure Code. He says it seemed to him that the proper course to take was to submit this Reference for decision before proceeding to dispose of the other motion.

We need not, therefore, go into the point of necessity for further inquiry under section 203, as we have dealt with it in a similar case to this in a somewhat lengthy judgment delivered this morning, in which we pointed out that the Government Circular, with regard

to inquiries into complaints against Police officers, has been greatly misunderstood, that that Circular cannot be held to refer to any kind of local investigation under section 202, Criminal Procedure Code, and that the local investigation which it mentions is a full and complete judicial inquiry on the spot after process issued and hearing witnesses on both sides and taking the explanation of the accused person.

It is clear that the accused person cannot be called upon for explanation nor can he be called upon to produce witnesses unless and until there is ground for issuing process against him, and the law says that if upon complaint there is ground for issuing process against him, the Magistrate shall issue summons for the attendance of the accused. That is section 204. The idea seems to have been that the Police officer might have an opportunity of defending himself and getting his accused charged with bringing a false case without a trial, that is to say, judicial trial. Now that would be as unfair to the complainant as the converse procedure would be to the accused. We must take it that the Government intended that both sides should have full and free justice, and, therefore, when a complaint is made against a Police officer of a certain offence, under section 202, the Magistrate who entertains the complaint must either go to the spot and make inquiry himself and issue process if he finds it necessary to call upon the accused to answer to anything, or if he makes it over under section 192 to any other Magistrate of the first class, that Magistrate must be vested with full seizin of the case and must continue the inquiry up to the necessary order of discharge, acquittal or conviction, as the case may be. But that is hardly the point which the learned Judge has referred to us. This is a point which he will have to deal in the light of the remarks which we have just made.

The point which he makes is that the Deputy Magistrate at head-quarters had no power as such to transfer the investigation to the Sub-Divisional officer of Balmghat, and the District Magistrate on his explanation has frankly admitted that this is so; but, as he points out, an error made in good faith is cured by section 529. Granted that this is so, this Sub-Divisional officer was vested with full seizin of the case and he alone can inquire into it and pass final orders. But this is just what the petitioner in this case intended to avoid when he went to the District Magistrate with his complaint; and it appears to us that the reasons which weighed with the District Magistrate in allowing him to make his complaint before the officer at head quarters, are equally cogent now. Nothing has occured since to render it the less desirable that some officer other than the local officer at Balmghat should make this inquiry. The cure of the erroneous order of transfer by section 529 would only give the Sub-Divisional officer, as we have seen, jurisdiction; it could not confer jurisdiction on the Deputy Magistrate at head-quarters to re call the case to be dealt with under section 203 or pass any orders under section 476. All those orders, therefore, are *ultra vires* and without jurisdiction. Whether there should be a further inquiry into the case or not is a matter which the Sessions Judge will now, no doubt, have no difficulty in deciding. But we must make the Rule absolute as far as this Reference is concerned and hold with the learned Judge that the order for prosecution under section 476 is without jurisdiction and must be set aside.

Rule made absolute.

[See the preceding case—*Ed.*]

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 896 OF 1911.

January 15, 1912.

Present:—Mr. Justice Twomey.

NGA THA GYI—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 235, 537—*Misjoinder of charges is an illegality.*

Proximity of time between acts does not necessarily constitute such acts parts of the same transaction.

A joinder of charges under sections 454 and 325 of the Indian Penal Code is not warranted by section 235 of the Code of Criminal Procedure, especially where the offence of house trespass is clearly distinct from a subsequent attack on the complainant while on his way to inform the Police.

Nga Ta Pu v. *Emperor*, 2 L. B. R. 19, referred to.

Misjoinder of charges is an illegality and not a mere irregularity which is covered by section 537 of the Criminal Procedure Code.

Subrahmania Ayyar v. *Emperor*, 25 M. 61; 28 I. A 257; 11 M. L. J. 233, 5 Bom. L. R. 540; 5 C.W.N. 866, followed.

SHEOBALAK RAI *v.* BHAGWAT PANDAY.

Appeal against the conviction and sentence of Special Powers Magistrate of Tharrawaddy, under section 454,75 and 325, Indian Penal Code.

JUDGMENT.—The joinder of charges under section 454 and section 325, Indian Penal Code, in this case was not warranted by the provisions of section 235, Code of Criminal Procedure, as remarked in *Nga Ta Pu* v. *King-Emperor* (1). Proximity of time between two acts does not necessarily constitute them parts of the same transaction. The house trespass on the complainant's house was clearly distinct from the subsequent attack on the complainant when he was on his way to inform the Police.

As to the effect of the misjoinder, the Courts are bound by the Privy Council ruling in *Subrahmania Ayyar* v. *King-Emperor* (2), which is to the effect that the misjonder is an illegality and not merely an irregularity curable under section 537, Criminal Procedure Code.

The convictions and sentences in this case are, therefere, set aside and it is ordered that the accused shall be tried separately on the two charges.

I note that the aggregate punishment (rigorous imprisonment for eight years) awarded by the Magistrate is, in my opinion, very excessive even when the previous convictions for theft are taken into consideration.

(1) 2 L. B. R. 19.

(2) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 540, 5 C. W. N. 866.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 560 OF 1912.

June 7, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

SHEOBALAK RAI AND OTHERS—PETITIONERS

versus

BHAGWAT PANDAY AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 146—Attachment of disputed property—Order without taking evidence wholly without jurisdiction.

Where a Magistrate makes an order under section 146 of the Criminal Procedure Code, attaching the disputed property, without taking any evidence, the order is wholly without jurisdiction and should be set aside.

Sheikh Mansur Ali v. *Mati Ullh*, 12 C.W.N. 896; 8 Cr. L. J. 202; and *Bejoy Madhub Chowdhury* v. *Chandra Nath Chuckerbutty*, 5 Ind. Cas. 40; 14 C.W.N. 80; 11 Cr. L. J. 27, referred to.

Rule against the order of the Deputy Magistrate of Arrah, dated March 6th, 1912, attaching the lands in dispute and directing the Police to gather the crops standing thereon, under section 146 of the Criminal Procedure Code.

Babus *Chandra Sekhar Prosad Singh* and *Jyotish Chandra Bose*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.—This was a Rule calling on the District Magistrate of Shahabad to show cause why the order under section 146 should not be set aside as wholly without jurisdiction, inasmuch as the Magistrate had not taken any evidence as was necessary in order to enable him to determine. if possible, who was in possession.

Now, as regards the duties of the Magistrate under section 146, it was laid down, in the case of *Sheikh Mansar Ali* v. *Mati Ullah* (1), that the Magistrate in the absence of information might have himself held a local inquiry under section 148 or in various ways might have informed himself as to the facts of the case; as he had not done so, it was held that he declined jurisdiction and the order complained of was set aside. This ruling has been followed by this Court in the experience of one of us who has been sitting upon this Bench for the greater part of two years, and has never, as far as we know, been differed from. There is a ruling in the case of *Bejoy Madhub Chowdhury* v. *Chandra Nath Chuckerbutty* (2), in which the learned Judges profess to distinguish the ruling in *Sheikh Mansar Ali* v. *Mati Ullah* (1), on the ground that the Judges set aside the order in that case because the Magistrate did not give sufficient time for regular proceedings to be followed. But as we have just pointed out, that was only one ground and a minor ground for setting aside the order. The main ground was the ground we have just now cited and that ground appears to us to be an obviously good ground, for the

(1) 12 C. W. N. 896; 8 Cr. L. J. 202.

(2) 5 Ind. Cas. 40; 14 C. W. N. 80; 11 Cr. L. J. 27.

law says that it is only if the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was in such possession, that he can attach the property, and it is perfectly clear that he cannot say he is unable to satisfy himself if he has never made the slightest effort to do so. He had only to send a Kanungo out to the spot and take his report, or send for the headman of the village and ask him what the facts were; he would have then fully armed himself with jurisdiction, but he did nothing of the kind, and it can be clearly distinguished from *Bejoy Madhub Chowdhury* v. *Chandra Nath Chukerbulty* (2), where the Magistrate said he was unable to satisfy himself. He does not even say that he has had the slightest difficulty. His order is as follows,—"No evidence produced by either side; lands attached under section 146." Whatever view, therefore, be taken of the rulings, that order is clearly incompetent and without jurisdiction.

The order must be set aside and the lands released from attachment.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 175 OF 1912.

(CRIMINAL REVISION PETITION NO. 145 OF 1912.)

April 4, 1912.

Present:—Mr. Justice Wallis.

RATHNAM—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Madras Motor Vehicles Act (I of 1907)—Motor rules, Rule No. 9—Omission to blow the horn at turning—Negligence.

An omission to sound the horn, when a motor car driver goes from the right side to the wrong side of the road for the purpose of turning, which causes a collision with another vehicle, constitutes an offence under Rule 9 of the Rules framed under the Madras Motor Vehicles Act, 1907.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Chief Presidency Magistrate, Egmore, Madras, in C. C. No. 268 of 1912.

FACTS.—The accused, a motor car driver, was charged with reckless and negligent driving of his motor car in a public road under rule 9 of the Government Rules under the Motor Vehicles Act, 1907.

The occupants of the motor car, after making a sketch and a little before lighting-up time, asked accused to drive the car slowly. The driver crossed from his own side of the road to the wrong side to make a turn, and failed to blow his horn at the turn. A horn was heard on the rear and a gentleman passed on a motor bicycle. The car proceeded and there was collision between it and a motor bicycle, which was ridden by one Captain Fraser, and the latter was thrown off the road.

The Magistrate found that the omission to blow the horn, when turning, caused the collision and convicted the accused.

The accused moved the High Court in revision.

Mr. *D. Chamier*, for the Petitioner,

Mr. *J. L. Rozario*, for the Crown.

ORDER.—Under Rule 9, a motor car must not be driven in a public place recklessly or negligently or in a manner which is likely to endanger life, etc., or which would be otherwise than reasonable and proper, having regard to all the circumstances of the case, including the natural condition and use of the road, and to the amount of the traffic which is actually on the road at the time or which may reasonably be expected on it. Under rule 12, every motor driver must have a suitable horn and sound it whenever expedient to prevent danger to the public. In this case, the Magistrate has found that on the Adayar road, while it was still light, but cannot have been long before lighting-up time, the petitioner, for the purpose of turning, had to go on to the wrong side of the road, that, before turning, the occupants of car looked up and down the road without seeing any thing coming, but none-the-less had to desist at the sound of a motor horn to allow a cyclist coming up from behind to pass, that, when the cyclist had passed, the driver resumed the process of turning, and in spite of what had just happened, still omitted to sound his horn, and that, while his car was on the wrong side of the road, another motor cycle came up and collided with it. These findings of fact, in my opinion,

afford ample ground for convicting the petitioner for failing to drive in the careful manner prescribed in Rule 9 set out above, and I see no reason to interfere in revision. A case has been cited about Salisbury plain, but nothing can be less like Salisbury plain than the Adayar road about this time of the evening.

The petition is dismissed.

Petition dismissed.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 532 OF 1912.
May 24, 1912.
Present:—Mr. Justice Holmwood and
Mr. Justice Imam.
EMPEROR—PETITIONER
versus
Sheikh IDOO—ACCUSED—OPPOSITE PARTY.

Jurisdiction—Discharge of accused by High Court at Criminal Sessions—Re-trial of accused—Whether order of discharge any bar to re-trial—Criminal Procedure Code (Act V of 1898), ss. 403, 437.

An order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under section 190 (*c*), Criminal Procedure Code.

Mir Ahwad Hossein v. *Mahomed Askari*, 29 C. 726 (F. B.), followed.

Therefore, a Magistrate has jurisdiction and is bound to adjudicate on any criminal information properly laid before him against an accused person, who had been discharged by the High Court in the exercise of its original criminal jurisdiction, without the order of discharge being set aside.

Rule calling upon the District Magistrate of 24-Pergannahs to show cause why further inquiry should not be made in the case of the accused on charges under section 376 and other sections of the Indian Penal Code; that is, the Advocate-General entering *Nolle prosequi*, amounting to the discharge of the accused at his trial before the High Court in its Ordinary Original Criminal Jurisdiction, may be set aside.

Mr. *B. C. Mitter*, Standing Counsel and Babu *Hemendra Nath Mitter*, for the Crown, Petitioner.

Mr. *K. N. Chowdhri*, Counsel, and Babu *Satish Chandra Ghose*, for the Accused, Opposite party.

JUDGMENT.—We think that the question raised on this Rule can be simply answered by pointing out that the order of discharge made by Mr. Justice Stephen cannot be set aside by any tribunal and does not require to be set aside.

Upon all the authorities, an order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under section 190 (*c*), Criminal Procedure Code. This was finally settled in the case of *Mir Ahwad Hossein* v. *Mahomed Askari* (1) by a Full Bench of this Court. If this is the rule of law in the case of Presidency and Provincial Magistrates, where the higher Courts have been specially empowered to interfere and order fresh inquiry, and if in those cases, it is unnecessary to set aside the order of discharge or order fresh inquiry, *a fortiori* it is unnecessary in the case of a discharge by the High Court in the exercise of its Original Criminal Jurisdiction, where there is no authority that can interfere with the order of discharge. We do not order further inquiry in this case since it is unnecessary. It is enough for us to lay down that the Magistrate is mistaken in declining jurisdiction which he undoubtedly has, and he is bound to consider and adjudicate on any criminal information properly laid before him against the accused.

(1) 29 C. 726.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1458 OF 1911.
January 11, 1912.
Present:—Mr. Justice Holmwood and
Mr. Justice Sharfuddin.
ANATH NATH DEY—COMPLAINANT—PETITIONER
versus
MOHENDRA NATH SRIMONI—ACCUSED—OPPOSITE PARTY.

Further inquiry—Process issued and trial held under section 506, Indian Penal Code—Discharge of accused for offence under section 500, if legal—Defamation—Discharge of accused—Magistrate thinking there may be grounds for making defamatory remarks—Penal Code (Act XLV of 1860), ss. 500, 506—Criminal Procedure Code (Act V of 1898), ss. 242, 437.

Process was issued against the accused under section 506, Indian Penal Code, and he was tried under

that section. He was discharged of an offence under section 500, Indian Penal Code, and his plea to the charge under section 506 was not recorded.

Held, that the proceedings were irregular; that the plea of the accused ought to have been taken under section 506, as the law provides that in summons cases the first thing to be done is to ask the accused what he has got to say; and that the discharge of the accused under section 500, when he was charged under section 506, was without jurisdiction.

'The accused cannot be discharged of an offence under section 500, Indian Penal Code, because the Magistrate thinks that there may be some substance in the defamatory remarks made by the accused.

Rule against the Chief Presidency Magistrate to show cause why there should not be further inquiry into the case in which the accused was discharged.

Babus *Atulya Charan Bose* and *Ramani Mohan Chatterjee*, for the Petitioner.

Mr. *K. N. Chaudhri*, Counsel, and Babu *Girish Chandra Pal*, for the Opposite Party.

JUDGMENT.—This was a Rule calling on the Chief Presidency Magistrate to show cause why there should not be a further inquiry into this case inasmuch as there was no summons under section 500, Indian Penal Code. Process was issued under section 506 and the trial took place under that section and the accused has been discharged for an offence under section 500; the proceedings are, therefore, without jurisdiction.

'The learned Magistrate in his explanation says that the issue of process under section 506 was a *lapsus calami*; he tried the case as one under section 500 and the evidence placed before the Court was entirely evidence in support of a case under that section. But we find that at law at any rate that cannot be so, because the offence complained of as set out in the indictment is criminally intimidating the complainant on or about the 14th June 1911, in Calcutta, section 506, Indian Penal Code, and that was the offence to which the plea of the accused ought to have been taken. Apparently, the Magistrate did not think it necessary to do so. This is also an irregularity. The law provides in summons cases that the first thing to be done is to ask the accused what he has got to say.

Then, as regards the trial which is said to be under section 500, we can only say that if it was intended to be under that section, the points of law which arise in a case of defamation have been wholly ignored. The learned Magistrate says that the complainant had some ground for making the defamatory statements he did. That does not justify him in any way whatever under section 500. It is only when a person to whom accusation may be preferred in good faith against another is a person who has lawful authority to deal with the subject-matter of the accusation, that the accusation is justified; and if you tell a man he is guilty of fraud, the only case in which you can plead good faith is if you made that accusation before a Court properly constituted for the purpose, and even then the *onus* is on the defendant to prove his good faith. There is here no question of justification. The question of good faith is entirely ignored, and merely because the Magistrate thinks that there may be some substance in the defamatory remarks he discharges the accused. This is, of course, not in accordance with law and there must be a further judicial inquiry in which the defamatory matter must be set out clearly under section 500, Indian Penal Code, and the accused must be asked to justify it, if he can, and then be tried under that section according to law.

[See the two cases next following. *Ed.*]

CALCUTTA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 46 OF 1912.

May 7, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

ANATH NATH DEY—COMPLAINANT—PETITIONER

versus

MOHENDRA NATH SRIMANI—ACCUSED—OPPOSITE PARTY.

Defamation—Penal Code (Act XLV of 1860), s. 500—Receiver—Charge of defamation against Receiver—Sanction of Court, whether necessary—Defamation arising out of matter of repairs of estate under charge of Receiver.

It is not a general rule of law that in all criminal proceedings, the leave of the Court is not necessary to prosecute a Receiver.

Dunne v. *Kumar Chandra Kishore*, 30 C. 593; 7 C. W. N. 390; and *Fink* v. *Corporation of Calcutta*, 30 C. 721; 7 C. W. N. 706, relied upon.

ANATH NATH DEY *v.* MOHENDRA NATH.

Sanction is required to proceed against a Receiver when he acts for the protection of the estate in his hands.

Therefore, where the alleged act of defamation arises out of a matter of repairs of the estate in the possession of the Receiver and is based upon a letter in which he claims that he is acting on behalf of the estate, a charge of defamation aganist the Receiver is incompetent without the leave of the Court.

As the Receiver in this case was appointed by the original side of the High Court, the case was sent to that Court for disposal of the question whether leave of the Court is required.

Rule calling on the Chief Presidency Magistrate of Calcutta to show cause why the hearing of the case should not be transferred from the file of the Second Presidency Magistrate to that of any other Magistrate.

Babus *Atulya Charan Bose* and *Ramani Mohan Chatterjee*, for the Petitioner.

Mr. *B. C. Mitter*, Standing Counsel and Babu *Girish Chandra Pal*, for the Opposite Party.

JUDGMENT.—This was a Rule calling on the Chief Presidency Magistrate, Calcutta to show cause why the hearing of this case on remand should not be transferred to some other Presidency Magistrate, on the ground that the learned Second Presidency Magistrate has misconceived our orders and is not prepared to try the case from the beginning in accordance with the directions we have given.

Now, had this matter been before us as an ordinary case in this simple form, we should have felt disposed to make the Rule absolute and to ask the Chief Presidency Magistrate to take the case back to his own file and either dispose of it himself or make it over to some other Presidency Magistrate. But an objection has been raised, and very properly raised, by the learned Standing Counsel, who appears for the Receiver who is the accused in this case, that the bringing of this case without the leave of the Court which appointed the Receiver is an act of contempt and that the case is incompetent without such sanction.

We have carefully considered the authorities and we have come to the conclusion that the matter is one at least of great doubt, and if there is any doubt, then it is clear that we cannot decide the jurisdiction of the original side of the Court. It was laid down in *A. M. Dunne* v. *Kumar Chandra Kisore* (1) that a Receiver cannot be made a party to section 145 proceedings which are criminal proceedings. It is, therefore, not a general rule of law that in all criminal proceedings, the leave of the Court is not necessary to prosecute. It was thrown out as a query in that case that a Receiver can neither sue nor be sued without the leave of the Court; and in a subsequent case in the same volume, *W. R. Fink* v. *The Corporation of Calcutta* (2), a Court of Criminal revision held that the case of *A. M. Dunne* v. *Kumar Chandra Kishore* (1), which we have just, referred to is an authority for the point that a Receiver cannot be made a party to any suit or proceeding without the leave of the Court appointing him. The word proceeding obviously has been added because it has been held that he could not be made a party to section 145 proceedings. But the word equally applies to a prosecution for defamation. An application to the Court of the Chief Presidency Magistrate for process is a proceeding and it is at that stage that the sanction became necessary, if it was necessary at all. Now, it so happens in this case that the accused is a defendant in the action and a part owner in the property as well as a Receiver under the Code; and it is argued that it was in his capacity as owner that he was brought up before the Municipal Magistrate for neglecting to execute certain repairs out of which this action has arisen. But it was held in the case of *A. B. Miller* v. *Ram Ranjan Chakravarti* (3), that the receiver of the High Court does not represent the owner, of the estate for which he is the Receiver, but is merely an officer of the Court and as such cannot sue or be sued except with the permission of the Court, so that where he even happens to be part owner he cannot be brought up before the Municipal Bench for neglect to repair a building within the Corporation of Calcutta except with the leave of the High Court; and this was what was decided in the case of *W. R. Fink* v. *The Corporation of Calcutta* (2), to which we have just referred. That being so, it appears to us that the alleged act of defama-

(1) 30 C. 593; 7 C. W. N. 390.
(2) 30 C. 721 at p. 724; 7 C. W. N. 706.
(3) 10 C. 1014.

tion, arising out of this very matter of the repairs and based upon a letter which claims for the accused that he is acting on behalf of the estate, would not lie without the leave of the Court. The whole matter seems to be of a very slight and unimportant character, that the words are in themselves defamatory and require justification. But the portion of the letter which seems to bring the case within the rule that sanction is required when the act of the Receiver is done for the protection of the estate in his hands, is contained in the last paragraph and is as follows:—"However, from your conduct it appears that your intention was not only to interfere with my proper management of the estate but to involve the same in unnecessary expenses, a thing most reprehensible for a tenant."

It is not for us to decide whether sanction is necessary but there being doubt on the point, it is our duty to stay the proceedings until the question has been decided by this Court sitting on the original side. The petitioner is at liberty to move the Court on the original side and obtain an order either giving him leave to prosecute or stating that leave is not necessary. In the event of his obtaining either of these orders, the Chief Presidency Magistrate will proceed to deal with the case himself or to make it over to some other Magistrate as we have suggested above.

The Rule will be thus partially made absolute and partially discharged in terms of the judgment we have delivered. In the meantime, further proceedings will be stayed and the record will remain with the Chief Presidency Magistrate.

Rule partly made absolute.

[See the preceding and following cases. *Ed.*]

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 161 OF 1908.

May 20, 1912.

Present:—Mr. Justice Fletcher.

NAGENDRA NATH SRIMONEY—PLAINTIFF

versus

JOGENDRA NATH SRIMONEY AND OTHERS—DEFENDANTS.

Receiver—Sanction of Court—Prosecution of Receiver for ordinary criminal offence.

The sanction of the Court appointing a Receiver is not necessary in order to proceed against him for a breach of the ordinary Criminal law of the country, *e. g.*, defamation.

Application by one Anath Nath Dey for an order that sanction, if necessary, be granted to prosecute Mohendra Nath Srimony, the defendant No. 2, in the aforesaid suit, who is a Receiver appointed by the Court in the above suit under sections 500 and 503 of the Indian Penal Code.

Mr. *Pugh*, for the Petitioner.

Mr. *C. C. Ghose*, for the Receiver.

JUDGMENT.—All that I am prepared to say is that on the petition coming on before me, it appears to me no sanction is necessary to proceed against a Receiver appointed by the Court for a breach of the ordinary Criminal law of the country. The cases in which the sanction of Court has been held necessary are that class of cases, such as that reported as *Fink* v. *The Corporation of Calcutta* (1) where the Receiver was prosecuted as owner and occupier of certain premises held as in the possession of the Court, and the offence against him was under the Calcutta Municipal Act that the premises were in a state dangerous or unfit for human habitation. In that case, it was rightly held that the Receiver was not criminally responsible and the Court itself was in possession of the premises in respect of which the prosecution was instituted. In another case mentioned by Mr. Ghosh, an Advocate of this Court was prosecuted under section 145, Criminal Procedure Code, and Prinsep and Handley, JJ., held that the prosecution did not lie without sanction. There the evidence was that the Receiver was in possession of immoveable property in respect of which the prosecution was instituted and that in fact he was in such possession in obedience to the order of the Court.

(1) 30 C. 721; 7 C. W. N. 706.

But that it is necessary to obtain the sanction of this Court or of any other Civil Court for the prosecution of a person, who happens to be a Receiver appointed by the Court, in respect of any criminal act committed during his tenure of such office, I do not agree. I make no order on this petition.

[See the two cases immediately preceding. *Ed.*]

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 3-B OF 1912.

January 13, 1912.

Present:—Mr. Justice Hartnoll.

NGA SAN TIN—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 423 (1) (*d*), 439, 476 (1) *and* (2)—*Revision—High Court's power to make consequential order.*

Under section 439 of the Criminal Procedure Code, a High Court has power to revise an order made under section 476 (1) and to direct that the proceedings started under section 476 (2) should cease.

Noor Mahomed v. *Aung Gyi*, 3 L. B. R. 234; 12 Bur. L. R. 318; 5 Cr. L. J. 123, referred to.

Section 423, clause (1) (*d*) gives a High Court power to make any consequential order that may be just and proper. Where an order under section 476 (1) is set aside, the proceedings under section 476 (2) should also cease.

Reference made by the Sessions Judge, Prome, for revision of the order of the Sub-Divisional Magistrate, Prome, dated 8th November 1911, directing the prosecution of the applicant for giving false evidence under section 193, Indian Penal Code.

ORDER.—I have gone through the different proceedings and agree with the learned Sessions Judge that there is ground for revising the Magistrate's order which was passed under section 476 of the Code of Criminal Procedure. That this Court has the power to revise such an order was laid down in the case of *Noor Mahomed v. Aung Gyi* (1). The Magistrate to whom the case was sent has proceeded under section 476 (2) and so the further question arises as to whether, if the order passed under section 476 (1) is set aside, this Court can stop the proceedings of the Magistrate acting under section 476 (2).

(1) 3 L. B. R. 234, 12 Bur. L. R. 318; 5 Cr. L. J. J. 123.

Section 439 of the Code gives this Court power, when acting in revision, to exercise the powers conferred on a Court of appeal by section 423, and clause (1) (*d*) of that section gives the power to make any consequential order that may be just or proper. It seems to be only just and proper that, if an order under section 476 (1) is set aside, the proceedings under section 476 (2) shall also cease. To allow them to proceed would render of no avail an order cancelling an order under section 476 (1) and would permit a trial to be brought to a conclusion for proceeding with which it has been ruled that no grounds exist. Furthermore, the order under section 476 (1) having been set aside, no material exists on which proceedings under section 476 (2) can be based.

I, therefore, set aside the order of the Sub-Divisional Magistrate, Prome, sending the case of Mg. San Tin for trial to the Court of the second Additional Magistrate, Prome, under section 193 of the Indian Penal Code, and I further direct that the proceedings now being taken against Mg. San Tin by the second Additional Magistrate cease and that Mg. San Tin be discharged of the charge laid against him.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 692 OF 1912.

June 7, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

ABDUL KARIM—ACCUSED—PETITIONER—

versus

EMPEROR—OPPOSITE PARTY.

Suburbs of Calcutta—Station of Howrah—Order and good Government—Act XXI of 1857, *s.* 2, *cl.* 1—*Reasonable suspicion—Accused found to be in possession of cement—No evidence that cement missing from complainant's premises—Penal Code* (*Act XLV of* 1860), *s.* 411—*Difference between s.* 411 *and s.* 2, *cl.* 1 *of Act XXI of* 1857—*Stolen article—Possession.*

The accused was convicted for being in possession of a certain quantity of cement; and because there was a heap of cement lying on the premises of the East Indian Railway Company at L. and because the accused was a *mistry* in the employ of the Company at L., it was assumed that this cement was stolen from the Company:

Held, that, in the absence of any evidence that shortly or immediately previous to the finding of the cement in the possession of the accused, a quantity of cement

belonging to the Company had been missing, there could not be any reasonable suspicion which would bring the case within section 2 of Act XXI of 1857.*

The only difference which section 2 of this Act makes between an offence under this Act and one under section 411, Indian Penal Code, is that it is not necessary under this Act to offer proof that the stolen property has been in the hands of a third person who actually stole it, as is the case under section 411.

Rule against the order of the Deputy Magistrate of Howrah, dated May 9th, 1912, convicting the petitioner under section 2 of Act XXI of 1857, and sentencing him to a fortnight's rigorous imprisonment, an appeal from which order was dismissed by the District Magistrate of Howrah on May 10th, 1912.

Babu *Atulya Charan Bose*, for the Petitioner.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Howrah to show cause why the conviction and sentence passed on the petitioner should not be set aside on the ground that there is no finding that the cement was stolen property, and also why the Act XXI of 1857 was used in this case when the case appears to fall under section 411, Indian Panal Code.

Now we find that this person has been convicted for being in possession of a certain quantity of cement; and because there was a heap of cement lying on the premises of the East Indian Railway Company at Lilua, and because the petitioner is an electric *mistry* in the employ of the East Indian Railway Company at Lilua, it was calmly assumed that this cement was stolen from the Railway Company. This we need hardly point out is not a reasonable suspicion. It would have been perfectly easy to call the officer in charge of the cement at Lilua to state that shortly or immediately previous to the finding of this cement in the possession of the accused, a certain quantity of cement belonging to the Company had been missing. Then there might have been reasonable suspicion which would bring the case within the meaning of this Act. The only difference which section 2 of this Act appears to us to make between an offence under this Act and an offence under section 411, Indian Penal Code, is that it is not necessary under this Act to offer proof that the stolen property has been in the hands of a third person who actually stole it as is the case under section 411. But beyond that, it is impossible to see how there can be a reasonable suspicion unless the owner comes forward and says that his property has been stolen, for if no cement was ever stolen from the East Indian Railway, there can be no reasonable suspicion that a man carrying cement stole it or received it knowing it to be stolen. On the principle enunciated in the judgment and the explanation of the lower Court, it would appear that if a person in Howrah was found in possession of a certain amount of coal, he might reasonably be suspected of stealing it from the East Indian Railway Company, because there is no doubt a heap of coal on the premises of that Company. There is absolutely no difference between the two cases.

The sanction and sentence must be set aside and the accused acquitted and released from his bail.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 10 OF 1912.

(CRIMINAL REVISION PETITION No. 10 OF 1912.)

April 26, 1912.

Present:—Sir Ralph Benson, Judge.

SUREY KONDAREDDI AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 94—Production of document or other thing incriminating accused—Issue of summons to accused for—Whether permissible.

It is competent to a Magistrate to issue summons to an accused person under section 94, Criminal Procedure Code, to produce a document or other thing, the production of which might tend to incriminate him.

Ahmed Mahomed Jackriah & Co. v. *Ahmed Mahomed*, 15 C. 109, followed.

In the matter of the complaint of H. H. The Nizam of Hyderabad v. *A. M. Jacob*, 19 C. 52, referred to.

Ishwar Chandra Ghoshal v. *Emperor*, 12 C. W. N. 1016; 8 C. L. J. 320; 8 Cr. L. J. 224, not followed.

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* Act XXI of 1857, an Act to make better provision for the order and good Government of the Suburbs of Calcutta and of the Station of Howrah; section 2, clause 1 runs thus:—"Whoever has in his possession, or conveys in any manner, anything which may be reasonably suspected of being stolen or fraudulently obtained, shall, if he fail to account satisfactorily how he came by the same, be liable to a penalty not exceeding one hundred rupees, or to imprisonment, with or without hard labour, for any term not exceeding three months."

MIRAN SHAH *v.* EMPEROR.

Petition, under sections 435 and 439, Criminal Procedure Code, for revision of the order of the 2nd Class Magistrate of Kawali, dated 5th December 1911, in C. C. No. 344 of 1911.

Mr. *T. Prakasam*, for the Petitioners.

Mr. *J. L. Rosario*, the Acting Public Prosecutor, for the Crown.

ORDER.—The question raised in this petition is, whether it is competent to a Magistrate under section 94, Criminal Procedure Code, to issue a summons to an accused person to produce a document or other thing, the production of which might tend to incriminate him. The words of the section are general. No exception is made in favour of an accused person, though several exceptions are specified in clause (3) of the section. The question was considered at length in the case reported in *Ahmed Mahomed Jackariah and Co.* v. *Ahmed Mahomed* (1), and it was held that it was clearly the intention of the Legislature to make section 94 applicable to an accused person, notwithstanding that this involved a departure from the general principle of the English law. A similar view was apparently taken in the case reported in *In the matter of the complaint of H. H. The Nizam of Hyderabad* v. *A. M. Jacob* (2). A contrary view was taken in the case reported in *Ishwar Chandra Ghoshal* v. *Emperor* (3), in which the learned Judges referred to sections 342 and 343, Criminal Procedure Code, which were not referred to in the two Calcutta cases noted above. In *Ishwar Chandra Ghoshal* v. *Emperor* (3), however, no one appeared to support the Magistrate's action and the learned Judges did not refer to cases of *Mahomed Jackariah and Co.* v. *Ahmed Mahomed* (1) and *In the matter of complaint of H. H. The Nizam of Hyderabad* v. *A. M. Jacob* (2). The Magistrate always has the power to issue a search warrant to obtain the production of a document or other thing in the possession of the accused. The issue of a summons is a milder means of attaining the same end. I am of opinion that the ruling in *Ahmed Mahomed Jackariah and Co.* v. *Ahmed Mahomed* (1) should be followed. I, therefore, dismiss the petition.

Petition dismissed.

(1) 15 C. 109.
(2) 19 C. 52.
(3) 12 C. W. N. 1016; 8 C. L. J. 320; 8 Cr. L. J. 224

PUNJAB CHIEF COURT.

CRIMINAL REVISON PETITION No. 720 OF 1912.

July 13, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

MIRAN SHAH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499—Defamation—Witness, liability of.

A person, who makes a defamatory statement as a witness in a judicial proceeding, is not exempted from criminal liability under section 499, Indian Penal Code, unless his statement is covered by any of the exceptions to the section.

Fateh Muhammad v. *Empress*, 34 P. R. 1889 Cr., *Maya Das* v. *Queen-Empress*, 14 P. R. 1893; *Emperor* v. *Ganga Prasad*, 26 A. 685; A. W. N. (1907) 235; 4 A. L. J. 605; 6 Cr. L. J. 197, followed.

Manjaya v. *Sesha Shetti*, 11 M. 477, *Queen-Empress* v. *Govinda Pillai*, 16 M. 235, *In the matter of Alraja Naidu*, 30 M. 222; 6 Cr. L. J. 130, *Queen-Empress* v. *Boboji*, 17 B. 127, *Queen-Empress* v. *Balkrishna Vithal*, 17 B. 573, *Woolfun Bibi* v. *Jesarat Sheikh*, 27 C. 262, not followed.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of Sessions Judge, Jhelum, dated 6th March 1912, modifying that of the Magistrate, 1st class, Pind Dadan Khan, dated 20th December 1911, convicting petitioner.

Mr. *Nanak Chand*, for the Petitioner.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The petitioner has been found guilty of the offence of defamation under section 500, Indian Penal Code, and has been sentenced to pay a fine of Rs. 500 or in default to undergo simple imprisonment for one year. In the course of a criminal trial for an offence under section 309, Indian Penal Code, the petitioner, who was examined as a witness for the prosecution, made a statement which has been held by both the Magistrate and the Sessions Judge in the present case to have been defamatory of the complainant, Bodh Raj. The question for decision in this revision is whether the petitioner is not liable to be criminally prosecuted for the offence of defamation under the Indian Penal Code because the defamatory statement was made by him as a witness in a judicial proceeding. It is urged by the petitioner's Counsel that witnesses as a class are exempt from the operation of section 499, Indian Penal Code, in respect of defamatory statements, made by them concerning any persons in their character as

witnesses, such statements being privileged by the occasion; and that, therefore, the petitioner in the present case has been wrongly convicted of the offence of defamation. In support of his contention, Counsel has cited *Manjaya* v. *Shesha Shetti* (1), *Queen Empress* v. *Govinda Pillai* (2), *In the matter of Alraja Naidu* (3), *Queen-Empress* v. *Babaji* (4), *Queen Empress* v. *Balkrishna Vithal* (5) and *Woolfun Bibi* v. *Jesarat Sheikh* (6). These authorities, no doubt, support the position taken up by him, but the contrary view has been held by two Division Benches of this Court in *Fateh Muhammad* v. *Empress* (7) and in *Kirpal Singh* v. *Hukam Singh*, (8), which is printed as a foot-note to the case just cited, and by Sir Meredyth Plowden in *Maya Dass* v. *Queen-Empress* (9). In a recent case in the Allahabad High Court, *Emperor* v. *Ganga Prasad* (10), the majority of the Judges have taken the same view as this Court; and we notice that in *Queen Empress* v. *Balkrishna Vithal* (5), Mr. Justice Telang observed that if the point which arose in the case before him had been *res integra*, he would have been of opinion that a witness could be prosecuted under the Indian Penal Code for defamation in respect of statements made by him in the course of a judicial proceeding. The learned Judge felt constrained to follow the decision to the contrary which had already been given by his own Court [*Queen Empress* v. *Babaji* (4)] and which was in conformity with the opinion expressed by the High Court of Madras.

The question under consideration has been discussed so fully by this Court in the three cases cited above and also by the Allahabad High Court in *Emperor* v. *Ganga Prasad* (10), that we need say no more in this place than that we entirely agree in the view taken in those cases; and we accordingly hold that the petitioner in this case was not exempted from the jurisdiction of a Criminal Court in respect of the defamatory statement made by him concerning the complainant. Both the Magistrate and the Sessions Judge have held that that statement was not covered by any of the exceptions to section 499, Indian Penal Code, and it is, therefore, clear that the petitioner's conviction for defamation was fully justified.

We dismiss the revision.

Revision dismissed.

(1) 11 M. 477.
(2) 16 M. 235.
(3) 30 M. 222; 6 Cr. L. J. 130.
(4) 17 B. 127.
(5) 17 B. 573.
(6) 27 C. 262.
(7) 34 P. R. 1889 Cr.
(8) 34 P. R. 1889 Cr., note.
(9) 14 P. R. 1893 Cr.
(10) 29 A. 685; A. W. N. (1907) 235; 4 A. L. J. 605; 6 Cr. L. J. 197.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 232 OF 1912.

June 19, 1912.

Present:—Sir George Knox, KT., Judge.

SHOHRAT SINGH—PETITIONER

versus

DARYAO SINGH—OPPOSITE PARTY.

Revision—Criminal Procedure Code (Act V of 1898), Chapter XII, proceedings under—High Court, power of.

A High Court has no power to send for the record of a case which in intention and in fact has been begun and continued under Chapter XII of the Criminal Procedure Code.

Jhingai Singh v. *Ram Partab*, 31 A. 150; 1 Ind. Cas. 762; 6 A. L. J. 113; 9 Cr. L.J. 382, *Hurbullubh Narain Singh* v. *Luchmeswar Singh*, 26 C. 188, 3 C. W. N. 49, relied upon.

Application for revision by Shohrat Singh.

Mr. *Sorabji*, for the Applicant.

Mr. *Howard*, for the Opposite Party.

JUDGMENT.—The proceedings, out of which this application has arisen, were proceedings instituted by one Daryao. He came to the Magistrate alleging that he was in possession of certain landed property, that a dispute likely to cause breach of the peace existed regarding it and that this dispute he further alleged came from the side of one Shohrat Singh. He asked the Magistrate to take action under section 145 of the Code of Criminal Procedure. Thus, he put before the Magistrate a case which came clearly within the provision of section 145 of the Code provided always that he established the fact that he was in possession and that a dispute likely to cause a breach of the peace existed.

The Magistrate then, after considerable delay and various intermediate orders issued, made an order in writing stating that he was satisfied on the ground that a breach of peace

did exist about land within the local limits of his jurisdiction and he required Shohrat Singh and Daryao to put in written statements of their respective claims as regards the fact of their actual possession of the subject of dispute. This application and the findings mentioned above gave the learned Magistrate jurisdiction to proceed under Chapter XII of the Criminal Procedure Code. I am told that after he had reached this stage, the Magistrate went wrong and passed certain orders which are said to be without jurisdiction. But, as I understand the law, I have no power to send for the record of a case, which in intention and in fact has been begun and has been continued under Chapter XII of the Criminal Procedure Code. If the Magistrate has fallen into error, the person aggrieved is not without remedy, but the remedy is not one by way of review from this Court. This has been laid down by this Court in a case which appears to me precisely similar to this [*Jhingai Singh* v. *Ram Partab* (1)] and with still greater emphasis by the Calcutta High Court in the case of *Hurbullubh Narain Singh* v. *Luchmeswar Singh* (2). The application before me is dismissed.

Application dismissed.

(1) 31 A. 150; 1 Ind. Cas. 762, 6 A. L. J. 113; 9 Cr. L. J. 382.

(2) 26 C. 188; 3 C. W. N. 49.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 721 OF 1911.

March 22, 1912.

Present:—Sir George Knox, KT., Judge.

CHIRANJI LAL—APPLICANT

versus

RAM LAL AND OTHERS—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—False evidence—Offence against public justice—Sanction to prosecute—Discretion of Judge.

An offence under section 193 of the Indian Penal Code is an offence against public justice. The person best qualified to say whether a prosecution should or should not be instituted is the Judge before whom the evidence was given and who had considered all the facts of the case.

Criminal revision against an order of the Additional Sessions Judge of Meerut.

Mr. *Ahmad Kareem*, for the Applicant.

Mr. *C. Dillon*, for the Opposite Party.

JUDGMENT.—This petition for revision arises out of an order passed by the Additional Sessions Judge of Meerut. That Judge was asked to grant sanction for the prosecution of eight men. These eight men were witnesses for the defence in the case of *King-Emperor* v. *Behary*, decided by that particular Judge himself. After he had decided the case, he took action under section 476 of the Criminal Procedure Code and directed the prosecution of such witnesses as he thought it desirable to prosecute. He refused to give sanction for the prosecution of the eight persons concerned in this petition, on the grounds that if they did perjure themselves, they played a very secondary part and the chief witnesses have been ordered to be prosecuted. An offence under section 193 of the Indian Penal Code is an offence against public justice. The person best qualified to say whether a prosecution should or should not be instituted is the learned Judge before whom the evidence was given and who had considered all the facts of the case. It may well be, and unfortunately too often is, the case at present in this country that false evidence is given in Courts without compunction and without remembrance on the part of the persons concerned that they are committing an offence of a serious nature. I do not, however, consider that the best or most effective way of checking this kind of offence is by a wholesale prosecution of all persons who may be considered to have given false evidence. The interests of justice and of the public are best secured by the prosecution of ring-leaders and by deterrent sentences in their case when they are found to have intentionally given false evidence. In a case like the present where the judgment shows that the learned Sessions Judge was fully cognizant of the facts of the case and had carefully considered the ends of justice, I am not prepared to interfere with his discretion in the matter I, therefore, reject the application.

Application rejected.

CALCUTTA HIGH COURT.
PRIVY COUNCIL APPLICATION No. 102 OF 1910.
February 6, 1912.
Present:—Sir Lawrence Jenkins, KT.,
Chief Justice and Mr. Justice N. Chatterjea.
EASTERN MORTGAGE AND AGENCY CO. LD.—PETITIONER
versus
PURNA CHANDRA SARBAGNA—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 12, cl. (2), Sch. I, Art. 179—Civil Procedure Code (Act V of 1908). O. XLV—Privy Council—Application for leave to appeal—Time for obtaining copies of judgment and decree, whether to be excluded.

Clause (2) of section 12 of the Limitation Act of 1908 applies to an application for a certificate under Order XLV of the Civil Procedure Code, that is, the time spent in obtaining copies of the judgment and decree of the High Court is to be excluded in computing the period of six months within which an application for leave to appeal to the Privy Council must be presented.

This is an application for leave to appeal to the Privy Council from a decree of the High Court made on June 3rd, 1910. Copies of the judgment and decree were applied for on June 12th, 1910 and they were ready on August 30th, 1910. Application for leave was presented on December 5th, 1910.

Dr. *Rash Behary Ghose* and Babu *Gunoda Charan Sen*, for the Applicant.

Babus *Jogesh Chandra Roy*, *Shib Chandra Palit* and *Prakash Chandra Majumdar*, for the Opposite Party.

JUDGMENT.—This is an application by way of a petition to the Court under Order XLV, rule 2 of the Code of Civil Procedure, 1908, by one desiring to appeal to His Majesty in Council.

A preliminary objection has been raised that the application is out of time, and in support of this, it is argued that clause (2) of section 12 of the new Limitation Act does not apply to an application for a certificate under Order XLV of the Code. But the answer to this is furnished by the phraseology of Article 179 of the first Schedule of the Limitation Act, which describes an application of this kind as an application for leave to appeal to His Majesty in Council. It is manifest, therefore, that clause (2) of section 12 of the Limitation Act does apply to applications such as the present, and the objection fails.

As the decree from which it is sought to appeal is one of reversal, the only question is whether the amount or value of the subject-matter in dispute is of the requisite amount, or whether it involves directly or indirectly some claim or question to property of the value of Rs. 10,000

The facts are these: The appeal now before us relates to rent, and it is said that the tenants have been evicted from a part of the land included in the tenancy, and the result has been that the High Court has decided that the rent is suspended and no claim, therefore, lies as long as the eviction continues.

The amount of the rent is Rs. 1,300 and odd, and it is claimed on the part of the applicant that if this sum of Rs. 1,300 is capitalized, it will reach a sum of more than Rs. 10,000. Further, it has been said on the part of the applicant that the eviction has been brought about by the creation of leases in favour of the tenants in perpetuity which cannot be brought out, and, therefore, the dispossession must continue for ever. It is accordingly claimed that the amount of the capitalized value of Rs. 1,300 would be more than Rs. 10,000; but the other side says that the capitalized value falls far short of that amount.

We have not before us the materials necessary for the decision of this question, and we must, therefore, utilize the provisions of rule 5, Order XLV of the Code, and refer the dispute to the Court of first instance to determine the amount or value and return its report to this Court.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 77 OF 1910.
December 19, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Carnduff.
Raja Sir SOURINDRA MOHAN TAGORE AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAHIM BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 23, 25 cl. (a), 76—Ejectment—Excavation of tank—Suit for ejectment—Subsequent suit for rent—Forfeiture—Waiver—Improvement—Use of land rendering same unfit for purposes of tenancy—Digging tank which is a practical necessity—Ground of ejectment.

SOURINDRA MOHAN *v.* RAHIM BAKHSH.

The plaintiffs instituted a suit for ejectment against certain occupancy-*raiyats* under clause (*a*) of section 25 of the Bengal Tenancy Act. A suit for rent was subsequently commenced in respect of a period subsequent to the alleged forfeiture:

Held, that there was no waiver at the date of the commencement of the suit, and the claim for ejectment could not be defeated on that ground.

Mansur Ali v. *Abdul Karim*, 1 Ind. Cas. 753; 10 C. L. J. 187, referred to.

Before a landlord can succeed in an action under section 25, clause (*a*), of the Bengal Tenancy Act, it is obligatory upon him to prove that the land has been used in a manner which renders it unfit for the purposes of the tenancy; what has to be considered is the effect of the act upon the entire land comprised in the tenancy.

Therefore, where a holding comprises 66 *bighas* and the tenants sub-let 4 *bighas* to an under-lessee who excavated a tank on 2 *bighas*, and it was found that the tank had not rendered the land of the tenancy unfit for the purposes thereof, but was a practical necessity:

Held, that the *raiyat* could not be ejected under clause (2) of section 25 of the Bengal Tenancy Act.

Appeal from the decree of the District Judge of Nadia, dated October 7th, 1909, affirming that of the Munsif of Ranaghat, dated May 17th, 1909.

FACTS.—The plaintiffs sued to eject their tenants for having in collusion with their under-tenants excavated a tank on the land in suit and thereby rendered it unfit for the purposes of cultivation. The tenants pleaded that as occupancy-*raiyats*, they had the right to use the land in any manner which did not materially impair its value and that the tank was an improvement to the holding.

The Munsif found that the tenants had an occupancy-right, that the tank was an improvement, which had considerably increased the value of the holding in suit, and that the claim of ejectment could not succeed on the ground of waiver. On the last question, the Munsif said:—

"It appears also that even after the excavation of that tank in *Baishakh* 1313, the plaintiffs brought a suit for rent, against the tenants in respect of the *jama* in question, which fell due up to the year 1314, and obtained a decree. The plaintiffs, by their conduct, therefore, must be held to have waived their right to ejectment. [*Kali Krishna Tagore* v. *Fuzle Ali Chowdhry* (1), *Jogeshuri* v. *Mahomed Ebrahim* (2) and *Kedarnath Nag* v. *Khetturpaul* (3)].

(1) 9 C. 843; 12 C. L. R. 592.
(2) 14 C. 33.
(3) 6 C. 34.

The Munsif dismissed the suit, and the plaintiffs appealed to the District Court, which said:—

"It appears from the plaintiffs' evidence that the excavation took place in 1313 and that in the year following, 1314, they sued the tenants for rent of the holding and obtained a decree. There are rulings which make it clear that such conduct on their part amounts to a waiver by them of a right to eject the tenants on the ground of such excavation [*Kedarnath Nag* v. *Khetturpaul*(3), *Kali Krishna Tagore* v. *Fuzle Ali Chowdhury* (1) and *Jogeshuri* v. *Mahomed Ebrahim* (2)]. It is immaterial, I think, under such circumstances, that the tenants did not raise the question of waiver definitely in their written statement. The point arises directly from the evidence on the record and it was taken in argument in the lower Court on the tenants' behalf. Moreover, I think that the tank which was dug with the full knowledge of the plaintiffs and which they have not cited any evidence to show to have been unnecessary, may be regarded as having been required. There is equally no evidence on the side of the tenants as to no other water-supply being available, but it may be assumed that the sub-tenant would not have spent a sum, which is said to have been about Rs. 3,000, and must, for the size of the tank covering some 2 *bighas* of land, have been considerable, unless it was considered a practical necessity. Under these circumstances, it is difficult to say that the tank has otherwise than improved the holding. It certainly is not shown to have impaired its value."

The appeal was accordingly dismissed, and the plaintiffs preferred a second appeal to the High Court.

Babus *Iwarka Nath Chakravarti*, and *Mohendra Kumar Mitra*, for the Appellants.

Babu *Hem Chandra Mitra*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in an action in ejectment. The plaintiffs commenced this action under clause (*a*) of section 25 of the Bengal Tenancy Act to eject the defendants on the ground that they, as occupancy-*raiyats*, had used the land comprised in their holding in a manner which rendered it unfit for the

purposes of the tenancy, because they had excavated a tank on the land in suit. The Courts below have concurrently dismissed the suit on two grounds, namely, *first*, that the plaintiffs had waived their right to eject the defendants, as, subsequent to the excavation of the tank which is alleged to have caused a forfeiture of the tenancy, they received rent from the defendants, and, *secondly*, that the excavation of the tank had improved the holding and was not shown to have impaired its value. This decision has been assailed before us on behalf of the plaintiffs on two grounds; namely, *first*, that the question of waiver ought not to have been decided because it was not expressly raised either in the pleadings or in the issues, and that in any view, upon the admitted facts, no question of waiver arises; and *secondly*, that the facts found are not sufficient to show that the excavation of the tank constitutes an improvement within the meaning of section 76 of the Bengal Tenancy Act. In our opinion, the first contention is well founded, but the second must be overruled.

In support of the first ground, it is pointed out that the tank was excavated in April 1906 and that the notices required by section 155 of the Bengal Tenancy Act as a necessary preliminary to the commencement of an action under clause (*a*) of section 25 were served on the 20th April 1907. The present suit was instituted on the 31st March 1908. A suit for rent was subsequently commenced on the 13th July 1908. Consequently, although, as explained by this Court in the cases of of *Kali Krishna Tagore* v. *Fuzle Ali Chowdhry* (1), *Jogeshuri* v. *Mahomed Ebrahim* (2), *Sita Nath* v. *Basudeb* (4), a landlord may, by acceptance of rent from his tenant subsequent to the date of forfeiture of the tenancy, be deemed to have waived his right to eject him, there was no waiver at the date of the commencement of the suit [*Cf. Mansar Ali* v. *Abdul Karim*(5)]. Possibly, the claim for rent might have been successfully defeated by the plea that as the plaintiffs had already sued the defendants as trespassers, it was not competent to them to hold them liable for rent. We are, however, not concerned with the decision in the rent suit. The conclusion at which we arrive is that the claim for ejectment cannot be defeated on the ground of waiver.

In support of the second ground, it has been contended, upon the authority of the decision in *Govinda Chandra Basu* v. *Kamiruddi Soyal* (6), that in order to constitute an improvement, it is necessary to show that the tank in question was excavated for the storage, supply or distribution of water for the purpose of agriculture or for the use of men and cattle employed in agriculture. It may be conceded that this position is well founded and that the finding of the District Judge is defective from this point of view, but it is obvious that it is unnecessary for the defendants to establish that the tank in question was an improvement within the meaning of section 76 to enable them to defeat the claim for ejectment. Section 23 of the Bengal Tenancy Act provides that when a *raiyat* has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy. Section 25, clause (*a*), then provides that an occupancy-*raiyat* shall not be ejected by his landlord from his holding except in execution of a decree for ejectment passed on the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy. Consequently, before a landlord can succeed in an action under section 25, clause (*a*), of the Bengal Tenancy Act, it is obligatory upon him to prove that the land has been used in a manner which renders it unfit for the purposes of the tenancy. It is obvious that what has to be considered is the effect of the act upon the entire land comprised in the tenancy. In the case before us, the holding comprises sixty-six *bighas*. The tenants sub-let four *bighas* to an under-lessee who excavated a tank on two *bighas*. The Courts below have concurrently found that the excavation of the tank had not rendered the land of the tenancy unfit for the purposes thereof. The District Judge has also found that the tank was a "practical necessity." The inference follows that the landlords have not established that the land comprised in the holding has been used in a manner which renders it unfit for the purposes of the tenancy. Their claim for ejectment, therefore, cannot be sustained.

(4) 2 C. L. J. 540.
(5) 1 Ind. Cs. 753; 10 C. L. J. 127.
(6) 9 C. W. N. ccxlvi.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 43 OF 1910.

September 15, 1911.

Present:—Sir Basil Scott, KT., Chief Justice,
Mr. Justice Beaman and
Mr. Justice Hayward.

BHAIJI SHAMRAO DAREKAR—
APPELLANTS
versus
HAJIMIYA MAHAMAD AMIN—
RESPONDENT.

Co-sharers—Possession—Adverse possession—Assertion of hostile title—Disclaimer of title—Mortgage by co-owners—Clandestine redemption and re-mortgage by one owner—Right of the other owner to redeem mortgage.

The possession of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of a hostile title by the former.

A. and *B.* jointly mortgaged certain property in 1866 to *C.* In 1882, *A.* alone redeemed the mortgage without the knowledge of *B.* and, shortly after, *A.* re-mortgaged the property to *D.*, without *B.*'s knowledge.

D. leased the property to *C.*'s heirs who were already in possession as first mortgagees. No knowledge of exclusion and adverse possession by *A.* could be imputed to *B.*

In 1908, *B.* sued to redeem the mortgage of 1866:

Held, that so long as *A.* took no steps to assert a title against *B.* in such a manner as to challenge his right to redeem his interest from *A.*, the possession of *A.* or his mortgagee *D.* would not be adverse to *B.* except in so far as the mortgagee might set up a limited title under Article 134 of the Limitation Act.

Vasudev v. *Balaji*, 26 B. 500, explained and distinguished.

Ramchandra v. *Sadashiv*, 11 B. 422, *Bhaudin* v. *Sheikh Ismail*, 11 B. 425, *Faki Abas* v. *Faki Nurudin*, 16 B. 191 and *Vithal* v. *Dinkarao*, 3 Bom. L. R. 685, relied upon.

Appeal against the order passed by the Assistant Judge, Thana, in Appeal No. 335 of 1909, reversing the decree passed by, and remanding the suit to, the Subordinate Judge at Mahad, in Civil Suit No. 228 of 1908.

The appeal was heard by Beaman and Hayward, JJ.; their Lordships differed in opinion and delivered the following

JUDGMENTS

BEAMAN, J.—All the facts material to be known are that a mortgage was jointly effected by Sakhling and Anapurnabai. Whether these two persons were joint mortgagors, or tenants-in-common, does not appear and, in my opinion, is now immaterial.

Subsequently, Anapurnabai redeemed alone, without the knowledge of Sakhling. This was in 1882. On the same day she, re-mortgaged, without the knowledge of Sakhling, to the defendants. The actual physical possession was not changed. The old mortgagees are found to have remained in possession as before under the new mortgage, but whether as mortgagees of the previous mortgage or after having attorned to the new mortgagees does not appear.

The plaintiff sues as the assignee of the heirs of Sakhling to redeem.

According to the decision of Sir Lawrence Jenkins in the case of *Vasudev* v. *Balaji* (1), the effect of the redemption of a mortgage by one of two or more joint or co-mortgagors, is to extinguish the whole equity of redemption. It is true that he expressly declines to decide such a case as this where the redemption was clandestine and without the knowledge of the co-mortgagor. This was in reference to the argument that to do so would be to prejudice co-mortgagors who were no parties to the proceedings of covert redemption. I cannot entertain the slightest doubt, having regard to what was being then urged on behalf of the plaintiff and the context, that this reservation was limited to the rival contentions, (*a*) for the plaintiff, that his equity was not, and (*b*) for the defendant, that it was, extinguished by the redemption. In the case before Jenkins, C. J., the redemption was made by one of two co-mortgagors, against both of whom a decree for sale had been obtained by the mortgagee. But the principle of the case as a whole, so far as it goes, is unmistakably clear. Redemption by one of two or more co-mortgagees extinguishes the entire equity of redemption, and all that survives in the co-mortgagors, who were not co-redeeming mortgagors, is a right to have their proportionate shares of the mortgaged property on paying off their proportionate share of the mortgage-debt, costs, principal and interest, etc. And the mortgagor who redeems has a lien or charge on the shares of his co-mortgagors to that extent, including, of course, their share of all the expenses legitimately incurred for the purpose of saving the pro-

(1) 26 B. 500; 4 Bom. L. R. 178.

perty. This being so, it appears to make little difference in theory whether the co-mortgagors did or did not know of the redemption. For if such redemption has in law the effect of putting an end to the equity, then a new relation is immediately set up as between the one mortgagor who has redeemed and the other mortgagors who have not. The former has a lien on the shares of the latter. He may be in or out of possession. If in, then he holds their shares subject to the charge. And in a subsequent suit to obtain possession by the mortgagors out of possession of their shares, the Court held very emphatically that Article 144 applied, and that as the suit had not been brought within twelve years of the redemption, the co-mortgagors were time-barred. This could only mean one thing, that in the opinion of the learned Chief Justice, the possession of the lienor in possession was adverse to his co-mortgagors from the moment of redemption. It is not a case of any person holding adversely to the equity of redemption, which, in spite of *Cholmondeley* v. *Clinton*(2), and much contained in the case of *Tarubai* v. *Venkatrao*(3), I think, can be easily shown in every case to be impossible unless expressly made possible by Statute (Article 134). It means only this, that in certain circumstances the equity of redemption is extinguished by operation of law. It has, indeed, been used up and exhausted. For it is a fundamental principle of the law of mortgage that a mortgage must be redeemed in its entirety, not piecemeal. In the Full Bench decision of *Bhavrao* v. *Rakhmin* (4), it was held with equal clearness and emphasis that when one of several tenants-in-common mortgages, without the knowledge or consent of his co-tenants, the whole or any part of the tenancy-in-common, the possession of the mortgagee going in under his mortgage, is "ownership" from the first moment of taking possession not only against his own mortgagors but against all the co-tenants who should have been but were not mortgagors. The basis of the reasoning of Farran, C. J., on this point is too clear to admit of serious dispute. The quality of the possession as between parties contending on the one hand that it was, on the other, that it was not, adverse, is to be determined by the intention of the person possessing. In the case of mortgagees put in under a mortgage, it must always (unless the contrary be shown, which I think it never can) be regarded as adverse alike to the mortgagors and all other persons who might have been but were not mortgagors. The reasoning summarily brushes aside all considerations touching the knowledge of the co-mortgagors and to that extent seems to me to make a large advance on the old and well settled rule that in the case of tenants-in-common, one cannot be excluded unless the act amounts in law to an ouster, in which this much has, I think, always held to be included, that he must know of it. In *Tarubai's case* (3), while agreeing with the conclusion, I must dissent from a great part of the judgment in which it seems to be held that had the original mortgagor known of what was being done, his equity of redemption would have been barred. I cannot bring myself to assent to the necessary premiss that the wholly unauthorized act of volunteers, who were no parties to the mortgage, could in any circumstances start a period of possession adverse to the equity of redemption, or indeed that any physical possession by anybody could in any circumstances be adverse to an incorporeal right vested exclusively in the mortgagor and never passing from him (except by his own will and act). If a third person steps in and redeems my mortgage, why need I raise a protest? He had no right to do it, and his act appears to me to be in law a mere nullity so far as the equity of redemption is concerned; it goes no further than to substitute him for the original mortgagee (if so far) and leave him as much exposed as the former to be redeemed.

Applying the principles of the two cases, I first mentioned, to the facts before us, the result would be this. In 1882, when Anapurnabai redeemed without the knowledge of Sakhling, the equity of redemption, of which Sakhling then had half, was extinguished and Anapurnabai held the land as tenant-in-common with Sakhling plus a charge on his half for his half share of the mortgage debt, costs, principal and interest. That charge she could only enforce within twelve years, but being in possession, her possession as lienor would, in my opinion, be clearly adverse to Sakhling. I can give no

(2) (1820) 2 J. & W. 1 at pp. 186, 187; 22 R. R. 84.
(3) 27 B. 43; 4 Bom. L. R. 721.
(4) 23 B. 137.

other meaning to the decision of Sir Lawrence Jenkins, nor can I believe that he overlooked so obvious an argument as that while Article 132 restricts the period within which a person having a charge may enforce it, it does not comprise a case in which the person having the charge is in actual possession. The argument is that if that be so, then the person liable to the charge may, if the person entitled to it has not sued to enforce it within twelve years (having been in possession all that time), recover on the first day of the thirteenth year, without paying a penny of the charge for which he was liable during those twelve years. The fact that Jenkins, C. J., without even adverting to such a contention, dismissed the plaintiff's suit, is, I think, a sufficient answer. The rights of persons standing in such relations appear to me to be reciprocal, just as the rights of mortgagor and mortgagee are reciprocal. The Article is framed as it is because ordinarily the person having the charge is out of possession, and so the possession of the person owing the charge is treated as adverse. *A fortiori*, I should have thought, when the person having the charge is in possession, that possession must be adverse to the person who owes it: so that when no steps have been taken either to pay off, or enforce the charge during twelve years, the case naturally falls under the general principle of Article 144. That appears to me to be the law governing this case. In 1882 Anapurnabai redeemed, and there was an end of Sakhling's equity of redemption. The same day she mortgaged to the defendants, and their possession, according to Farran, C. J.'s judgment, immediately became adverse to her and Sakhling equally. This suit, therefore, since the plaintiff cannot rely on any fraction of the equity of redemption having survived in Sakhling (which was the ground of his claim), has long since been barred by limitation: and no question as to whether Sakhling knew that he was excluded arises.

The validity of this conclusion rests upon a chain of reasoning, in which one link needs strengthening. It is not clear from the findings of Courts below whether the mortgagees of Anapurnabai really obtained possession. The original mortgagees are said to have been in ostensible possession, but I have assumed that what was meant was that they attorned to the mortgagees under the mortgage executed by Anapurnabai to the defendants. Unless this were so, there would have been no possession adverse or otherwise to be reckoned with in the defendants. But if the defendants really did obtain possession under the mortgage of 1882, then I feel that there is no escape whatever from the effect of the judgment of the Full Bench and that the knowledge of the predecessors-in title of the plaintiff becomes entirely immaterial. I have ventured to doubt whether that is a correct interpretation of the law, but there can, in my opinion, be no doubt at all that it is what was ruled by the Full Bench and, therefore, binding on us. I would, therefore, remand an issue to the lower Court to be tried, "Did the defendants obtain possession under their mortgage of 1882?" and if that be found in the affirmative, I would reverse the decree of the Court below and dismiss this suit: if in the negative, then I would confirm the decree of the lower Appellate Court.

HAYWARD, J.—The lower Appellate Court has not recorded its findings with that precision which is desirable, but it appears to have held that the property in suit belonged originally to the first cousins, Sakhling and Babling, and was mortgaged with possession to Bajirao in 1866, after Babling's death, by Sakhling and Anapurna, the mother of Babling, that whether the property in suit was originally owned as joint family property or as a tenancy-in-common by Sakhling and Babling, it became, by adverse possession consequent on the mortgage, a tenancy-in-common in the hands of Sakhling's heirs and of Anapurna; that the property in suit was redeemed from the heirs of Bajirao and re-mortgaged with possession to the father of defendants Nos. 1 to 3 in 1882 without the knowledge of Sakhling's heirs by Anapurna; that the heirs of Bajirao nevertheless remained in possession professedly as the tenants of the defendants Nos. 1 to 3 but not so as to affect Sakhling's heirs with knowledge of exclusion or adverse possession by Anapurna; that Sakhling's heirs included Ganling, one of the vendors of plaintiff, who had thus obtained a subsisting interest in the equity of redemption and was entitled to redeem the property from the defendants Nos. 1 to 3.

The lower Appellate Court has, in my opinion, come to a correct conclusion. The effect of the redemption by Anapurna was to place her in the position of a lienor with regard to her co-tenants, Sakhling's heirs,

and had Anapurna thereafter held the property exclusively as her own to the knowledge of Sakhling's heirs, she would, no doubt, have obtained exclusive title by adverse possession as indicated in the cases of *Ramchandra Yashvant Sirpatdar* v. *Sadashiv Abaji Sirpatdar* (5) and *Vasudev* v. *Balaji* (1). But it has been contended that even without knowledge, Sakhling's heirs must be held to have lost their title by the adverse possession of Anapurna's mortgagees on the strength of the Full Bench decision in *Bhavrao* v. *Rakhmin* (4). What was, however, decided in that case was that knowledge of the true owner's title did not prevent the mortgagees obtaining by adverse possession complete title as mortgagees. No question was there raised as to the true owner's knowledge of the adverse possession of the mortgagees. This question has been exhaustively discussed in the case of *Tarubai* v. *Venkatrao* (3), where it has been shown that, without knowledge or circumstance that could have given knowledge to the true owner, there could be no adverse possession on the part of the mortgagees. Reference can also be made to the case of *Purshottam* v. *Sagaji* (6).

The lower Appellate Court's decision ought, therefore, in my opinion, to be confirmed and this appeal dismissed with costs.

Owing to this difference in opinion, the following question of law was referred to the third Judge:—

"Whether a co-mortgagor can lose his equity of redemption by adverse possession of his co-mortgagor who has, without his knowledge and without circumstances that could have given knowledge, redeemed the mortgage and re-mortgaged the property to other mortgagees."

Mr. *Coyaji*, with him Mr. *P. B. Shingne*, for the Appellants.

Mr. *D. A. Khare*, for Resepondent No. 1.

Mr. *D. C. Virkar*, for Respondents Nos. 2 and 3.

JUDGMENT.—The question is whether the interest of Anapurnabai has been for over twelve years adverse to the plaintiff.

Anapurnabai in 1882 redeemed from one Bajirao or his representatives certain out-standing mortgages, and the plaintiff, or those under who mhe claims, as co-mortgagors with Anapurnabai, became entitled, as soon as they should pay their share of the redemption money, to enjoy the property jointly with her. A short time after redeeming the mortgages, Anapurnabai mortgaged the property to the first and second defendants by Exhibit 21, and it may be assumed, for the purpose of this judgment, that the first and second defendants have been in possession as mortgagees since that time, and have leased out the property to the descendants of Bajirao, the redeemed mortgagees. The lower Court finds as a fact that no knowledge of exclusion or adverse possesson by Anapurnabai can be imputed to the plaintiff's vendors. So long as Anapurnabai took no step to assert a title against the plaintiff or those under whom he claimed in such a manner as to challenge their right to redeem their interest from her, the possession of Anapurnabai and her mortgagees would not be adverse to the plaintiff or his predecessors in-title, except in so far as the mortgagees might set up a limited title under Article 134 of the Limitation Act. There is ample authority for this proposition, the Bombay cases being *Ramchandra Yashvant Sirpatdar* v. *Sadashiv Abaji Sirpatdar* (5); *Bhaudin* v. *Sheikh Ismail* (7); *Faki Abas* v. *Faki Nurudin* (8) and *Vithal* v. *Dinkarao* (9).

Shortly stated, the possession of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of a hostile title by the former.

On behalf of the appellants, reliance has been placed upon the judgment of this Court in *Vasudev* v. *Balaji* (1). That judgment expresses approval of three of the Bombay cases above referred to, but the finding of the District Court was accepted that there had, in fact, been twelve years' adverse possession on the part of the redeeming co-mortgagor. It cannot, therefore, be taken as an authority in support of the appellants' case.

I am, therefore, of opinion, that the judgment of the Assistant Judge was correct, and

(5) 11 B. 422.
(6) 28 B. 87; 8 Bom. L. R. 674.
(7) 11 B. 425.
(8) 16 B. 191.
(9) 3 Bom. L. R. 685.

that his order must be affirmed and the appeal dismissed with costs.

Order confirmed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 979 OF 1912.

May 27, 1912.

Present:—Mr. Justice Brett and Mr. Justice Sharfuddin.

TARAK CHANDRA GOSWAMI—PETITIONER

versus

SATYA CHARAN PATNI AND ANOTHER—OPPOSITE PARTY.

Succession (Property Protection) Act (XIX of 1841), s. 3—Inquiry—Question to be considered before taking action under.

It is necessary before action can be taken under Act XIX of 1841 that the provisions of section 3 of that Act are strictly fulfilled. And in order to fulfil the provisions of that section, it is necessary to consider, (1) whether the opposite party has no title, (2) whether the person claiming is really entitled to the property, and (3) whether the person making the application is likely to be materially prejudiced if left to the ordinary remedy by a regular suit.

Phul Chand Lal v. *Kishmish Koer*, 6 Ind. Cas. 630; 11 C. L. J. 521 and *Sato Koer* v. *Gopal Sahu*, 34 C. 929; 12 C. W. N. 65, relied upon.

Where action was taken under Act XIX of 1841 without considering those three requisites, the High Court set aside the order.

Rule against an order of the District Judge of Hooghly made under Act XIX of 1841.

Babu *Shib Chandra Palit*, for the Petitioner.

Babus *Boidya Nath Dutt* and *Bipin Bihari Ghosh* (Senior), for the Opposite Party.

JUDGMENT.—This Rule was obtained on the opposite party to show cause why a certain order, passed by the learned Judge of Hooghly, under the provisions of Act XIX of 1841, should not be set aside on the ground that under the law it does not appear that he had jurisdiction to pass the order or that the requirements of the law necessary to pass the order do not appear to have been properly complied with. It appears that one Tinkori Dasi died at Benares after a short illness. Before her death, she left her house at Bhadreswar and went with the members of the family to which the present opposite party belongs to Benares. There she died. An application was made by the opposite party claiming to be related to the lady as relatives of her husband for proceedings to be taken by the District Judge under Act XIX of 1841. The Act was passed more than 70 years ago and it is not clear why, in the circumstances, the opposite party did not in the first instance adopt the ordinary course open to them under the law. They claimed as heirs of the husband of the deceased to be entitled to all the properties left by her and specially they claimed to be entitled to two boxes of ornaments which were left by her in her house. They claimed these boxes on the ground that before her death, she made over the keys of the boxes to them. The application was directed against the present petitioner who appears to be a relation of the spiritual guide of the lady and who appears to have lived with her for the last 16 or 20 years. This petitioner claimed title to the immoveable property left by the lady under a deed of gift and also claimed title to the moveable property which was in these boxes and in the house in which, in fact, those persons were living. The learned Judge proceeded to dispose of the case under the provisions of Act XIX of 1841 and, having tried the case more or less as a regular suit, delivered a long judgment in which he came to the conclusion that the title was with the opposite party, who were the petitioners before him and passed an order directing the properties to be made over to them. The other side, who was in possession of the property at the time of the death of the deceased, has come to this Court and has obtained the present Rule the terms of which have already been mentioned.

The question which we have to decide in this case is whether or not there were circumstances sufficient to justify the lower Court in acting under the provisions of this old Act passed no less than 70 years before, which has very seldom been used, instead of leaving the parties to follow the ordinary course and bring a regular suit to prove their title to the property. In two similar cases, the same question came before this Court, one disposed of in 1900 [*Phul Chand Lal* v. *Kishmish Koer* (1)] and other disposed of in 1907 [*Sato Koer* v. *Gopal Sahu* (2).] In

(1) 6 Ind. Cas. 630; 11 C. L. J. 521.
(2) 34 C. 929; 12 C. W. N. 65.

these cases, it was pointed out that it was necessary, before action could be taken under Act XIX of 1841, that the provisions of section 3 of that Act should be strictly fulfilled and that in order to fulfil the provisions of that section, it was necessary to consider, *first*, whether the opposite party had no title; *secondly*, whether the person claiming was really entitled to the property and, *thirdly*, whether the person making the application was likely to be materially prejudiced if left to the ordinary remedy by a regular suit. In the present case it has not been shown to us nor does it appear to be declared on the judgment of the lower Court that the opposite party in this Rule, who were the applicants under the provisions of Act XIX of 1841, would have been materially prejudiced if left to the ordinary remedy of a regular suit. It would have been open to the Court, in which they brought their suit, at their instance, to give directions for the proper custody and protection of the property during the disposal of the suit and certainly it was very desirable that in a case like the present, the matter should be tried out in the regular way and not disposed of by summary proceedings under this old Act. The other points with regard to which the Court should be satisfied are that the person in possession of the property had no lawful title and that the claimant was really entitled to the property. In the present case, the person in possession set up a title which, if proved, would be a lawful title and she at the same time alleged that the opposite party had no title as the property in dispute was property which had come to the deceased from her own father. In these circumstances, it is impossible to say that the title set up by the petitioner was not a *bona fide* title or was not one which ought not to be considered and determined in a regular suit. Certainly, in the present case the conditions required by section 3, which are necessary to give the Court jurisdiction to act under Act XIX of 1841, do not appear to us to have been complied with. Following, therefore, the principles laid down by this Court in the two cases to which we have referred, namely, the cases of *Phul Chand Lal* v. *Kishmish Koer* (1) and *Sato Koer* v. *Gopal Sahu* (2), we direct that the Rule be made absolute, that the judgment and order of the lower Court be set aside and that the parties be referred to the Civil Court in order to prove in a regular suit their respective title to the property. The Court before which the application will be made by plaint or otherwise will, no doubt, take the steps necessary for the protection of the property pending the disposal of the suit. The result, therefore, is that the Rule is made absolute with costs three gold *mohurs*.

Rule made absolute.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 242 OF 1911.

March 1, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Russell.

GOBIND BALKRISHNA JOSHI—

PLAINTIFF

versus

PANDURANG VINAYAK JOSHI—

DEFENDANT.

Provincial Small Cause Courts Act (IX of 1887), sch. II, Art. 35 (l)—Small Cause Suit—Suit for injury—Assault—Threatening to beat with a shoe—Suit for compensation.

A suit to recover damages from defendant for running after plaintiff with a shoe in his hand, threatening to beat him and using abusive language, though not actually touching the plaintiff's person, is a suit for "injury to the person" within the meaning of clause 35 (*l*) of the second Schedule of the Provincial Small Cause Courts Act and is, therefore, excluded from the cognizance of the Small Cause Court.

The act complained of amounts to an assault and to an offence affecting the human body.

Application from the decision of the District Judge of Poona, in Miscellaneous Appeal No. 10 of 1911, on appeal from the order passed by the First Class Subordinate Judge at Poona, in Civil Suit No. 235 of 1911, and Civil Reference No. 13 of 1911, made by the Small Cause Court Judge at Poona.

FACTS.—Plaintiff brought this suit to recover damages from defendant on the ground that the latter ran after him with a shoe in hand, threatening to beat him and using abusive language.

It was admitted that the person of the plaintiff was not actually touched.

Mr. *P. D. Bhide*, for the Applicant.

RASARAJ KUNAI *v.* PROSONNA KUMAR ROY.

Mr. *D. G. Dalvi*, *amicus curiæ*, in support of the Reference.

Mr. *B. V. Desai*, *amicus curiæ*, against the Reference.

JUDGMENT.—The action complained of by the plaintiff would be an assault and an offence affecting human body under the Penal Code. It also would be an assault under the English law : see *Stephens* v. *Myers* (1). We think also that it was an injury to the person within the meaning of clause 35, sub-clause (*l*) of the second Schedule of the Provincial Small Cause Courts Act, and the suit was, therefore, not within the cognizance of the Small Cause Court.

We set aside the decree of the first class Subordinate Judge and remand the case for trial to him.

Rule made absolute.

Costs costs in the cause.

Rule made absolute.

(1) 4 Car & P. 349; 34 R. R. 811.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 223 OF 1911.

May 6, 1912.

Present:—Mr. Justice Brett and Mr. Justice N. Chatterjea.

RASARAJ KUNAI AND OTHERS—PETITIONERS—APPELLANTS

versus

PROSONNA KUMAR ROY AND ANOTHER OPPOSITE PARTY—RESPONDENTS.

Execution of decree—Sale—Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Sale without notice—Whether sale void—Substantial injury.

Omission to serve a notice, under the provisions of Order XXI, rule 22 of the Civil Procedure Code, is not by itself sufficient to render a sale, which has subsequently been held, void.

Such omission would constitute a serious irregularity entitling the judgment-debtor to vacate the sale by proving that substantial injury has been the result of it.

Mallarjun v. *Narhari*, 27 I. A. 216; 5 C. W. N. 10, 25 B. 337; 10 M. L. J. 368, 2 Bom. L. R. 927 and *Lakshmi Charn Sen* v. *Srish Chandra Roy*, 9 Ind. Cas. 584; 13 C. L. J. 162, relied upon.

Gobind Pershad alias *Govind Lal* v. *Rung Lal*, 21 C. 23, not followed.

Appeal from the order of the District Judge of Murshidabad, dated February 3rd, 1911, confirming that of the second Munsif of Jangipur, dated September 26th, 1910.

Babu *Biraj Mohan Majumdar*, for the Appellants.

Babus *Chandra Sekhar Banerjee* for Babu *Ram Chandra Majumdar* and Babu *Harish Chandra Roy*, for the Respondents.

JUDGMENT.—The only question raised in this appeal is whether the omission to serve a notice under the provisions of Order XXI, rule 22, of the new Code of Civil Procedure, corresponding to section 248 of the old Code, is by itself sufficient to render a sale, which has subsequently been held, void. In the present case, an application was made by the present appellants to have a sale set aside on that ground and the Court of first instance, treating the application as one under Order XXI, rule 90 of the new Code, came to the conclusion that the judgment-debtors had failed to prove any irregularity which by reason of the fact that it had caused substantial injury to them would be a sufficient ground for setting aside the sale. On appeal before the District Judge, the main question which seems to have been contested was whether the application was preferred under Order XXI, rule 90, corresponding to section 311 of the old Code, or under section 47 of the new Code, corresponding with section 244 of the old Code. The learned Judge appears to have been of opinion that the application was one under rule 90 of Order XXI of the new Code, but at the same time, he held that, even if it could be regarded as an application under section 47, as the judgment-debtors had failed to prove any substantial loss resulting from any irregularity, the application to set aside the sale could not succeed. The judgment-debtors have appealed to this Court and a preliminary objection is taken to the competency of the appeal on the ground that, as the application was one under Order XXI, rule 90, no second appeal would lie. The learned Pleader for the appellants has, however, contended that the application could not be one falling under Order XXI, rule 90, because the service of the notice under section 248 of the old Code was not a matter arising in the execution of the decree itself and he has further contended that the omission to serve the notice under section 248 of the old Code is itself sufficient to render the sale void. He has referred

us to the decision of this Court in the case of *Livinia Ashton* v. *Madhabmoni Dasi* (1). On the other hand, the learned Pleader for the respondent has relied on the decision of this Court in the case of *Lakshmi Charan Sen* v. *Sris Chandra Roy* (2). We have considered those two decisions carefully and, in our opinion, they do not support the view that the omission to serve the notice required by Order XXI, rule 22, is sufficient to render a subsequent sale void. In the case of *Livinia Ashton* v. *Madhabmoni Dasi* (1), on which the appellants' Vakil relies, reference is made to the decision of the Privy Council in the case of *Malkarjun* v. *Narhari* (3). Their Lordships of the Privy Council, in dealing with the question whether a sale held without the issue of a notice under section 243 of the Code is a nullity, expressed the opinion that the omission would constitute a serious irregularity entitling the judgment-debtor to vacate the sale; but, at the same time, they laid down that, after the sale had become complete, the sale was a reality which could be defeasible only in the way provided by law; and they seemed to favour the opinion, which was afterwards expressed by this Court in the case of *Lakshmi Charan Sen* v. *Sris Chandra Roy* (2), which is relied on by the learned Pleader for the respondents, that, though an application to set aside a sale on the ground that no notice has been served as required by Order XXI, rule 22, is one which cannot be made under the provisions of Order XXI, rule 90 of the new Code, corresponding with section 311 of the old Code but must be one made under the provisions of section 47 of the new Code corresponding with section 244 of the old Code, still in order to justify a Court in setting aside a sale on the ground of the omission to serve a notice under Order XXI, rule 22, it must be proved that the omission to serve such notice has resulted in substantial injury to the owner of the property sold. The learned Pleader for the appellants has also referred to the case of *Gobinda Pershad* alias *Gobind Lal* v. *Rung Lal* (4) to support the contention that the omission to serve the notice renders the sale void. We are not, however, prepared to follow the decision in that case and consider that we are bound by the decision of the Privy Council which has been followed in the two cases, which have been already mentioned and which are reported in *Livinia Ashton* v. *Madhabmoni Dasi* (1) and *Lakshmi Charan Sen* v. *Sris Chandra Roy* (2). In the present case, both the lower Courts have found that the judgment-debtors failed to prove that they had suffered any substantial loss by the sale and, in those circumstances, we consider that both the lower Courts were justified in the conclusions at which they arrived that the sale could not be set aside.

The result, therefore, is that the appeal is dismissed with costs. We allow two gold *mohurs* as the hearing fee to be divided in equal shares between the two sets of respondents who have appeared.

Appeal dismissed.

(1) 5 Ind. Cas. 390: 11 C. L. J. 189; 14 C. W. N. 569.

(2) 9 Ind. Cas. 584; 13 C. L. J. 162.

(3) 27 I. A. 216, 25 B. 337, 2 Bom. L. R. 927, 5 C. W. N. 10, 10 M. L. J. 368.

(4) 21 C. 23.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 574 OF 1910.

February 2, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

BADAMAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

NET RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Escheat—Proprietor of land dying without heirs by relationship—Right of proprietors of thulla *and* patti *of different tribes and* gots.

In a suit for a declaration that the plaintiffs are owners in possession of lands, having succeeded as owners of *thulla* or *patti* left by a proprietor who died without heirs by relationship, and that the defendants had no right to the land, the Court must determine whether the plaintiffs have any right of succession by custom; the weakness of defendants' case should not be accepted as a proof of plaintiffs' title.

As a general rule the *pattidars* do not succeed and the land escheats, when among the *pattidars* are proprietors of different tribes or *gots* of the same tribe and the deceased has left no heirs by relationship.

Second appeal from the order of the Divisional Judge, Ambala Division, dated the 28th October 1909, confirming that of the

BADAMAN v. NET RAM.

District Judge, Karnal, dated the 17th August 1909, decreeing the claim.

Lala *Laipat Rai*, for the Appellants.

Lala *Dwarka Das*, for the Respondents.

JUDGMENT.—One Chajju, a *Jat* of *got Dudhan*, who was a co-proprietor of certain lands in *Thulla Dayala*, *Patti Jattan*, *Mouza* Ratangarh, died about 1908 and admittedly left no lineal or collateral heirs. Mutation of names in respect of his estate was in the first instance effected in favour of all the proprietors of the *Patti Jattan* which comprises *Thulla Dayala* and two other *thullas* but subsequently the Revenue authorities rescinded their previous order and directed mutation to be effected in favour of the proprietors of the *Thulla Dayala* only. Plaintiffs, who are the proprietors of the two other *Thullas*, Basti and Ratan, in the same *patti*, accordingly, sue for a declaration to the effect that according to law and custom, the proprietors of the *patti*, (*i. e.*, of all three *thullas*) are entitled to the said land and not merely the proprietors of *Thulla Dayala*. The latter have been made defendants in the suit. The land is actually in possession of one Buali, a *Teli*, and this person admits the rights of plaintiffs. The Courts below have held that plaintiffs must be regarded as being in possesssion through him and that their suit for a declaratory decree is entertainable. Plaintiffs' suit has been decreed both by the District Judge and by the Divisional Judge, and defendants have applied to this Court for revision of these decrees; their application was admitted as a further appeal, under section 70 (1) (*b*) of the Punjab Courts Act and we have heard it argued as such. In our opinion, the *onus probandi* was upon plaintiff, who claimed a declaratory decree affirming their right to the land, to affirmatively establish their title, and this despite the fact, that they happen to be in possession of the land. Admittedly, they are not the lineal or collateral heirs of the deceased proprietor and we know of no authority to the effect that when a village proprietor dies without such heirs, the proprietors of the *patti* or of the village must be deemed to be entitled to succeed to his estate.

The lower Courts have lost sight of this aspect of the case and have regarded it as a contest purely between the proprietors of the *patti* (plaintiffs) and the proprietors of *Thulla Dayala*. They have weighed the respective claims of these two parties and because defendants have not been able to show a preferential right to the land, they have granted plaintiffs a decree for which they prayed. This was an entirely erroneous method of dealing with a case of this kind. There is no presumption that either plaintiffs or defendants are entitled to the property, and as plaintiffs ask the Courts to affirm by decree that all proprietors of the *patti* are owners of that property, the burden of proving their claim lay heavily upon them, and they were not entitled to the decree unless and until they had succeeded in affirmatively establishing their allegation. The weakness of defendants' case should not have been accepted as proof of plaintiffs' title. The question then is, whether plaintiffs have proved that they are entitled together with defendants to the estate of the deceased. Admittedly, Chajju was the last *Jat* of the *Dudhan got* in this village, and it is not denied that among the proprietors of *patti* are *Jats* of various *gots* and also certain Muhammadans and Brahmans. In such cases, the general rule is that in the event of a proprietor dying without heirs, his estate ordinarily escheats to Government (Digest of Civil Law in the Punjab, para. 28). When, therefore, plaintiffs claim a decree declaratory of their right to succeed to the property of Chajju, they are bound to show that this general rule does not apply to their case. What then is the proof adduced by them in support of their claim ?

They rely, in the first place, upon the *Riwaj-i-am* of the Thanesar *tahsil*. The lower Courts held that this document supports plaintiffs' claim, but we cannot agree. The important clause in the *Riwaj-i-am* is, undoubtedly, No. 47, which provides that in the event of a man dying without *ek jaddis*, all the proprietors of the *patti* who are of the same *got* will succeed. It is not contended that plaintiffs are of the same *got* as the deceased, Chajju, but it is argued that in the absence of members of the proprietary body of the same *got*, all other proprietors in the *patti* are entitled to succeed. We cannot accept this argument, for it seems clear to us, after a perusal of clauses 40 and 47 of the *Riwaj-i-am*, that the intention was to make provision merely for such collateral relations of the deceased as were unable to prove affirmatively their descent from a

common ancestor. In villages in this Province, it is often found that certain persons are unable to trace descent from an ancestor common to themselves and a deceased person whose property they claim, and the utmost they can show is that the deceased and themselves were of the same *got*. In such cases, Courts are asked to presume descent from a common ancestor simply on that ground. It seems to us that it was to provide for such cases that the entry was made in the *Riwaj-i-am* and that it was not intended thereby to confer rights upon persons who could not possibly have belonged to the family of the deceased. In any case, the entry in question does not directly support plaintiffs' case. The entry in the *wajib-ul-arz* of 1353 is the next piece of evidence relied upon by plaintiffs, but it affords them even less assistance. If provides that if a village proprietor goes away or is lost sight of, and there are no heirs (*warisan*), the *proprietors of the village* can take possession of his land and that they shall all be responsible for payment of land revenue and other Government demands.

Apart from the objection that this provision relates to the proprietors of the *whole village*, and not merely the proprietors of the *patti*, it is obvious that it confers no right of succession as owners or heirs. It merely provides that, in the event of a proprietor leaving the village, if there are no heirs to the property, the whole village will have to bear the burden of paying Government demands, and that as some compensation, the proprietary body of the village may take possession of the *derelict* property, [see as to this, *Harnam Singh* v. *Partab Singh* (1)]. It is conceded that the oral evidence in this case is of no value, and thus plaintiffs' claim rests solely upon the entries in the *Riwaj-i-am* and the *wajib-ul-arz*. These, as we have shown, do not establish their right to succeed to Chajju's property, and their claim must, therefore, fail. In granting them the declaratory decree for which they prayed, the Courts below were (as here already remarked) misled by regarding the case as one merely between plaintiffs and defendants. They are of opinion that defendants have no preferential or exclusive right to the property and they lay stress upon the fact that the *thullas* in the village are mere artificial units, without (as the Divisional Judge says) any recognizable "*raison d'etre*." Finding, then, that defendants have no exclusive right to the property, they conclude that plaintiffs' contention must be correct and that it devolves upon the proprietors of the *patti*. This is clearly a case of *non sequitur* and the Courts have lost sight of the fact that before plaintiffs can claim the decree asked for, they must prove not merely that defendants have no exclusive right to the property, but also that they themselves have a right to claim the declaration for which they pray. This they have entirely failed to prove and we, therefore, accept the appeal and dismiss plaintiffs' suit with costs throughout.

How far this decision will benefit either party is a matter with which we are not concerned.

Appeal accepted.

(1) 102 P. R. 1906; 129 P. L. R. 1906.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 174 OF 1911.

May 21, 1912.

Present:—Mr. Rafique, A. J. C.

BAKHT BALI SINGH—PLAINTIFF—APPELLANT

versus

Musammat LEKHRANI KUNWAR—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Transfer with a view to defeat an anticipated attachment—Transferee not sharing in fraudulent intention—Burden of proof on plaintiff when he sets up a deed as genuine—Finding of fact, right of appellant to challenge in second appeal—Inferences from facts found can be challenged in second appeal.

The mere fact that a transfer was made to defeat an anticipated attachment does not evidence an intent to defeat or delay creditors of the vendor.

Bhagwant Appaji v. *Kedari Kashi Nath*, 25 B. 202; 4 Bom. L. R. 986, referred to.

Where a plaintiff sues for a declaration that a particular transfer in his favour is a good and valid one, it is incumbent upon him to make out in the first instance the validity of the sale in his favour.

Shib Narain v. *Shankar Panigrahi*, 5 C. W. N. 403, referred to.

Although an erroneous finding of fact cannot be challenged in second appeal unless it is shown that there is an error of procedure or that there is no evidence in support of the finding, yet inferences drawn from facts found might be questioned in second appeal.

Bhagwant Appaji v. *Kedari Kashi Nath*, 25 B. 202; 4 Bom. L. R, 986, referred to.

BAKHT BALI SINGH *v.* LEKHRANI KUNWAR.

Appeal against an order of the District Judge of Gonda, dated 14th February 1911, upholding that of the Munsif, Tarabganj, dated 21st December 1910.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Jiban Krishna Banerji*, for the Respondent.

JUDGMENT.—It appears that Udairaj, Hetia and some others were the proprietors of the village Sudamanpur. On the 12th of December 1900, they executed a deed of mortgage in respect of the entire village of Sudamanpur in lieu of Rs. 4,800 in favour of *Musammat* Lekhrani Kunwar, who sued Udairaj and others to recover the mortgage-money due on the deed of 1900. As Udairaj had not joined in the registration of the deed, a simple money-decree was passed against him on the 14th of April 1904. On the 10th of December 1906, Udairaj is said to have executed a deed of sale in respect of his share in Sudamanpur and of some other property in favour of Bakht Bali Singh, the plaintiff-appellant, in lieu of Rs. 1,400. *Musammat* Lekhrani Kunwar, in execution of her decree, attached the share of Udairaj in Sudamanpur on the 7th of February 1909. As Udairaj failed to pay up her decree, his share was sold and purchased by her on the 22nd of August 1910. On the 22nd of October 1910, the plaintiff-appellant instituted the suit, out of which this appeal has arisen, to have it declared that he was the owner of 1 anna 1 pie 4 *krants* 28-4/7 decimal share of Udairaj in Sudamanpur and that the sale of that share to the defendant-respondent in execution of her decree was invalid and ineffectual as against him. The claim was brought against *Musammat* Lekhrani Kunwar only. She denied the claim. She denied the alleged sale in favour of the plaintiff-appellant and said that if there had been one, it was fraudulent and collusive made at a time when the share of Udairaj was under attachment and with a view to defeat her decree. She said that the plaintiff-appellant never got possession of Udairaj's share and that the suit for a declaration was not maintainable.

The Court of first instance, the Munsif of Tarabganj, dismissed the claim. He found that, as a matter of fact, a deed of sale was executed in favour of the plaintiff-appellant on the 10th of December 1906, when no attachment of Udairaj's share was pending. But he held that the sale was fraudulent and collusive and was made with the object of defeating the decree of *Musammat* Lekhrani Kunwar. On appeal, the learned District Judge of Gonda affirmed the decree of the Munsif.

Bakht Bali Singh has preferred this second appeal. He contends that the evidence in the case does not disclose any circumstances showing the transaction of the 10th of December 1906 to be collusive. The circumstances enumerated by the lower Court, it is said, may perhaps point to the intention of Udairaj, the vendor, to defeat the decree of the respondent. But they do not show that the plaintiff-appellant shared in or was cognizant of that intention. And unless there is evidence to show that the vendee conspired with the vendor to defeat or delay the creditors of the latter, the sale in question must be held to be good and valid. Nor is it said that the mere fact of the sale having being made on the eve of an impending attachment of the property sold renders the sale invalid in spite of the knowledge of the vendee of the impending attachment. The appellant refers to the following case in support of his contention:—*Bhagwant Appaji* v. *Kedari Kashinath* (1).

The facts of the Bombay case were that the Bhagwant filed a suit against Ganpati, the manager of a Hindu undivided family, to recover a sum of money due to him. On the day the suit was filed, Bhagwant obtained an order of attachment before judgment of certain property belonging to the family of Ganpati. Before the attachment was actually made, Martand, a member of the joint family, sold the property against which an order of attachment had been made and some other property to one Kedari. But before the execution of the sale-deed in favour of Kedari, notice of the order of attachment was served both on Ganpati and Kedari. Bhagwant then filed a suit against Ganpati and Kedari to have it declared that the sale to Kedari was fraudulent and void and that the property about which an order for attachment before judgment was made was liable to attachment in execution of his (Bhagwant's) decree. Bhagwant relied on the provisions of section 53 of Act IV of 1882, in support of his case. The High Court held that although

(1) 25 B. 202; 4 Bom. L. R. 986.

the object of the sale to Kedari was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors so as to render clause (1) of section 53 applicable. And it was also held that clause (2) of section 53 of Act IV of 1882 did not apply as it was not proved that the sale in question was made fraudulently or for a grossly inadequate consideration. The Bombay case is not on all fours with the present case. In the former case, Bhagwant wanted to avoid the sale in favour of Kedari on two grounds, namely, *first*, that the sale was made, after notice to the vendor and the purchaser of the impending attachment, with the object of defeating the anticipated execution, *secondly*, that the sale to Kedari was fraudulent and colourable. Their Lordships of the Bombay High Court, after an exhaustive review of the case-law on the subject, came to the conclusion that the mere fact that a transfer was made to defeat an anticipated attachment did not evidence an intent to defeat or delay creditors of the vendor. They found on the evidence in the case that the allegation as to the sale to Kedari being fraudulent had not been established. In the present case, the sale to Bakht Bali has not been held by the lower Court to be invalid on the ground that it was made to defeat an anticipated attachment. Nor has any such argument been advanced for the respondent before me. The finding against the plaintiff-appellant is that he has failed to prove that the sale in his favour was genuine and free from taint of fraud. Bakht Bali came into Court for a declaration that the transfer in his favour, prior to the decree of *Musammat* Lekhrani Kunwar, was a good and valid one and that the proceedings subsequent to his sale did not affect the transfer in his favour. It was, therefore, for him, in the first instance, to make out the validity of the sale in his favour, as Bhagwant the plaintiff in the Bombay case was required to establish his case first, namely, that the sale he wanted to avoid was not genuine. The case of *Shib Narain Pahari* v. *Shankar Panigrahi* (2) is also in point on the question of burden of proof. In fact, the learned Pleader for the appellant admitted in the end that the onus was on his client to prove that the sale of the 10th of December 1906 was genuine and free from taint of fraud. The lower Courts have found that the plaintiff-appellant has failed to prove the genuine character of the sale in his favour. This finding, according to the learned Pleader for the respondent, is one of fact and cannot be questioned in second appeal. He argues that the appellant ought not to be allowed to discuss the value of the evidence as to the character of the sale. But the appellant, relying on a *dictum* of the Bombay High Court in the case already mentioned, contends that he can, for reasons to be given presently, challenge the finding of the lower Court. The *dictum* is as follows :— "There can be no room for doubt that an erroneous finding of fact, however gross or inexcusable the error may seem to be, could afford no ground for entertaining this appeal unless it be shown either that there was error in procedure or that there was no evidence before the lower Court proper for its consideration in support of that finding, though, on the other hand, inferences drawn from the facts found might be called in question in second appeal." Vide *Bhagwant Appaji* v. *Kedari Kashinath* (1).

This view of the law has been enunciated in other cases also, some of which have been referred to in the Bombay case. I think that the appellant can, for any of the reasons given in the *dictum* just quoted, assail the finding of the lower Court. He attacks it on one ground only, namely, that the circumstances found by the lower Court do not warrant the inference that the sale of the 10th of December 1906 was collusive and fraudulent. The facts found by the lower Court which led it to make an inference adverse to the appellant are these :—

1. The fact that the vendor and vendee are both *thakurs*.

2. The improbability of the vendee wishing to purchase a fractional share in a village nearly thirty miles from his own home.

3. The abstention of the appellant from objecting to the attachment of the property in the execution proceedings.

4. The facts that more than a year before the sale, the decree-holder suspected the intentions of the judgment-debtor and secured a temporary injunction restricting him from making an alienation.

(2) 5 C. W. N. 403.

S. N. DAR, B. A. LL. B.,
Vakil High Court.

5. The suspiciously careful manner in which the deed of sale was drawn up.

The learned Pleader for the appellant, taking up each circumstance, argues that it does not necessarily show that the sale in favour of his client was nominal. The argument is ingenious. But the inference of the lower Court is not based on any single circumstance. It is drawn from the cumulative effect of all the circumstances enumerated above. Now I am not prepared to say that the said circumstances do not justify the inference made by the learned Judge. There is no explanation forthcoming for the appellant of any of the facts which have led to an adverse inference being made against him. It is not explained, for example, why he should have purchased a small piece of land so far from his village that the management of it would only entail loss on him or if he had really purchased it, why did he make no objection to its attachment. I think that the plaintiff-appellant has failed to prove the genuine character of the sale in his favour.

The appeal fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 916 OF 1910.

November 30, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Russell.

NATHUBHAI NARANDAS—

versus

MANORDAS LALDAS—

Land Acquisition Act (I of 1894), *ss.* 53, 54—*Award —Decree—Suit—Appeal—Second Appeal—Decision by Assistant Judge—Forum of appeal—Civil Procedure Code (Act V of* 1908), *ss.* 2 (2), 93, 96, 100.

No second appeal lies to the High Court from an award by a District Court on appeal from an award made by an Assistant Judge's Court under the Land Acquisition Act.

Reading sections 53 and 54 of the Land Acquisition Act with section 96 of the Code of Civil Procedure, it must be taken to have been the intention of the legislature to place an award under the Land Acquisition Act on the footing of a decree.

Zemindar of Dhar v. *Rama*, 53 P. R. 1906; 103 P. L. R. 1906, relied upon.

Nilkanth v. *Collector of Thana*, 22 B. 802, *Ladha Ebrahim & Co.* v. *Assistant Collector of Poona*, 35 B. 145, 12 Bom. L. R. 839, 843; 8 Ind. Cas. 166, not approved.

Section 53 of the Land Acquisition Act has the operation of putting proceedings before the Court on the same footing as proceedings in a suit.

Where the amount in dispute is less than Rs. 5,000, an appeal against the decision of a Subordinate Judge or an Assistant Judge on an award lies to the District Judge and not to the High Court.

Ranchhodbhai Vallavbhai v. *The Collector of Kaira*, 11 Bom.L.R. 317; 33 B. 371; 2 Ind. Cas. 492 folllowed.

Balaram Bhramaratar Ray v. *Sham Sunder Narendra*, 23 C. 526, dissented from.

Second appeal from the decision of the District Judge of Thana, in Appeal No. 328 of 1909, confirming the awards in References Nos. 5 and 7, made by the Assistant Judge of of Thana.

JUDGMENT.—This case raises an important and difficult question. Two references, Nos. 5 and 7 of 1904, under the Land Acquisition Act I of 1894, were decided by the Assistant Judge of Thana, who in No. 5 ordered that the whole amount of the award, *viz.*, Rs. 2,005-0-5 should be paid to the mortgagee, Manordas Laldas, each party bearing his own costs, and in No. 7 confirmed the Collector's award, Manordas having objected that the amount awarded by the acquiring officer was too little.

Appeal No. 328 of 1909, of the District File, was decided by the acting District Judge of Thana who dismissed it with costs.

The above second appeal has been filed in this Court and the preliminary objection is raised by Mr. Rao, for the respondent No. 1, that no second appeal lies, and he relies, in the first place, upon section 54 of the Land Acquisition Act. That provides that:—

"Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award, of the Court in any proceedings under this Act."

Now section 96 of the Code of Civil Procedure (V of 1908), first clause, is as follows:—

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree, passed by any Court, exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court."

The extreme difficulty in this case arises in consequence of two decisions of the Bombay High Court, first, *Nilkanth* v. *Collector of Thana* (1), decided under the former Land Acquisition Act, X of 1870, where it was held that that Act did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there is no general law which enables a Civil Court to enforce such a statutory liability, when imposed upon a Collector or other civil officer by means of execution proceedings without a suit. And Farran, C. J., at p. 808 says: "In the above view, it is unnecessary for me to consider whether an award made under the provisions of Act I of 1894 can be enforced against the Collector by execution proceedings. That is a complex problem which has been set by the Legislature for solution by the Judges. Such problems often arise when the provisions of one Act are introduced by reference into another and incorporated with it." We may mention in passing that we entirely agree with that remark, and this is the second occasion, within a short time, on which we have had to animadvert upon this mode of Legislation.

That case was expressly followed in the case of *Ladha Ebrahim & Co.* v. *The Assistant Collector of Poona* (2), where Scott, C. J. says: "With regard to the first question, we think the reasoning of the majority of the Court in *Nilkanth* v. *Collector of Thana* (1) sufficiently establishes that an award under the Land Acquisition Act of 1894 is not a decree or order capable of execution under the Code of Civil Procedure and is, therefore, not within the purview of the section." But in *Zemindars of Dhar* v. *Rana* (3), it was decided that an adjudication made by a Court under either section 26 or 30 of the Land Acquisition Act, 1894, or on appeal under section 54 by the Chief Court as to compensation or apportionment of compensation is tantamount to a decree within the meaning of section 2 of the Code of Civil Procedure and capable of execution, and that a party entitled to any benefit under a decree passed in an appeal under section 54 is entitled to recover the same by process of execution through the Court which passed the original decree or award.

In that case, the Punjab Chief Court distinguished *Nilkanth* v. *Collector of Thana* (1) upon the ground that the effect of the provisions of the Act of 1894 on the question before the Court was not decided, and they quote the words which we have above set out from the judgment of Farran, C. J.

We must now refer to section 53 of the Land Acquisition Act, which provides that:—

"Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act."

The following passage from the judgment of the Punjab Chief Court is so important to this present case that we set it out at length:—

"A comparison of the provisions of the previous Act X of 1870, with those of the present Land Acquisition Act, appears to show that proceedings in Court have now been almost entirely assimilated to those of an ordinary civil suit. The former Act prescribed a special procedure which had to be followed by the Court, and in the matter of appeal, the provisions of the Code of Civil Procedure for regular appeals had to be followed, *vide* sections 35 and 39. By section 36, the provisions of the Code as to adding parties, adjournments, death, marriage, and insolvency of parties, summoning of witnesses and their attendance, examination of parties and witnesses, production of documents and commission to examine witnesses and to make local inquiry were made applicable so far as they could be. The present Act, section 53, makes the Code applicable generally to all proceedings under the Act, except where inconsistent with anything in the Act itself. This would appear to be a notable departure from the policy of the previous Act. In our opinion, therefore, adjudication as to compensation or apportionment of compensation is tantamount to a decree within the meaning of section 2 of the Code of Civil Procedure, though called an award in the Act. There is an overwhelming mass of authority for treating the award of the Court as a decree for purposes of appeal. See *Sheo Rattan Rai* v. *Mohri* (4), *Muhammad Ali Amjad Khan*

(1) 22 B. 802.

(2) 12 Bom. L. 839 at p. 843; 8 Ind. Cas. 166; 35 B. 146.

(3) 53 P. R. 1906; 103 P. L. R. 1906.

(4) 21 A. 354.

v. *Secretary of State for India* (5). The memorandum of appeal is stamped as one from an original decree. As far as we know, there is no authority to the contrary. The judgment of their Lordships of the Privy Council in *Rajah Nilmoni Singh* v. *Ram Bandhu Rai* (6) to the effect that the settling of the amount or the distributing of the compensation by the Court is final and conclusive, supports the same conclusion.

"There is no good ground whatever for holding such a decree to be merely a declaratory one. Not only is there nothing in the Act to support the contention, but the whole scheme of the Act seems to negative any such conclusion. Under the Act when a reference is made to the Court, the Collector is required by section 31 to deposit the amount of compensation under his award in the Court, and the remaining sections of Part V of the Act show that the Court is vested with plenary authority in dealing with the money. It is not reasonable to infer under the circumstnces that the Court's adjudication is merely declaratory, and that it is incompetent to take any action in respect of its award or decree. The provisions aforesaid clearly require it to take action in various ways. A statute framed for a particular object ought to be deemed sufficient in itself, in the absence of clear indications to the contrary, to carry out that object. Moreover, the Legislature cannot be presumed to favour multiplicity of proceedings.

"We, therefore, hold on the first point that the award is a decree which is capable of execution."

This decision was not referred to in *Ladha Ebrahim's case* (2). But it appears to us that, reading together sections 53 and 54 of the Land Acquisition Act with section 96 of the Code of Civil Procedure, it must be taken to have been the intention of the Legislature to put awards under the Land Acquisition Act on the footing of decrees. Otherwise we cannot understand how the procedure applicable to appeals from original decrees can be made applicable to what are not decrees.

It is perfectly true, as Mr. Rao argued, that by section 2 of the Code of Civil Procedure, a "decree" is defined as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." The word "suit" has not been defined in the Code of Civil Procedure, and the latter half of section 582 of the former Code of Civil Procedure, in which it was declared to include an appeal in certain cases, has not been reproduced in the new Code of Civil Prcadure. But it has been held in Calcutta, with reference to the Bengal Court of Wards Act IX of 1879, that the term "suit" includes all contentious proceedings of an ordinary civil kind, whether they arise in a suit or proceedings. See *Bhoopendro Narain Dutt* v. *Baroda Prosad Roy* (7), and *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia* (8). In a later case, however, a less certain view seems to have been taken, and it was said that a "suit" ought to be confined to such proceedings as under that description are directly dealt with by the Code of Civil Procedure, or such as, by the operation of the particular Acts which regulate them, are treated as suits. See *Watkins* v. *Fox* (9), We do not find anything in the Land Acquisition Act inconsistent with the view we are putting forward; and section 53 of that Act has the operation of putting proceedings before the Court on the same footing as proceedings in a suit, it seems to us.

If we are right in saying that the award is a decree, then section 93 of the Code of Civil Proceedure lays down that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

Now, the amount in dispute being less than Rs. 5,000, by Bombay Civil Courts Act XIV of 1869, section 16, the appeal lies to the District Judge, which by that section "is the Court authorized to hear appeals from the Subordinate Judge." See section 96 of the new Civil Procedure Code. And this has been expressly so held in *Ranchhodbhai Vallavbhai* v. *The Collector of Kaira* (10), where the learned Judges, Chandavarkar and Heaton,

(5) 30 C. 501.
(6) 8 I. A. 90; 7 C. 288; 10 C. L. R. 393.
(7) 18 C. 500 at p. 504.
(8) B. L. R. Sup. Vol. 985 at p. 988, 990; 9 W. R. 402.
(9) 22 C. 943 at p. 948.
(10) 11 Bom. L. R. 317; 33 B. 371; 2 Ind. Cas. 492.

JJ., apply the reasoning in *Laxmi* v. *Aba*(11). With regard to this decision, however, it is to be observed that in the case of *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra* (12), where the amount in dispute was less than Rs. 5,000, the Calcutta High Court held that the appeal lay to the High Court. There, at page 529, the learned Judges say as follows:—

"Upon the question raised in the Rule, namely, whether the District Judge was right in holding that the appeals in these cases lay not to his Court, but to the High Court, we are of opinion that the answer ought to be in the affirmative. It is true that by section 39 of Act X of 1870, it was provided that the appeal shall lie to the High Court, unless the Judge whose decision is appealed from is not the District Judge, in which case the appeal shall lie in the first instance to the District Judge; but that Act has been repealed by Act I of 1894, and the only saving clause is that in sub-section (2) of section 2, which provides that all proceedings commenced under the Land Acquisition Act (X of 1870) shall, as far as may be, be deemed to have been commenced under the Act of 1894. We must, therefore, look to the provisions of Act I of 1894 to see whether an appeal lies or not, and, if any appeal lies, to what Court.

"Now section 54 of Act I of 1894 enacts: 'Subject to the provisions of the Code of Civil Procedure, applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act.' The proceedings in these cases, though commenced under the old Act, must, by virtue of the provisions of sub-section (2) of section 2 of Act I of 1894, be deemed to be proceedings under the latter Act. That being so, section 54 would apply to the case, and under that section, the appeals lie to the High Court."

But, in accordance with the usual practice in these cases, we must follow the judgment in *Ranchhodbhai Vallavbhai* v. *The Collector of Kaira* (10), above referred to, and hold that no appeal lies in this case to this Court.

But the question remains whether a second appeal lies to this Court from the decision of the District Court sitting in appeal from an award of the Assistant Judge's Court made under the Land Acquisition Act.

Under section 100 of the Code of Civil Procedure, a second appeal lies to this Court from any *decree* passed in appeal by a Court subordinate to it. In the Punjab case above cited, it was held that an award made by a District Court under the Land Acquisition Act is a decree, because section 53 of the Act directed that the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the former Act. A decision of the District Court under the Land Acquisition Act is called in the Act itself an "Award" and the question of appeal is dealt with in section 54. Only one appeal is allowed by that section; the right to appeal is a creation of Statute. Had it been the intention of the Legislature to allow a right to a second appeal also in such cases, it would have said so. We cannot infer such a right merely from the language of section 53, because, had the general words of that section been intended by the Legislature to apply the provisions of the Code relating to appeals also to second appeals, section 54 would have become unnecessary. The irresistible inference is that no second appeal lies to this Court from an award made by a District Court in appeal from an award made by an Assistant Judge's Court, whether the award is treated as a decree or not.

This second appeal must, therefore, be dismissed with costs on the ground that it does not lie.

Appeal dismissed.

(11) 32 B. 634; 10 Bom. L. R. 924.
(12) 23 C. 526.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1764 OF 1909.
June 10, 1912.
Present:—Mr. Justice Carnduff and Mr. Justice Chapman.
BHUPENDRA KUMAR CHAKRAVARTI —PLAINTIFF—APPELLANT
versus
PYARI MOHAN ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second Appeal—Finding of lower Appellate Court based upon

alleged evidence not existing in record—Decision "contrary to law".

The circumstance that a finding of a lower Appellate Court is based mainly upon evidence which is explicitly referred to and avowedly re-produced in the judgment, but is not to be found anywhere in the record, vitiates the decision and renders it contrary to law within the meaning of section 100 of the Civil Procedure Code of 1908.

Bibee Ameeran v. *Shaikh Cherag Ali*, 24 W. R. 343, relied upon.

Appeal from the decree of the District Judge of 24-Pergannahs, dated May 3rd, 1909, reversing that of the Sub-Judge of 24-Pergannahs, dated June 19th, 1907.

Babus *Nil Madhab Bose* and *Shiba Prosonna Bhattacharyya*, for the Appellant.

Dr. *Rash Behary Ghose*, Babus *Mohendra Nath Roy* and *Krishna Prosad Sarbadhikari*, for the Respondents.

JUDGMENT.—This is an appeal against a decree of the District Judge of the 24-Pergannahs reversing a decision of a Subordinate Judge and dismissing a suit for the recovery of possession of some 600 *bighas* of land in the Sundarbans. The plaintiff's vendor, Shama Charn Das, obtained from the landlord, the third defendant, on the 22nd June 1909, a permanent lease for the reclamation of a *chak* in the lot known as Jeha Khal; and the first defendant obtained a similar lease on the 12th August following, of two adjoining *chaks*, one to the north and the other to the east, of the *chak*, of Shama Churn Das. The plaintiff charged that the defendant had, by erecting an embankment south of the Bhardut *Khal*, which was fixed by the leases as the northern boundary of the former's *chak* and the southern boundary of the first of the latter's *chaks*, encroached upon, and wrongfully taken possession of, the land in suit. The first Court gave the plaintiff a decree subject to the payment to the defendant of the expenses actually incurred by the latter in reclaiming the lands; but on the defendants' appeal, the suit was dismissed *in toto*, and the plaintiff has now preferred this second appeal.

The learned District Judge has found that there was in the lease (by which he must have meant each of the leases) a clause providing that there should be a consultation and arrangement between the parties regarding the precise division of the lands covered by the two; that, in pursuance of this understanding, it was agreed between Shama Churn Das and the defendant that the embankment complained of should be erected on the boundary and that the embankment was erected accordingly. These are undoubtedly findings of fact, and it has been strongly pressed upon us by Dr. Ghosh that, as such, they are conclusive and cannot be questioned on second appeal. *Prima facie*, certainly, it would seem to be so; and we are fully alive to the limitations imposed on us by section 100 of the Code of Civil Procedure of 1908 and the rulings of the Judicial Committee in such cases as *Durga Chowdhrani* v. *Jawahir Singh Chowdhri* (1) and *Ramratan Sukal* v. *Nanlu* (2). But in this instance, the first of the learned District Judge's findings involves a construction of title-deeds which is not above criticism. And the second is based mainly upon evidence which is explicitly referred to and avowedly re-produced in the judgment, but is not to be found anywhere in the record. The latter circumstance, at least, must, in our opinion, be held to vitiate the decision and render it "contrary to law." "Shamachandra's son swears," so runs the judgment, "that there was such a consultation" (that is to say, a consultation between Shamacharan Das and the defendant as to the demarcation of the boundary between the lands leased), "and that Shamacharan agreed to the division that was proposed; Shamacharan's son swears that he went and pointed out to Peary Mohan's people where the *bundh* was to be built," and "Ram Das, Shamacharan's son, swears that he went and saw this *bundh* when it had been built, and approved of it." Now, we have read the whole of the evidence with care, and we find that, as has been submitted by the learned Vakil for the appellant before us, there is no trace of any statements such as those quoted. The only "consultation" of any sort, to which Ram Das alludes, was one between himself and the plaintiff when they together called upon a Pleader in connection with the contemplated conveyance to the latter; and nowhere does Ram Das say that he agreed to the division proposed by the defendant, or that he saw the embankment complained of after it had been erected and approved of it. And Kartik, who was Shamacharan's peon and is the only witness answering that description, far from asserting

(1) 17 I. A. 122; 18 C. 23.
(2) 19 I. A. 1; 19 C. 249.

that he pointed out to the defendant's people where the embankment was to be made, strenuously declares that he opposed its erection and desisted only because he was threatened with death by Peary Mohan's emissaries. Now, here the learned District Judge has committed himself to a much graver mistake than the mere misunderstanding of the effect of a witness's deposition: he has referred to evidence which does not exist at all, and has based his decision principally, if not entirely, upon it. The case is really very similar to that of *Bibee Ameerun* v. *Shaikh Cherag Ali* (3), in which Ghosh and Mitter, JJ., observing that when the main ground which a Judge below takes has no existence, the Appellate Court cannot be satisfied that his estimate of the evidence was a proper one, remanded the appeal for a re-consideration of the evidence as it really stood, and not as it had been supposed to have stood. We feel that we ought to pursue the same course here, discharge the decree of the learned District Judge, and direct that the appeal be re-heard. The costs will abide the result.

Appeal allowed; Case remanded.

(3) 24 W. R. 243.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 89 OF 1910.

November 13, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Russell.

MALKAJEPPA MADIVALAPPA BULLA —APPELLANT

versus

THE SECRETARY OF STATE— RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 14—Suit to set aside ultra vires *order—Bombay Land Revenue Code (Act V of 1879), ss. 73, 135—Collector's power to interfere with private property.*

If a Collector purports to deal with land which is *prima facie* the property of an individual who has been in peaceful occupation thereof and not of the Government, he is not dealing with that land in his official capacity but is acting *ultra vires*.

Article 14 of the Limitation Act, 1877, does not apply to a suit to set aside an order which is *ultra vires* of the officer passing the order.

Surannanna v. *Secretary of State for India*, 24 B. 435 at p. 455; 2 Bom. L. R. 261, *Abaji* v. *Secretary of State for India*, 22 B. 579 at p. 582, *Bejoy Chand Mahatab Bahadur* v. *Kristo Mohini Dasi*, 21 C. 626, relied upon.

First appeal from the decision of the District Judge of Dharwar, in Civil Suit No. 3 of 1908.

Mr. *Coyaji* with him Mr. *G. S. Mulgaokar*, for the Appellant.

Mr. *G. S. Rao*, Government Pleader, for the Respondent.

JUDGMENT.—The plaintiff herein sued to be declared owner of a piece of ground in Mouje Gadag measuring eight feet long from North to South and thirty-three feet broad from East to West, immediately to the south of the present building of the plaintiff and also for an injunction to restrain the defendant, the Secretary of State, from interfering with the plaintiff's enjoyment of the ground or extending his building thereover. Although the plaint does not, in so many words, pray to set aside the Deputy Collector's order hereinafter set out, still para. 4 which says *inter alia* that "this order is erroneous and illegal. Government had no title whatever to the plot" obviously involves such a consequence. It appears that the plaintiff purchased first a plot of land from the Basel Mission, which is marked on the plan (Exhibit 18) measuring as stated in the deed (Exhibit 10), fifty-six feet East and West to the North, twenty-nine feet East and West to the South, and fifty-seven feet on the east side and fifty-four feet on the west side, the Southern boundary being given as Government Betta land. Subsequently, the plaintiff bought another piece of land to the North of the former thirty-five feet East to West and eight feet North to South, and the plaintiff has built upon the said pieces of ground.

The learned Judge in the Court below has found, and we have had no argument addressed to us to the contrary, that the plaintiff purchased and is entitled to sixty-two feet from North to South, but that, as a matter of fact, he has up to the present time built over only sixty feet; in other words, that he is entitled to build over a space of two feet further to the South than what he has already built over.

On the 27th December 1906, the District Deputy Collector passed the order (Exhibit 24), the effect of which was to restrain the plaintiff from building over the said two feet. It was in the following terms:—

"I personally inspected the ground in dispute and also took measurements. It is not now in

the condition in which it was when it was purchased. The building of that time is removed and the present one is newly built. In the deed of sale under which this ground was purchased, the boundaries of the ground purchased have been mentioned. It is mentioned therein that on the North there is the backyard of Gowda. Recently, out of that backyard, a portion adjoining this ground in dispute was got by Malkajappa by way of purchase. To the East thereof, he now holds what has now come to the share of Dyamangowda. The old wall built on the boundary of the backyard of his share exists now. That wall alone is the index to determine the ground purchased. In the deed of sale, the measurements of four sides have been mentioned. From the corner between the North and the East, (that is), from the North-East corner of the above wall, the measurement North to South from the corner to the East along the whole length of the building is fifty-seven feet. Malkajappa says that the measurement of the building should be taken in a straight line and that thus the ground up to the point at which it measures fifty-seven feet to the South belongs to him. What he says is not correct. In the deed of sale, it is mentioned that towards the East the measurement of the building including an open ground and trees is fifty-seven feet. It is also mentioned that the measurement East to West is fifty-six feet towards the North. These two measurements are found to be correct if they are taken from the above-mentioned North East corner. What Malkajappa says is wrong. The building now existing and the measurement in the sale-deed tally (a difference of one foot or half a foot is not of any importance. Now, after the dispute arose, the Circle-Inspector took measurements according to scale. They might not have been taken in that manner when they were entered in the deed of sale formerly). From the existing condition, it does not appear that the Government land is included in the building now built by Malkajappa. Therefore, it does not appear necessary to take further steps in this matter. But now the building should not be allowed to be extended on the South over a larger space than it occupies at present. It should be allowed to remain in its present dimensions. Besides informing Malakajappa in writing of the above decision, steps should be taken to supply a *dakhla* (a copy of it) to the village also."

We have set the order out at length, for it seems to us that it is an order which "interfered with the plaintiff's possession so as to give rise to a cause of action, and not simply administrative orders which need no setting aside." See per Parsons, J., *Surannanna* v. *Secretary of State for India* (1). The plaint was filed on the 11th of August 1908, and the defendant has raised a plea of limitation, under Article 14 of the Limitation Act of 1877. The plaintiff in his plaint says that he unsuccessfully filed before the Revenue authorities appeals against the District Deputy Collector. But we agree with the learned Judge's opinion that that fact will not affect the question of limitation. See *Abaji* v. *Secretary of State for India* (2). The learned Judge held, as we have pointed out, that the plaintiff is in fact entitled to the two feet extra to the south of his present building; but that the suit is barred under Article 14 of the Limitation Act.

The question we have to decide is: Is this view correct? It is admitted that the Deputy Collector in, passing the said order, purported to act under section 37 of the Land Revenue Code, which runs thus:—

"All public roads, lanes and paths, the bridges, ditches, dikes and fences, on, or beside, the same, the bed of the sea and of harbours and creeks below high-water mark, and of rivers, streams, *nalas*, lakes and tanks, and all canals, and water-courses, and all standing and flowing water, and all lands, wherever situated, which are not the property of individuals or of aggregates of persons legally capable of holding property, and except in so far as any rights of such persons may be established in or over the same and except as may be otherwise provided in any law for the time being in force, are and are, hereby declared to be, with all rights in or over the same, or appertaining thereto, the property of Government; and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such a manner as he

(1) 24 B. 435 at p. 455; 2 Bom. L. R. 261.
(2) 22 B. 579 at p. 582.

may deem fit, or as may be authorized by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

"*Explanation*:—In this section 'high-water mark' means the the highest point reached by ordinary spring tides at any season of the year."

Obviously, the important words in that section are "all lands, wherever situated, which are not the property of individuals, etc., and except in so far as any rights of such persons may be established in or over the same."

Section 135 of the Land Revenue Code runs as follows:—

"Any suit instituted in a Civil Court to set aside any order passed by the Collector under section 37 or 129, in respect of any land situated within the site of a village, town or city, shall be dismissed, although limitation has not been set up as a defence, if it has not been instituted within one year from the date of the order."

Article 14 of the Limitation Act of 1877 runs as follows:—"To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for." The words "or order" were not in the Limitation Act of 1871. The important words in that Article are "in his official capacity." Judging of this case by the light of this legislation alone, it appears to us that, if a Collector purports to deal with land which is *prima facie* the property of an individual, who has been in peaceful occupation thereof and not of the Government, and passes an order with reference thereto, he is not dealing with that land in his official capacity, but is acting *ultra vires*. If this is so, then the judgment of Jenkins, C. J., in *Surannanna* v. *Secretary of State for India* (1), is directly applicable; so also is *Bejoy Chand Mahatab Bahadur* v. *Kristo Mohini Dasi* (3) (see especially Trevelyan, J.'s judgment in that case); and *Balvant Ramchandra* v. *Secretary of State for India* (4). We have read the three judgments in *Surannanna's case* (1) but have been quite unable to differentiate this case from the judgment of Jenkins, C. J., nearly the whole of whose judgment is applicable to the present case.

(3) 21 C. 626.

(4) 29 B. 480; 7 Bom. L. R. 497.

If we are right in this opinion, it follows that the decree in the lower Court must be reversed and the decree we would pass is:—Declare the plaintiff entitled to the strip of land measuring two feet North and South and thirty-three feet East and West, and grant an injunction restraining the defendant, his servants and agents, from interfering with his possession thereof, dismiss the plaintiff's suit in so far as he claims any relief in respect of the remaining six feet of the said southern strip and direct each party to bear his own costs throughout.

Decree reversed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 515 OF 1911.

December 27, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

Munshi RAJBANS SAHAY—DEFENDANT—APPELLANT

versus

SOORJA LAL AND OTHERS—PLAINTIFFS—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 104, *sub-s.* (1) *cl.* (*c*)—*Appeal—Award—Order modifying award—How far appealable.*

The provision in clause (*c*) of sub-section (1) of section 104 of the Civil Procedure Code that an appeal shall lie from an order modifying or correcting an award, does not confer an unrestricted right of appeal, and when an order has been made modifying an award, the validity of the whole award cannot be called in question in an appeal preferred against that order, but the appeal is allowed against the order only in so far as it modifies the award.

Appeal from the order of the Sub-Judge of Gaya, dated September 21, 1911.

Babu *Jyotish Chandra Hazra*, for the Appellant.

Babus *Umakali Mukherji* and *Khetra Mohan Sen*, for the Respondents.

JUDGMENT.—The substantial question of law which calls for decision in this appeal relates to the construction of section 104, sub-section (1), clause (*c*), of the Code of Civil Procedure of 1908. That clause provides that an appeal shall lie from an order modifying or correcting an award. On behalf of the appellant, it has been argued

that this clause, in effect, confers an unrestricted right of appeal; in other words, that when an order has been made by which an award has been modified or corrected, in an appeal preferred against that order, the validity of the whole award may be called in question. On behalf of the respondent, it has been argued, on the other hand, that the true effect of the clause is to allow an appeal against the order only in so far as it modifies or corrects the award. In our opinion, there is no room for controversy that the contention of the appellant is unfounded. If the argument of the appellant were to prevail, the result would be that the party in whose favour the award has been modified or corrected would be at liberty to prefer an appeal and to question the propriety of the award in so far as it went against him. This could hardly have been intended by the Legislature. In the case before us, the appellant was the defendant in an action for money commenced against him by the plaintiff-respondent. The matters in controversy were referred to three arbitrators who submitted their award in due course. The defendant took exception to the award on all possible grounds The Subordinate Judge considered those objections in detail and overruled every one of them except the objection as to costs. He held that the arbitrators had no authority to make an award as to the costs of the litigation. The result was that the Subordinate Judge modified the award in so far as the order for costs was concerned and confirmed the award in every other respect. The appellant now contends that as an order had been made modifying the award, although the modification is in his favour, he is entitled in the present appeal to re-agitate all the questions on the merits which were decided against him by the Subordinate Judge. In support of this view, reference has been made to decisions under the Code of 1882, of which *Kali Prosanno Ghose* v. *Raiani Kant* (1) may be taken as the type, where it was held that upon an appeal against a decree made in accordance with an award it was competent to the Court to consider whether there was any legal award on which a valid decree could be founded. Those decisions are of no assistance to the appellant, whose case must be determined with reference to the terms of the provisions of the Code of 1908. We are, therefore, of opinion that the only question open for consideration in the present appeal is the question of costs. In so far as that question is concerned, it has not been suggested that it is in any way improper.

The result, therefore, is that the order of the Court below is affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold *mohur*.

Appeal dismissed.

(1) 25 C. 141.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 400 OF 1911.

October 19, 1911.

Present:—Mr. Justice Hayward.

MAHOMED JUSAB HAJI ADAM NURANI—PLAINTIFF

versus

HAJI ADAM HAJI OOSMAN NURANI—DEFENDANT.

Muhammadan Law—Maintenance—Minor son—Right to maintenance not dependent on custody—Charge on property of father—High Court—Law applicable to Muhammadan family relations—English Law—Hindu Law—Cutchi Memons.

When the family relations of Muhammadans, such as marriage, guardianship and maintenance, come into litigation before the High Court of Bombay, the Court should be guided by the laws and usages of Muhammadans. The English law of family relations cannot be applied to such cases.

The rights of maintenance are enforceable under Anglo-Muhammadan Law and the right to enforce them under section 9 of the Civil Procedure Code is unaffected by the fact that there is a concurrent permission for their enforcement in Criminal Courts under section 488 of the Criminal Procedure Code.

Under Muhammadan Law, a minor son can sue his father for maintenance. This right to maintenance can be enforced against the father even when the custody of the minor is withheld from the father and the minor is in the lawful custody of his mother.

Emperor v. *Ayshabai*, 6 Bom. L. R. 536; 1 Cr. L. J. 599, relied upon.

The maintenance of a minor son cannot be charged on the father's property.

Cutchi Memons are governed by the principles of Hindu Law with regard to inheritance and succession only and not with regard to maintenance.

Haji Noor Mahomed v. *Macleod*, 9 Bom. L. R. 274, not approved.

In the matter of Haroon Mahomed, 14 B. 189, explained and distinguished.

Ahmedbhoy v. *Cassumbhoy*, 18 B. 534; *Bai Baiji* v. *Bai Santok*, 20 B. 53, relied upon.

MAHOMED JUSAB *v.* HAJI ADAM.

Messrs. *Dastur* and *Havelivalla*, for the Plaintiff.

Messrs. *Jinnah* and *Desai*, for the Defendant.

JUDGMENT.—The plaintiff a minor son, sues by his next friend, his mother, to recover maintenance from the defendant, his father. The plaintiff is a boy under seven years of age and in the lawful custody of his mother who has, however, been divorced by his father. It is sought to charge the maintenance on the father's property. The parties are *Cutchi Memons* subject in matters of inheritance and succession to Hindu law.

The defendant pleads that a minor son cannot sustain a suit for maintenance against his father and that the amount claimed is excessive and not chargeable on the father's property.

The first question to decide is the law applicable to the case. It has been contended that the English law under which the father's duty to provide maintenance is a moral and not a legal obligation, as pointed out at page 114, para. 266 of Vol. 17 of Halsbury's Laws of England, is applicable under the terms of the Letters Patent of 1823, continued in force by clause 19 of the present Letters Patent of this Court. Those terms are as follows: "Yet, nevertheless, in the cases of Mahomedans....., their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined in the case of Mahomedans by the laws and usages of the Mahomedans...or by such laws and usages as the same would have been determined by if the suit had been brought and the action commenced in a Native Court." Those terms would appear not to include family relations such as marriage, guardianship and maintenance, but, at the same time, they do not expressly exclude recourse in such cases to the laws and usages of Mahomedans. No authority has been quoted for the application of the English law of family relations and there are manifest difficulties and objections in the way of such application. Where the family relations of Mahomedans come into litigation, there remains, therefore, nothing for guidance except the laws and usages of Mahomedans, and such laws and usages have, as a matter of practice, it is believed, been followed in such cases in this Court.

It has, however, been contended that in any case the Muhammadan law as to maintenance is a law of imperfect obligation imposing a moral and not a legal obligation. The distinction between laws of perfect and imperfect obligation has been discussed in detail by Abdur Rahim at page 62 of his Principles of Mahammadan Jurisprudence, where he has described the laws as to domestic relations to be laws of perfect and not imperfect obligation Later on at page 343, Abdur Rahim has referred to the maintenance of children being a right against their father. So also Wilson, in Chapter VI of his Anglo Muhammadan Law, has treated the rights of maintenance as rights enforceable under Anglo Muhammadan Law, and in para. 142 has asserted the right of minor sons to maintenance from their father on the authority of page 456 of Baillie's Digest. The remarks of Trevelyan in Chapter XXII of his Law Relating to Minors would not appear to be based on any authority relating to Anglo Muhammadan Law. So that there would appear to be no reason to doubt that rights of maintenance are enforceable under Anglo Muhammadan Law. That being so, the right to enforce them in Civil Courts, under section 9 of the Civil Procedure Code, is unaffected by the fact that there is a concurrent provision for their enforcement in Criminal Courts under section 488 of the Criminal Procedure Code as pointed out in the case of *Ghana Kanta* v. *Gereli* (1).

It has, however, been further contended that the right to maintenance cannot be enforced under Muhammadan Law so long as the custody of the minor is withheld from the father. But this would not appear to be the case, for it has not been denied that the right to the coustody of the minor plaintiff, who is a boy under seven years of age, rests with his mother even though she has been divorced, and this right would appear to have been recognized by Muhammadan Law for the benefit of children of tender age and to be independent of the obligation resting on the father to maintain his children. These principles have been indicated upon the anthority of Hamilton's Hedaya, pages 138 and 146, in Wilson's Notes to paras. 49 and 107 of his Anglo Muhammadan Law, and have

(1) 32 C. 479; 13 C. W. N. 150; 2 Ind. Cas. 550.

been followed in the case of *Emperor* v. *Ayshabai* (2).

There remains only for consideration the amount of maintenance to be allowed. It has been contended that bare subsistence can alone be enforced and not maintenance according to the condition of life of the father. This contention must, in my opinion, be allowed in default of express authority under Muhammadan Law, and no such authority has been quoted nor would appear to be forthcoming as stated in Wilson's Notes to para. 140 of his Anglo Muhammadan Law. Now the plaintiff has been offered, since his mother's divorce, Rs. 7-8-0 a month which cannot, in my opinion, be held to be less than bare subsistence for a child under seven years of age.

But in any case, it would, in my opinion, hardly be possible to award a higher maintenance upon the evidence produced as to the father's position in life. Prior to the divorce, the maintenance allowed for both mother and child was only Rs. 25 plus Rs. 9 for house rent though three years earlier as much as Rs. 30 plus Rs. 13 for house-rent had been allowed. This appears from the correspondence between the parties, Exhibits A and B. This maintenance was paid out of the earnings from the defendant-father's shop and rents received from two houses, and the defendant alleges the shop has been working for years at a serious loss and that Rs. 60 a month is all he gets for his share in the two houses. On the other hand, the mother alleges the shop to be worth Rs. 100 to 150 a month and the rents six or seven hundred rupees, but there is nothing beyond the mother's own statement in support of her estimate of the income, which would appear to have greatly exaggerated the father's real position in life. It has only to be added that no authority has been quoted for charging the maintenance on the father's property and there would appear to be none under Muhammadan Law. No distinct interest can be claimed in the father's property, for though the parties are *Cutchi Memons*, it is only with regard to inheritance and succession that they can claim to be governed by the principles of Hindu Law. Reference was made to the case of *Haji Noor Mahomed* v. *Macleod* (3), in support of a wider extension to *Cutchi Momons* of Hindu Law. But that was a decision of a Single Judge purporting to follow the Appellate Bench decision in the case *In the matter of Haroon Mahomed* (4), and it appears from the remarks at page 194 of that report that the decision rested actually on the application only of the rules of succession of Hindu Law. It will not, therefore, conflict with the decisions in the cases of *Ahmedbhoy* v. *Cassumbhoy* (5) and *Bai Baiji* v. *Bai Santok* (6).

Upon the issue whether the plaint discloses any cause of action—my finding must accordingly be in the affirmative; upon the issue whether the defendant is not entitled to have the plaintiff to live with him and to maintain him in his own house—in the negative; upon the issue whether a minor *Cutchi Memon* can sustain a suit for separate maintenance against his father and have the maintenance charged on the property in his father's hands whether self-acquired or ancestral—that he can sustain the suit but not so as to charge the maintenance on the father's property; and upon the issue whether Rs. 7-8 agreed to be paid for maintenance of the plaintiff in the "*talaknama*" of the 2nd April 1911 is not a proper amount of maintenance having regard to the position and income of the defendant, and if not what other sum would be proper maintenance for the plaintiff—that Rs. 7-8 as agreed to be paid is a proper amount. There must, therefore, be a decree in favour of the plaintiff declaring that he is entitled to recover from the defendant maintenance at the rate of Rs. 7-8 per month and for recovery of arrears at that rate due from the 1st March 1911 to judgment. As the plaintiff was offered maintenance at that rate before the institution of these proceedings, each party must bear his own costs.

Attorneys for the plaintiff: Messrs. *Jehangir Mehta* and *Somji*.

Attorneys for the defendant: Messrs. *Tyabjee Dayabhai and Co.*

(2) 6 Bom. L. R. 536; 1 Cr. L. J. 559.
(3) 9 Bom. L. R. 274.
(4) 14 B. 189.
(5) 13 B. 534.
(6) 20 B. 53.

RAM SARUP *v.* JAGAN NATH PRASHAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 134 OF 1911.

April 3, 1912.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

RAM SARUP AND OTHERS—JUDGMENT-DEBTORS—APPLICANTS

versus

JAGAN NATH PRASAD—DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115 and O. XXI, r. 2—Uncertified payment, effect of, for purposes of limitation—Wrong decision on a point of law amounts to illegality or material irregularity—Revision.

A payment or adjustment, not certified or recorded in the manner prescribed by Order XXI, rule 2 cannot be recognized by the Court executing the decree even for the purposes of limitation.

Musammat Sheorani v. *Chandarpal*, 13 O. C. 137; 6 Ind. Cas. 1000, followed.

Roshan Singh v. *Mata Din*, 26 A. 36; A. W. N. (1903) 179, dissented from.

Where by deciding a point of law erroneously, the Judge does what the law forbids him to do, his action amounts to an illegality or material irregularity which is liable to be corrected by the High Court in revision.

Application against an order of the District Judge, Fyzabad, dated 26th August 1911, reversing that of the Munsif, Fyzabad, dated 3rd July 1911.

Babu *Rudardat Sinha*, for the Applicants.

Pandit *Gokarun Nath Misra*, for the Respondent.

ORDER.—The facts of this case are set out in the order of reference dated the 13th December 1911, and the point for decision is whether, in view of the language of Order XXI, rule 2, sub-rule (3) of the Code of Civil Procedure of 1908, a Court executing a decree can, for the purpose of deciding whether or not the application for execution is within time, recognize a payment made by the judgement-debtor which has not been certified or recorded in the manner prescribed by Order XXI, rule 2, sub-rules (1) and (2).

As stated in the referring order, there is a long series of decisions of the various High Courts to support the proposition that such payments can be recognised for the purpose of determining a question of limitation. Most of these decisions are cited in the case reported in *Roshan Singh* v. *Mata Din* (1).

On the other hand, there is the decision in the contrary sense of a Judge of this Court in *Musammat Sheorani* v. *Chandarpal* (2).

All these rulings were passed with reference to the terms of the last clause of section 258 of the Code of Civil Procedure of 1882, which reads as follows:—

"Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree."

The corresponding provision of the new Code which applies to the case in hand is expressed in the following language:—

"A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree."

The difference in the language of these two enactments was pointed out in the referring order as justifying the conclusion that the intention of the Legislature was to prevent the recognition of such payments for any purpose whatever. It has been strenuously argued on behalf of the decree-holder (opposite party) that the alteration in language has not effected any change in the meaning of the law and the only object of the alteration was to remove words which were redundant. We are unable to yield to this contention for it appears to us that as the rule now stands, it embodies an absolute and general prohibition forbidding the recognition of such payments for any purpose whatsoever. To say that a payment or adjustment shall not be recognized is a different thing from saying that it shall not be recognized as a payment or adjustment of the decree. We do not think, therefore, we should follow the rulings relied upon by the decree-holder in this case, which rest upon the interpretation of an enactment the language of which has been materially altered since. And, as already pointed out, the interpretation put upon section 258 of the former Code was not accepted in the case reported in *Musammat Sheorani* v. *Chandarpal* (2). It is said that the report in the latter case does not show that the point was argued. Be that as it may, the opinion of the learned Judge responsible for the ruling was not a mere *obiter dictum*. He had to decide the question of limitation and held that an uncertified payment could not be taken into consideration in deciding

(1) 26 A. 36; A. W. N. (1903) 179.

(2) 13 O. C. 137; 6 Ind. Cas. 1000.

the question. Apart from this, it appears to us that the interpretation of the rule now pressed upon us on behalf of the decree-holder would involve the introduction into the rule, as it now stands, of qualifying words which are not to be found in it. We are of opinion, therefore, that as the law now stands, an uncertified payment cannot be recognized by the Court executing the decree for the purpose of deciding an issue of limitation. We were also pressed with the argument that the lower Court's order should not be disturbed in revision merely on the ground that it had come to an erroneous decision on a point of law. Apart from the fact that the learned Judge, most probably from inadvertence, failed to follow a ruling of this Court, it cannot be said that there was merely a wrong decision on a question of law. In coming to the decision, the Judge did what, in our opinion, the law forbids in recognizing a payment uncertified by the decree-holder. His doing so amounts, in our opinion, to an illegality or material irregularity which is liable to be corrected by proceedings in revision. We allow this application, set aside the order of the Court below and direct that the application for execution be dismissed as time-barred. The applicants will get their costs in this Court.

Application allowed.

CALCUTTA HIGH COURT.
LETTERS PATENT APPEAL No. 109 OF 1911.
March 26, 1912.
Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice N. Chatterjea.
SALIMA SAIDATANNESSA BIBI—PLAINTIFF—(APPELLANT IN SECOND APPEAL)—APPELLANT
versus
ENATULLA TALUKDAR—DEFENDANT No. 1—(RESPONDENT IN SECOND APPEAL)—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 22—Occupancy, non-transferable—Purchase by co-sharer landlord of non-transferable occupancy-right, effect of.

The case of *Girish Chandra Chowdhury* v. *Kedar Chandra Roy*, 27 C. 473, which lays down that, in the case of a non-transferable occupancy-holding, the holding itself, as apart from the right of occupancy, cannot be sold so as to give the transferee a right to retain possession of it, has not been overruled by any subsequent decision of a Full Bench.

Where such a holding is transferred to one of the co-proprietors, the occupancy-right ceases to exist, and the other co-proprietors are entitled to have joint possession with the transferee co-proprietor.

Girish Chandra Chowdhury v. *Kedar Chandra Roy*, 27 C. 473, followed.

Appeal, under section 15 of the Letters Patent, from a decision of Mr. Justice Holmwood, dated April 24th, 1911, in Second Appeal No. 1589 of 1909, affirming the decree of the Sub-Judge of Pabna and Bogra, dated May 4th, 1909, which had reversed that of the Munsif of Bogra, dated June 17th, 1908.

FACTS.—The plaintiff brings this suit to eject the defendant No. 1, Enatulla *talukdar*, from a 7-annas share of a *jote* on the ground that the *jote* was an occupancy-holding in possession of one Sarup Koch, the tenant, and was purchased by defendant No. 1 in execution of a mortgage decree against Sarup. After the auction purchase, the defendant No. 1 is in the possession of the *jote* as a trespasser, the holding not being transferable by custom. Hence plaintiff seeks to recover *khas* possession to the extent of 7 annas proprietary share either jointly with or on partition from her co-sharers, the *pro forma* defendants, by ejecting the principal defendant.

The defence, *inter alia*, was that section 22 of the Bengal Tenancy Act bars this suit.

The first Court held that the plaintiff was entitled to get *khas*-possession jointly with the *pro forma* defendants.

The defendant appealed to the District Court. That Court set aside the judgment of the Munsif and dismissed the suit. The Court made the following observations:—

"The original tenant, Sarup, has been in occupation of the homestead land appertaining to the *jote* with permission of the defendant No. 1. So the lower Court, relying on the ruling in *Sailabala Debi* v. *Sriram Bhattacharji* (1), passed a decree in plaintiff's favour for joint possession with other co-sharers; but it appears that section 22 of the Bengal Tenancy Act, and the interpretation given to it in *Jowodul Huq* v. *Ram*

(1) 11 C. W. N. 873; 7 C. L. J. 303.

Das Saha (2), which was approved in *Ram Mohun Pal* v. *Sheikh Kachu* (3), were not brought to his notice. It has been held in these rulings that "the result of the purchase by co-sharer landlord of the occupancy-holding, is not the extinction of the tenancy right altogether, but only his occupancy-right in the holding," and that, "a co-sharer landlord is not entitled to joint *khas* possession with his co-sharer who has purchased the occupancy-holding of a tenant." The defendant No. 1, who has purchased the occupancy-holding in suit, is admittedly plaintiff's co-sharer. So the plaintiff is not entitled to joint *khas* possession to the extent of her share. This appeal is allowed and the decree of the lower Court set aside and judgment reversed and suit dismissed."

The plaintiff appealed to the High Court. The appeal was heard by Mr. Justice Holmwood, who dismissed the appeal by the following judgment:—

HOLMWOOD, J.—The only question which arises in this case is whether the ruling in *Girish Chandra Chowdhury* v. *Kedar Chandra Roy* (4) is still of full force and effect after the decision of the Full Bench in the case of *Ram Mohan Pal* v. *Sheikh Kachu* (3). The learned Judges in making the reference to the Full Bench clearly stated that they did not agree in the distinction drawn in the case of *Girish Chandra Chowdhury* v. *Kedar Chandra Roy*(4), distinguishing transferable from non-transferable occupancy-right. In either case, they considered the occupancy-right must cease to exist after purchase by the sale or joint proprietor. Now, although the Full Bench did not discuss the case of *Girish Chandra Chowdhury* v. *Kedar Chandra Roy* (4), it did lay down in very clear terms that the case of *Jowaldul Haq* v. *Ram Das Saha*(2) was rightly decided, as also two other cases which followed that case, and it was pointed out that this case, *Jowadul Haq* v. *Ram Das Saha* (2), was practically a decision of six Judges, and that the only thing which ceased to exist was the occupancy-right and this distinction is based by Mr. Justice Ghose upon this very case of a co-sharer landlord. He says: "To my mind there is an obvious distinction between the two cases contemplated by section 22. In the first mentioned case, I mean that in clause (1), the interest of the *raiyat* and the landlord becomes united in one and the same person, and the necessary result is that the tenant's right is merged in the higher right of the landlord, because the latter could not hold the land as a *raiyat* to himslf. But the like result does not follow in the other case, for the co-sharer landlord having acquired the rights of a *raiyat* could hold the land as a *raiyat*, if not to himself certainly to the other co-sharer landlord"; and this is precisely what has now been enacted in the latest Bengal Tenancy Act. Furthermore, Mr. Justice Ghose points out that "Section 22 of the Bengal Tenancy Act speaks of an occupancy-right, and in the circumstances mentioned in clause (2), it says, such 'occupancy-right shall cease to exist.' But it does not say that the holding itself shall cease to exist." As far as I can gather, the only ground upon which the plaintiff can come in is that taken in the case of *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (4), namely, that the sale of a non transferable occupancy-holding amounts to an abandonment of the holding. But as the Full Bench held that the tenancy does not come to an end by transfer to a joint landlord, I am unable to see how the question of abandonment can arise. In this particular case, the vendor was allowed to remain on the land in occupation of his homstead by the purchaser landlord. Although this, under the ruling in *Sailabala Debi* v. *Sriram Bhattacharji* (1), does not appear in every case to get rid of the plea of abandonment, yet if the tenancy is, as the Full Bench holds, continuous and is not extinguished, then it seems to me that the theory of abandonment cannot apply.

I think that the learned Subordinate Judge is right in the view which he takes of the Full Bench ruling, and the appeal is, therefore, dismissed with costs.

The plaintiff appealed under section 15 of the Letters Patent.

Babu *Shyama Charan Roy*, for the Plaintiff-Appellant.

Babus *Satish Chandra Ghose* and *Satish Chandra Bhatthcaryya*, for the Defendant-Respondent.

JUDGMENT.—It appears to us that we must follow the decision in *Girish Chandra*

(2) 24 C. 143; 1 C. W. N. 166.
(3) 1 C. L. J. 1; 32 C. 386; 9 C. W. N. 249 (F. B.).
(4) 27 C. 473.

Chowdhry v. *Kedar Chandra Roy* (4), for we are unable to perceive how it can be said that this case has been overruled by any subsequent decision of a Full Bench. On this basis, we must grant the plaintiff the relief to which she is entitled, that is, joint possession to the extent of 7 annas with the other co-sharers, that is, the principal defendants and the *pro-forma* defendants. We do not think that in the circumstances of the case, it is necessary to consider any further or incidental relief.

The appellant must have her costs in the High Court and in the lower Courts from the respondents, in proportion to her success, that is to say, on the basis of Rs. 60 the market-value of the 7 annas share.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 141 OF 1911.

May 22, 1912.

Present:—Mr. Lindsay, J. C.

Saiyid MUHAMMAD RAZA—DEFENDANT—APPELLANT

versus

Musammat KUBRA BIBI—PLAINTIFF—RESPONDENT.

Damages—Breach of contract—Mortgagee failing to discharge prior incumbrances with money left in his hands, effect of—Set-off—Court-fee.

Where a mortgagor, at the time of the execution of the mortgage, left money in the hands of the mortgagee to pay off a prior incumbrance, which the mortgagee did not pay off, the mortgagor is entitled in law to recover from the mortgagee the damages resulting from his failure.

A plea of *set off* is quite distinct from the plea of payment and should not be entertained until Court-fee with respect to it has been paid by the defendant in the Court of first instance, nor should it be entertained if the claim is not within the jurisdiction of the Court.

Appeal against an order of the District Judge, Fyzabad, dated 7th February 1911, upholding that of the Munsif, Akbarpur, dated 1st November 1910.

Syed *Wazir Hasan*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This is the appeal of one Syed Muhammad Raza, who was the defendant in the Court of first instance in a suit brought by one *Musammat* Kubra Bibi for the recovery of Rs. 494-3 by way of damages for breach of contract. The facts are somewhat complicated but for the purpose of disposing of this appeal, it will not be necessary to enter into all the details. The contract for breach of which damages are sought by the plaintiff was embodied in a document, dated the 17th February 1900, and executed by Kubra Bibi in favour of Mahammad Raza. This document was a mortgage of certain shares in three villages, Shadipur, Ninawan and Bebri, which were the property of Kubra Bibi. This property was already mortgaged to certain other persons, namely, Zahur Muhammad, Shafi Muhammad and one Baij Nath, but the land held in mortgage by these previous mortgages comprised certain plots of land in the village of Nandapur which were not included in the mortgage executed in favour of Muhammad Raza. To return to the deed executed in Muhammad Raza's favour, the mortgage-money was expressed to be Rs. 6,000 and it was stated that this sum was left with Muhammad Raza to pay off the previous mortgages. It will be apparent that the effect of the discharge of these previous mortgage-debts would have been to free the plots in Nandapur from the mortgages with which they were incumbered and to bring them into the possession of *Musammat* Kubra Bibi. The other mortgaged properties, of course, would have gone to Muhammad Raza in accordance with the terms of his mortgage. Kubra Bibi's case then was this, namely, that Muhammad Raza had failed to carry out his contract to redeem these previous mortgages, the result being that she was deprived of possession of these lands in Nandapur. She, therefore, sued for damages—the measure of damages being the amount of profits which could have accrued to her had these lands come into her possession after the previous mortgagees had been paid off. Both the lower Courts have decreed the claim. The main point taken in appeal here on behalf of the defendant-appellant is that he was not liable under the contract for damages. It is admitted that he did not pay off these previous mortgagees and that consequently the Nandapur lands did not come into the possession of Kubra Bibi. If we compare this contention with the defence which was set up by Muhammad Raza in the Court of first instance, it will appear that the case which has now been put forward on the appellant's behalf is inconsistent with the case he raised in the Court of the Munsif. In paragraph

13 of his written statement, the defendant, far from denying that there was a liability on his part for damages under the contract in suit, admitted that there was such a liability but put forward a fresh agreement, the effect of which according to him was to provide a method for the payment of the damages in question. He stated that in 1311 *Fasli*, it was agreed between him and Kubra Bibi that the loss she had incurred through her not getting possession of the Nandapur lands was to be made good by Muhammad Raza paying up the reveune due in respect of Kubra Bibi's share in the village of Nandapur. Evidence in support of this fresh agreement was put forward in the Court of first instance and was rejected as unworthy of credit. Both the Courts below have found that this agreement was not proved and this is a finding of fact which cannot be disturbed in second appeal. To return to the contention which is pressed on behalf of the appellant here, the agreement is that although under the deed of 17th February 1900, money was left with Muhammad Raza to discharge the prior mortgages, he was under no legal duty to discharge those mortgages and, therefore, his failure to redeem them does not amount to any breach of contract for which damages can be claimed. I am unable to agree with this contention. In the deed executed in Muhammad Raza's favour, it is stated in the preamble that Kubra Bibi's property is in the possession of mortgagees and that interest is going on increasing to such an extent that the amount of the debts will soon exceed the value of the property. It is quite true, as pointed out by the appellant's learned Counsel, that this recital does not refer to the usufructuary mortgages in which the profits of the parties were being received in lieu of interest. Further on in the deed, it is said that the mortgage has been made with a view to discharging all the mortgage debts due to other mortgagees and that Rs. 6,000 are being left with Muhammad Raza for this purpose. At the bottom of the deed, there is a list of the various mortgagees who are to be paid off and this list includes the names of the mortgagees who are in possession of the Nandapur lands owned by Kubra Bibi. It may be, as argued by the appellant's learned Counsel, that this contract contains no express provision by which Muhammad Raza bound himself to discharge these previous mortgages at any particular time but I am quite satisfied that having regard to the situation of the parties, it must be taken that there was an implied promise on the part of Muhammad Raza to discharge the mortgage-debts. It cannot be doubted that what was in the mind of the mortgagor Kubra Bibi was that the result of her executing the mortgage in favour of Muhammad Raza and getting the previous mortgages discharged by him would be that she would come into possession of the Nandapur lands. It can hardly be supposed that the lady contemplated that she might have to wait for an indefinite time in order to get possession of these lands. On the contrary, it seems far more reasonable to suppose that what she wanted was to get possession of these lands as soon as possible. Mr. Wazir Hasan, who appears for the appellant, concedes that Kubra Bibi probably expected this result to follow from the transaction entered into between her and Muhammad Raza and it appears to me that once this concession is made, there is nothing to be said on behalf of the appellant. In the view which I take of this transaction, I have no doubt whatever that Muhammad Raza was under a legal obligation to discharge the previous mortgages promptly and to see that the Nandapur lands were made over to *Musammat* Kubra Bibi and as he had admittedly failed to discharge that duty, there can be no question as to his liability for damages for breach of contract. In the fifth ground of appeal, it is stated that the lower Appellate Court ought to have considered the effect of a particular sale deed, dated the 31st May 1901 ,both with regard to the question of agreement and to the question of the legal liability of Muhammad Raza for damages. This document is mentioned in paragraph 12 of the defendant's written statement, in which it is said that Kubra Bibi on the 31st May 1901 sold to Muhammad Raza the property mortgaged under the deed of the 17th February 1900 and other property for a sum of Rs. 14,000. It has been argued that this sale-deed had the effect of extinguishing the previous deed of the 17th February 1900 and of all the obligations incurred under it. It may be noted, in the first place, that this sale-deed of May 1901 was not produced in the Courts below nor has any satisfactory explanation of its non-production been put forward. There

is no proof that any such deed was executed and, indeed, in the plaintiff's replication, it was denied that any such sale had ever taken place. It is impossible, therefore, to consider the legal effect of a document which was neither produced nor proved in the course of the trial. But, even assuming for a moment that this document had been produced and that its execution by Kubra Bibi had been established, I fail to see how it can be argued that the execution of the sale-deed released Muhammad Raza from any liability which he may have incurred by reason of his failure to redeem the previous mortgages. It has not been stated that the sale deed in question contains any express provision, which would have released Muhammad Raza from liability for damages, and if that is so, it cannot be contended that the mere execution of the sale-deed was a good discharge of any liability outstanding. The sale-deed may have had the effect of putting Muhammad Raza in the position of an owner instead of a mortgagee as he was before but in the absence of any express covenant, it would not release him from liability for damages for breach of any other covenant contained in the mortgage-deed. There only remains to be noticed another plea, namely, one of set off. It was alleged by Muhammad Raza that he had paid on *Musammat* Kubra's behalf certain sums on account of Government revenue due by her. These payments, he stated, were made in accordance with the agreement made in 1311 *Fasli*, to which reference has been made in a previous part of the judgment. He pleaded, therefore, that he was entitled to have credit for the sums paid on account of Government revenue. The Court of first instance found that as the agreement of 1311 *Fasli* had not been proved, it was not necessary to enter into the question of this payment of revenue. The Munsif remarked in his judgment that if the defendant had paid any sums on account of arrears of revenue due from Kabra Bibi, he might bring a suit for their recovery. The lower Appellate Court also refused to allow any claim of set-off to be raised in respect of these payments. It has been argued before me that a set-off should have been allowed but I am unable to agree that Muhammad Raza has any right to such a remedy. In the first place, no proper claim for set-off was put forward by the defendant in his pleadings. He only raised the plea of payment in order to show that nothing was owing by him to the plaintiff. No Court-fee was paid with respect to the sum mentioned in paragraph 16 of the written statement and, as has been pointed out by the respondent's learned Pleader, a claim for recovery of revenue paid on behalf of a co-sharer was not one of which a Civil Court could take cognizance. Suits of this nature lie only in the Revenue Courts. For these reasons, I am of opinion that the Courts below were correct in refusing to allow any set-off against the claim made by the plaintiff. The point of limitation which is mentioned in the memorandum of appeal has not been pressed. It is conceded that if the mortgage-deed of 1900 is evidence of a contract on behalf of Muhammad Raza to redeem the prior mortgages and thereby to procure the release of the Nandapur lands, then the suit is within time. As I have already decided in the respondent's favour that there was such a contract, the point of limitation fails. The appeal is dismissed with costs.

It has been brought to my notice by the parties in this case that I have omitted to deal with the 7th ground of appeal which is to the effect that the appellant was not liable for interest. The meaning of this plea is that the Courts below awarded the respondent interest on damages. It was conceded at the hearing of the appeal that no claim for interest on damages could properly lie inasmuch as the damages were supposed to be compensation for the total loss sustained by the plaintiff. The parties are agreed, therefore, that the appellant is entitled to succeed to this extent that the interest allowed by the lower Courts on damages should be disallowed. To this extent, therefore, the appeal should be decreed and in drawing up the decree of this Court, the office will be careful to see that the amount awarded by the Courts below as interest (Rs. 87-4-6) should be struck out.

Appeal allowed in part.

MOHESH CHANDRA SHAHA *v.* BRINDARANI CHOWDHURANI.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 324 OF 1910.

May 20, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Richardson.

MOHESH CHANDRA SHAHA AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Rani BRINDARANI CHOWDHURANI AND OTHERS—DECREE HOLDERS—RESPONDENTS.

Appeal—Fruitless even if successful—Execution—Direction that properties, be sold in particular order—Appeal by judgment-debtor—Sale absolute—No appeal filed against order dismissing application to set aside sale—Whether appeal against first order competent.

In execution of a decree, the Court directed that the properties of the judgment-debtor should be sold in a particular order. The judgment-debtor appealed from that order. Before the appeal was heard, the properties were sold and objections to the sale were rejected:

Held, that the appeal was incompetent and should be dismissed, because, even if it were successful, it would be fruitless, as the sale could not now be set aside.

Appeal from the order of the Sub-Judge of Rungpur, dated April 6th, 1910.

Babus *Basanta Kumar Bose* and *Tarakeswar Pal Chowdhary*, for the Appellants.

Babus *Baidya Nath Dutt*, *Mukunda Nath Roy* and *Hem Chandra Mitra*, for the Respondents.

JUDGMENT.—This is an appeal against an order made in the execution of a mortgage-decree on the 6th April 1910, directing that the mortgaged properties should be sold in the order in which they stood in the sale proclamation. Since this order was made, the properties have been sold in that order. That sale still stands although objections were taken to it not by the appellant now before us but by a third person. Now should the appellant succeed in making out that the order now before us is bad or improper, it would be futile for us to set it aside when that could not affect the sale which subsequently took place.

We say nothing as to the merits of the case before us which, in fact, have not been gone into. But we dismiss the appeal merely because the appeal, if it were successful, would be fruitless. The appeal is, therefore, dismissed with costs. We assess the hearing-fee at two gold *mohurs*.

Appeal dismissed.

RAJARAM *v.* KHANDU BALU.

BOMBAY HIGH COURT.

CIVIL SUIT No. 893 OF 1909.

November 25, 1911.

Present:—Sir Dinsha Davar, Judge.

RAJARAM RAJARAM—PLAINTIFF

versus

KHANDU BALU—DEFENDANT.

Gift—Deed of gift—Validity—Burden of proof—Absence of power of revocation—Suit for setting aside deed—Grounds for setting aside—Conditional gift—Transfer of Property Act (IV of 1882), s. 126.

The burden of proving that a deed of voluntary gift, executed by an old and infirm woman, was executed with the full knowledge of its contents and that she did so willingly and without any pressure or solicitations which might amount to the exercise of undue influence, lies heavily on the donee. It should be proved that the donor thoroughly understood the contents of the document she executed, that all the material clauses were explained to her, that she appreciated the effect the execution of the deed would have on her with respect to her property and that the deed carried out her intentions at that time. If these facts are proved, it would then be for the other side to show that some substantial reason exists why the deed should be set aside.

Henry v. *Armstrong*, (1881) 18 Ch D. 668; 44 L. T. 918; 30 W. R. 472, relied upon.

Any person of full age and sound mind, who has executed a voluntary deed of gift by which he has denuded himself of his property, is bound by his act; and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside.

A voluntary deed of gift is not voidable by the donor merely because it does not contain a power of revocation.

The absence of the power of revocation in a deed of gift is one of the circumstances to be taken into consideration when the Court has to consider whether a deed of gift shall stand or be set aside.

Coutts v. *Acworth*, (1869) L. R. 8 Eq. 558; 38 L. J. Ch., 694: 21 L. T. 224; 17 W. R. 1121, not approved.

Henery v. *Armstrong*, (1881) 18 Ch. D. 668; 44 L. T. 918; 30 W. R. 472, *Toker* v. *Toker*, (1862) 31 Beav. 629; 9 Jur. (N. S.) 370, *Villers* v. *Beaumont*, (1682) 1 Vern. 100, *Phillips* v. *Mullings*, (1872) L. R. 7 Ch 244; 41 L. J. Ch. 211; 20 W. R. 129, *Hall* v. *Hall*, (1873) L. R. 8 Ch. 430; 42 L. J. Ch. 444; 21 L. T. 383; 21 W. R. 373, followed.

The donor and the donee may agree that on the happening of a specified event which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be.

An old, infirm and illiterate woman executed a deed of gift by which she conveyed all her property to one of her nephews. She executed the deed of gift voluntarily while in possession of all her senses and without the exercise of any fraud, misrepresentation or undue influence on her. When she executed the deed of gift, she fully understood its contents and the

effect it would have of divesting her of her property. The gift was her "free determined act" and she intended the gift to be irrevocable. Subsequently, she herself sued to have the gift set aside:

Held, that the deed of gift was binding on her and could not be set aside. The mere fact that the donor's feelings towards the donee subsequently underwent a change was not sufficient to set aside the gift.

Messrs. *Jinnah* and *Desai*, for the Plaintiffs.

Messrs *Talyarkhan* and *Kanga*, for the Defendant No. 1.

JUDGMENT.—In August 1909, Malubai, an old woman belgoning to the Telagu community of Bombay, presented a petition to be allowed to sue *in forma pauperis*. After investigation, the Prothonotary, on the 28th of September 1909, granted leave to sue as pauper and her petition then became her plaint in this suit. Malubai used to be a Muccadum of a gang of working women and was, previous to May 1908, possessed of a small house at Kamatipura worth about two or three thousand rupees. She apparently had no nearer relatives than the four sons of her three predeceased brothers. On the 8th of May 1908, she executed a deed of gift whereby she unconditionally transferred and made over her house as a free gift to one of her four nephews, named, Khandu Balu. She filed this suit for the purpose of having that deed of gift cancelled and the title-deeds of her property returned to her.

In her petition, she stated that she had intended to leave her property to her four nephews after her death, that Khandu at first "taking advantage of her old age and ignorance" represented to her that she should execute some document by which her aforesaid intention would be carried out, and that he said "he would arrange for such a document being prepared." She adds that Khandu, taking advantage of the absence of her other nephew Rajaram, proposed to her that she should leave the said property after her death to him alone and she adds that, though she was unwilling to do so, Khandu finally prevailed upon her to give her consent to that arrangement. She then goes on to say that on the 8th of May 1908, she was taken to the office of a Solicitor in Fort, where she was asked to put her mark to a document which was represented to her as the document giving effect to the aforesaid arrangement. On the same day, she says, she admitted execution of the document before the Registrar, but subsequently discovered that the said document was a gift in favour of the defendant and, under the circumstances narrated in her petition, she claimed that she was entitled to have the deed of gift cancelled and her property restored to her.

It seems that, after executing the deed of gift on the 15th of June 1908, Malubai made a Will of which she appointed Rao Saheb Manaji Rajuji Kalewar and another, executors. Before her suit came on for hearing, she died on the 25th of December 1909. Rao Saheb Manaji proved her Will and applied to the Prothonotary to have his name substituted as plaintiff in place of the deceased Malubai and to be allowed to continue the suit in *forma pauperis*, and by an order, dated the 17th of June 1910, made by the then Prothonotary, Rao Saheb Manaji Rajuji became the plaintiff in this pauper suit.

The case came on for hearing before me on the 1st of April 1911, and the very first question raised by the learned Counsel for the defendant was, "whether the plaintiff can maintain or continue the suit *in forma pauperis*." That question was argued before me at an adjourned hearing, and on the 16th of June, I delivered my judgment and found on the preliminary issue that Rao Saheb Manaji Rajuji, being a man of means, was not, for the reasons I gave in my judgment, entitled to maintain or continue the suit in *forma pauperis*: *Rao Saheb Manaji Rajuji Kalewar* v. *Khandoo Baloo* (1). The plaintiff then asked for a short time to consider his position and, on the 19th of June 1911, his Counsel announced to the Court that he was not prepared to go on with the suit otherwise than *in forma pauperis*. On this occasion, two of the four nephews of Malubai, namely Rajaram and Shanker, applied to me to be made parties to the suit and to be permitted to go on with it.

After I heard arguments on the application, on the 23rd of June, I made an order whereby the two applicants were made plaintiffs, the fourth nephew, who did not join in the application, was made a co-defendant with Khandu and Rao Saheb Manaji was retained on the record and made the third defendant in suit. In this altered form, the suit came on for hearing before me on the 9th of November and has occupied me several days in trying the question whether

(1) 13 Bom. L. R. 577; 11 Ind. Cas. 724.

the deed of gift of the 8th of May 1908 ought to be upheld or cancelled.

At the first hearing, the defendants' Counsel raised only one issue, namely, whether the deed of gift dated the 8th of May 1908 is not valid and binding on all parties. Mr. Jinnah for the plaintiffs raised two other issues, namely, whether the first defendant did not stand towards Malubai in the position of active confidence and whether Malubai was not a *purdanashin* woman. As the onus of the last two issues undoubtedly lay on the plaintiffs, I held that they should begin. Plaintiffs led no evidence, their Counsel merely put in correspondence and the evidence which Malubai had given in a Small Cause Court case, and closed the plaintiffs' case. On behalf of the defendant, Khandu Balu, Mr. Solomon Judah, a Solicitor of this Court, his managing clerk, Shanker Sayanna Persha, Mr. Almeida, the Sub-Registrar, Raju Babaji, a leading member of the Telagu community of Bombay, and the first defendant himself gave evidence. Plaintiffs then applied for leave to call rebutting evidence and the first plaintiff and Rao Saheb Manaji Rajuji were examined on behalf of the plaintiffs.

The case of the plaintiffs, as originally framed by Malubai and as set out in the present plaintiffs' joint affidavit, affirmed on the 20th of June 1911, in support of their application to be made parties, is somewhat different from the case placed before the Court by the learned Counsel who conducted the plaintiffs' case. Malubai's grievance, as it is gathered from her plaint, is that it was represented to her that the document she executed was not a gift out and out to Khandu but that it was a document which carried out the arrangement that the property should be left to Khandu after her death. Her case was, to all intents and purposes, one of misrepresentation made to her and fraud practised on her. The present plaintiffs took up the same attitude. In paragraph No. 2 of their affidavit to which I have referred, they say:—

"On the 8th of May 1908, the defendant above-named by fraud and misrepresentation caused the said Malubai to execute a deed of gift of the said property in his own favour representing to her that it was her Will by which she was bequeating her property in equal shares to her four nephews."

It will be observed that Malubai herself does not put her case as high as the present plaintiffs have put in their affidavit. She admits in her plaint that she consented to execute a document whereby the property was to be left to Khandu alone.

Mr. Jinnah for the plaintiffs in the very beginning admitted that he was not in a position to adduce any evidence of misrepresention and fraud, but he contended that, having regard to all the circumstances of the case, to the fact that Malubai was an old and infirm woman, that she had no independent Solicitor but that the same Solicitor who acted for the donor acted for the donee, having regard again to the fact that there was no power of revocation inserted in the deed and to the fact that she was not told that she could have such a power inserted, having regard also to the fact that she had no other property except this house, that this was a deed which could not be and ought not to be supported and must be cancelled. Mr. Desai, who took up the conduct of the plaintiffs' case in its later stages, contended that a voluntary gift, which leaves the donor destitute with no provision for his or her maintenance, would of itself be sufficient to entitle the donor to come to the Court and ask for its cancellation, and that a mere verbal promise by the donee that he or she will take care of the donor is not sufficient. The learned Counsel further contended that a deed evidencing a voluntary gift would be set aside, if there was no power of revocation in it, unless it is proved that the executant had independent advice, that he or she thoroughly understood the effect of omitting that power and that it was the intention of the donor that such a power should be excluded.

I may state at once, before I discuss the evidence more fully, that there is not in this case any evidence whatever to support the original allegation of Malubai and the present plaintiffs that this deed of gift was obtained by any misrepresentation or fraud whatsoever. In fact, that aspect of the case was practically abandoned before me at the hearing, and stress was laid on what is stated in several English cases on the point of voluntary gifts and settlements, and I was asked to hold that on the admitted facts of this case, it would be inequitable to allow this

deed to stand. I think it is desirable, under the circumstances, first to ascertain how the law applicable to this case stands, before I proceed to discuss the evidence.

It has been argued before me with great insistence that the mere fact that Malubai was an old woman of sixty and in feeble health and that because there is no power of revocation in the deed of gift and that a common Solicitor acted for both, the entire burden of proving that the transaction was thoroughly understood and assented to by her and was a righteous one was on the donee. And on the authority of *Coutts* v. *Acworth* (2), it was further contended that the mere fact that there was no power of revocation was quite sufficient for the Court to hold that the deed must be set aside.

It is true that this being a voluntary gift, the onus of proving that Malubai executed the deed with the full knowledge of its contents and did so willingly and without any pressure or solicitations, which might amount to the exercise of undue influence, lies heavily on the defendant Khandu Balu. But I think it is as well to keep in mind the exact position of the parties in such a case, as laid down by Mr. Justice Kay in *Henry* v. *Armstrong* (3). The learned Judge there says (at page 669) :—

"No doubt there are to be found in reported cases *dicta* to the effect that the onus of supporting a voluntary deed rests upon those who set it up; but I do not think that these *dicta* go so far as to say that whenever a voluntary settlement is impeached on any ground whatever, the onus is at once thrown on those who would maintain it. As I understand it, the law is that anybody of full age and sound mind, who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside."

In this case Malubai, though aged and physically weak, was, at the date of the execution of the deed and long before and after it, of perfectly sound mind; there are indications in the case that she was a woman of intelligence. The question, therefore, is whether she thoroughly understood the contents of the document she executed, whether all the material clauses were explained to her, whether she appreciated the effect the execution of the deed would have on her with respect to her property, and whether the deed carried out her intentions at that time. If the evidence establishes all these facts, and the onus of proving this is entirely on the defendant Khandu and when he has discharged that onus, it would be for the plaintiffs to show that some substantial reason exists why the deed should be set aside. I confess, on the question of the absence of the power of revocation, I was considerably startled at the language used by Vice-Chancellor Malins in *Coutts* v. *Acworth* (2). The learned Judge there says (at p. 567) :—

"If I had the power, I would lay it down as a rule, that wherever a voluntary gift of a material part of a person's property is made [unless, as in *Toker* v. *Toker* (4), it is prepared by an independent Solicitor, and the donor distinctly repudiates and refuses to have the power of revocation], it is the duty of the Solicitor to insist that there should be, and almost to go to the extent of refusing to execute such an instrument unless there be, a power of altering that which was done, so as to meet the various exigencies that may arise in future life."

A study of the case law on this subject, however, leads me to believe, that the Vice-Chancellor has given far greater importance to the absence of the power of revocation in deeds of voluntary gifts than the law justifies. In *Villers* v. *Beaumont* (5), which is a very ancient case, it was held that a voluntary settlement without a power of revocation shall bind the party and shall not be defeated by a subsequent Will.

In the case of *Henry* v. *Armstrong* (3), which I have cited above, after discussing the question of onus, Mr. Justice Kay held that a voluntary deed of settlement is not voidable by the settlor merely because it does not contain a power of revocation.

(2) (1869) L. R. 8 Eq. 558; 38 L. J. Ch. 694; 21 L. T. 224; 17 W. R. 1121.

(3) (1881) 18 Ch. D. 668; 44 L. T. 918; 30 W. R. 472.

(4) (1862) 31 Beav. 629; 9 Jur. (N. S.) 370.

(5) (1682) 1 Vern. 100.

In *Phillips* v. *Mullings* (6), Lord Hatherley, L. C., referring to *Coutts* v. *Acworth* (2), says:—

"Some cases, however, have attempted to lay down what ought to be in such an instrument. It has, for instance, been almost laid down in *Coutts* v. *Acworth* (2) that where there is no power of revocation, the deed will be set aside.....But whether there should be a power of revocation or not must depend upon the circumstances; and it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation."

In *Toker* v. *Toker* (4), the Master of the Rolls sums up the law on the subject of voluntary deeds in these words (at p. 644):—

"The law of this Court is very strict on the subject of voluntary deeds, it gives no assistance to the completion of them; it does not lay down as a rule that they are always void; and the mere alteration of intention is not sufficient to induce this Court to interfere and cancel an instrument which was fully understood and deliberately executed by the grantor. That I believe to be the case here, and being so, I cannot interfere, because the feelings of the plaintiff towards the defendant are now no longer what they were in November, 1853."

This case in appeal is reported in *Toker* v. *Toker* (7), where, in affirming the judgment of the Master of the Rolls, Lord Justice Turner says (at p. 491):—

"I think it is going too far to say that no voluntary settlement can be valid unless the settlor is advised that there should be a power of revocation inserted in it. What the Court has to be satisfied of in these cases, as I apprehend, is this, that the settlement whether containing or not containing a power of revocation, is the free determined act of the party making it; and the absence of advice as to the insertion of a power of a revocation is a circumstance, and a circumstance merely, to be weighed in connection with the other circumstances of the case."

And similar was the finding of the Court of appeal in *Hall* v. *Hall* (8), where it was held that the absence of the power of revocation and the fact that the attention of the settlor was not called to that absence did not make a voluntary settlement invalid. They were merely circumstances to be considered in deciding on the validity of a voluntary settlement.

Throughout this case it has been strenuously contended on behalf of the plaintiffs that the fact that the deed of gift in question did not contain a power of revocation in favour of the donor was in itself sufficient to enable the Court to declare against its validity; and it was further urged that that fact coupled with the facts that the donor was an old woman and illiterate, that she disposed of the whole of her property, leaving herself nothing and that she had no independent Solicitor acting for her alone, made it incumbent on the Court to hold that the deed of gift was not valid and binding on her and ought to be set aside and cancelled.

The arguments urged in respect of the absence of the power of revocation ignored the fact that in India a deed of gift with an unconditional power of revocation in favour of the donor would make the gift a nuliity. Section 126 of the Transfer of Property Act provides that the donor and donee may agree that on the happening of a specified event which does not depend on the will of the donor, a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be.

When this was pointed out to the learned Counsel for the plaintiffs, he argued that in this instance the power of revocation may have been made conditional on the failure of the donee to maintain herself and her nephew Vithal. On the authorities, it seems to me clear that the absence of the power of revocation in a deed of gift is after all one of the circumstances to be taken into consideration, when the Court has to consider whether a deed of gift shall stand or be set aside.

Having regard, therefore, to the principles laid down in the cases I have referred to, I will now proceed to consider the evidence and apply those principles to the present case. Malubai is, unfortunately for the plaintiffs, dead and they have not the benefit of her evidence in this case. But before her death

(6) (1872) L. R. 7 Ch. 244; 41 L. J. Ch. 211; 20 W. R. 129.

(7) 3 DeG. J. & S. 487; 32 L. J. Ch. 322; 8 L. T. 777.

(8) (1873) L. R. 8 Ch. 430; 42 L. J. Ch. 444; 28 L. T. 383; 21 W. R. 373.

she gave evidence in respect of this very deed of gift in a Small Cause Court suit, which she had filed against Khandu's mother, to enforce payment of rent for the occupation of a portion of the property in question. That evidence I have permitted the plaintiffs' Counsel to put in. In the course of her cross-examination, Malubai stated:—

"Rajaram is disappointed on account of this gift to Khandu. The Solicitor had read out and explained to me the contents of the document. The Registrar had also asked me about the contents."

In her plaint she admits that she agreed to execute a document by which her property was to go to Khandu after her death. Four witnesses, whom I consider to be both independent and trustworthy, have been examined on behalf of the first defendant Khandu, and their evidence I have no hesitation whatever in accepting as wholly truthful.

Mr. Solomon Judah, a Solicitor of this Court, has given clear and explicit evidence that the contents of the deed of gift were explained to Malubai in Marathi, which was her mother tongue, by his Marathi speaking clerk, Shanker, in his presence, and that he was satisfied that she fully understood the conditions of the deed and assented to them. This evidence is corroborated by the evidence of his clerk Shanker, who is equally clear and emphatic in his statement that he explained the contents of the deed of gift to her and she expressed her assent. The third witness, Raju Babaji, has given evidence which establishes beyond all doubt that it was the firm resolution of Malubai to execute a document making a free gift of this house to Khandu. Mr. Judah's evidence is not attacked on any ground either of its veracity or honesty. The only argument urged against his evidence is that he does not know sufficient Marathi to be able to say definitely that every thing was explained to Malubai. Mr. Judah has told the Court that although he cannot speak Marathi very well, he understands it quite sufficiently to enable him to say that the contents of the deed were explained in his presence to Malubai. Mr. Judah has lived all his life in Bombay, and I feel sure that he is correct when he said that he understood Marathi sufficiently to know that the deed was correctly interpreted to Malubai. Mr. Judah's clerk, Shanker Sayana Persha, impressed me most favourably. He gave his evidence without the slightest bias and in a most straight-forward manner. He did not know the parties before and I have no reason whatever to believe that in this matter he has acted throughout with anything other than scrupulous good faith. I cannot recall to my mind any single argument of any substance as to why I should not accept Shanker's evidence as wholly truthful.

The third witness, Raju Babaji, again, is one whose evidence created a very favourable impression on my mind. He is a wealthy and leading member of his community and heads one of the factions. No doubt he and Rao Saheb Manaji Rajuji are not on good terms with each other, but both these men are much too well placed in their community and would not, I think, go out of their way to give untruthful evidence on behalf of parties who occupy a very humble position in their community. No doubt Rao Saheb Manaji has befriended the plaintiffs and Raju Babaji has befriended the 1st defendant, but I see nothing in their conduct to discredit the evidence which they have given. Accepting as I do Raju Babaji's evidence, it seems quite clear that Malubai after a great deal of consideration came finally to the conclusion that she would give this house to her nephew during her life-time so as to avoid all possibility of fights, quarrels and litigation, after her death.

In addition to the evidence of these three witnesses, I have before me the evidence of Mr. Almeida, the Sub-Registrar of Bombay. It seems to be his practice, when old illiterate and not very intelligent parties appear before him to admit execution of documents, to satisfy himself that the executants have understood the contents of the documents which they have executed. I think this is a most excellent practice on his part. In this case, he says:—

"Seeing that Malubai was a very old lady, I asked her questions and I was satisfied that she understood what the document was."

Khandu, of course, is deeply interested in this litigation and, therefore, his evidence has to be considered with caution. I found nothing in his demeanour and nothing in his

evidence, which would lead me to distrust what he stated. He is a man of small intelligence and of extremely weak manners. He was subjected to very rigorous cross-examination, from which he emerged wholly unharmed. As against this evidence, the first plaintiff himself entered the witness-box and called Rao Saheb Manaji Rajuji on his behalf. Rao Saheb Manaji's evidence does not assist the plaintiffs in any material portion of their case nor does it destroy any part of the first defendant's case. The first plaintiff did not create an impression favourable to himself on my mind by his demeanour in the box. He seems to be gifted with far higher intelligence than Khandu. If one can judge by his behaviour in the witness box, one would be inclined to think that he is a man of aggressive temperament and is easily excited. Taking the evidence of the first plaintiff and the first defendant side by side, I have come to the conclusion that it would be infinitely safer to rely on the evidence of Khandu in preference to that of Rajaram.

The second defendant Vithal or Vithoba Sayana was not called by either of the parties to give evidence at the end of the first defendant's case. However, while inquiring whether he desired to give evidence on his own behalf or call witnesses, I had him sworn and asked him a few questions. He is a young boy of 18 or 19. He possesses intelligence beyond his years. It is true he exhibted a good deal of animus against Rajaram, but in spite of that I am inclined to believe that what he said, about Malubai's relations with Rajaram and Khandu, was on the whole correct.

After a full and careful consideration of all the evidence recorded in this case, my findings of facts are that about fifteen years before her death, Malubai, when she was seriously ill, expressed a desire to give her property to her four nephews after her death but she recovered and the intended Will was not executed. I find that many years thereafter, she lived by herself in her own house and attended to her own wants and managed her own property. The assertion of Rajaram that he used to manage her property till within a short time of the deed of gift is, I think, incorrect. He is not able to produce any single paper or voucher evidencing the fact that he managed her property, and beyond vague statements he has not proved one single act of his management of Malubai's property. I find that sometime previous to the execution of the deed of gift, she was ill, weak, and in bad health. She seems to have approached Rajaram asking him to take care of her but he treated her overtures unfavourably. On the other hand, as soon as it was found that she was ill and unable to cook her own food, Khandu's mother began attending to her. Malubai, when able to move out of the house, took her meals at Khandu's place, and when ill and unable to move out, Khandu's mother took her meals to her. This friendly intercourse evidently irritated Rajaram, and I believe the evidence which goes to show that he frequently abused and ill-treated Malubai. She seems to have given expression to her desire to give her property to Khandu, and that seems to have aroused greater ill-will in Rajaram, both against Malubai and Khandu. If one can read the mind of Malubai about this time, and, with the aid of the incidents deposed to in the course of the evidence before the Court, such reading is not very difficult, it clearly appears that Malubai was much distressed at the ill-treatment which Rajaram was subjecting her to and she felt that possibly all the quarrels would end, if she definitely carried out her intentions with respect to her property and set the matter at rest once for all. She apprehended that if she did not do that, there were certain to be quarrels, fights and litigation, amongst her nephews and her property would be lost. Under these circumstances, she makes up her mind, takes Khandu with her and goes to Raju Babaji and asks him to help her in carrying out her intentions to make a gift of her house to Khandu. When Raju Babaji is satisfied that she has definitely made up her mind, he sends for Shanker, who was known to him but was a stranger to Malubai and Khandu, and entrusts him with the work. Shanker ascertains her wishes, takes her to his master's office, gets his master to prepare a deed of gift in accordance with Malubai's instructions, and the deed is duly executed. Mr. Judah did consider the question whether the deed should have a power of revocation, and he says he thought it was unnecessry as the lady was old and she wished to give the house away to Khandu. When Mr. Judah

discussed this question with his clerk and when he gave evidence in the box, it seems to me that the provisions of section 126 of the Transfer of Property Act were not present to his mind, otherwise he would have said that "in an Indian deed of gift, I could not put in an unconditional clause containing a power of revocation, for that would nullify the gift." When Malubai made up her mind to give the only property she owned to Khandu, she knew perfectly well that she would be thereby divesting herself of all means of maintenance during the rest of her life. She seems, however, to have been quite satisfied that Khandu and his mother would look after her and provide for her wants during the remaining portion of her life. She was ill, she was feeble, she was ailing, and she must have realized that she was not likely to survive the gift many years. Be that as it may, she made the gift with a full conviction in her mind that Khandu would provide for her and look after her during the rest of her life. She had one other wish. She wanted to make sure that Vithal should be provided for and maintained by some one, and she stipulated orally in the first instance that Khandu would do so. A second document was executed in Mr. Judah's office simultaneously with the deed of gift. That document was tendered but for want of registration was rejected on objection taken by the learned Counsel for the plaintiffs. The result is the Court is not entitled to refer to the contents of that document

The conclusion to which I have come, after a careful consideration of the whole of the evidence, is that Malubai, in full possession of all her senses and without the exercise of any fraud, misrepresentation or undue influence on her, voluntarily conveyed her property to her nephew Khandu; that when she executed the deed of gift, she fully understood its contents and the effect it would have of divesting her of her property and that the gift to the nephew was her "free determined act"; that she intended the gift to be irrevocable; and that there is not in this case a single "substantial reason why the deed should be set aside." The evidence in the case, I think, fully establishes that Malubai before execution of the deed of gift, had unmistakably manifested her intention of making an unconditional and irrevocable gift of her house to Khandu and she carried out that intention of her own free will.

What happened subsequent to the deed of gift is not a matter of any importance. Whether it was through the influence of Rao Saheb Manaji Rajuji and his sister or whether it was through the working of Rajaram, it is quite clear that Malubai's feelings towards Khandu were changed within a month of the date of the deed of gift. That change of feeling was not due to any act of Khandu or his mother. As in *Toker* v. *Toker* (4), the feelings of Malubai towards the defendant were no longer what they were when she executed the deed. Rajaram seems to have been considerably embittered against Khandu because Malubai had given him her house and it is in evidence that he started a campaign of persecution against Khandu, and openly expressed his intention of doing all in his power, so that Khandu may not have the benefit of a single brick of that house. He resorted to a false charge to the Police and a prosecution before the Magistrate, both unsuccessfully. He then seems to have got Malubai to file this suit. He and his brother, the two plaintiffs, are admittedly men of no means or very small means which they have already exhausted in this litigation, and although the defendant may succeed in this suit, he stands a very poor chance of recovering his costs, and if he has to pay them himself, the house will be gone.

I find first issue in the affirmative and find that the deed of gift of the 8th May 1908 is valid and binding.

I find issues 2 and 3 in the negative, and I dismiss the plaintiff's suit. I direct the plaintiffs to pay to the first defendant his costs of this suit from and after the 19th of June 1911, on which date they applied to me to be made party-plaintiffs. The second defendant has incurred no costs nor has the 3rd defendant after he was made a defendant and I have dealt with the costs previous to the re-constitution of the suit.

Suit dismissed.

Attorneys for the Plaintiffs : Messrs. *Dadachandji & Pocha.*

Attorneys for the Defendants: Messrs *Mulla & Mulla ; Dadachandji & Pocha.*

HARIHARNATH DAS *v.* RAJANI KANTA LAIK.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 456 OF 1908.
June 12, 1912.
Present:—Mr. Justice Chitty and
Mr. Justice Teunon.
HARIHARNATH DAS—DEFENDANT—APPELLANT
versus
RAJANI KANTA LAIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Patni *sale—Patni Regulation (VIII of* 1819), *ss.* 8, 10, 14—Patni *sale only viodable, not void—Suit to set aside sale—Mortgagee of defaulting* patnidar, *if entitled to bring such suit—Notice in sections* 8 *and* 10, *what to contain—One lot comprising several tenures—Notice specifying only one, bad—Sale irregular—Patni Regulations, provisions to be strictly complied with.*

A *patni* sale is not void, but only voidable, by reason of any irregularities in the transaction, and it can only be avoided by a suit under the provisions of section 14 (1) of the Patni Regulation.

Suresh Chandra Mukhopadhya v. *Akkori Singh*, 20 C. 746 and *Ram Sona Chowdhurani* v. *Nabakumar Sinha Chouduri*, 10 Ind. Cas. 90; 13 C. L. J. 404, 16 C. W. N. 805, referred to.

A mortgagee of the defaulting *patnidar* is entitled to bring such a suit.

The notice mentioned in sections 8 and 10 of the Regulation must contain the various lots to be sold with the amounts claimed in respect of them. Where a lot comprised three tenures and the notice specified only one:

Held, that the notice was bad and the sale irregular and liable to be set aside.

The provisions of the Patni Regulation, which allow of sales in a summary manner, must be strictly complied with.

Appeal from the decree of the District Judge of Birbhoom, dated June 29th, 1908.

Babus *Bipin Bihari Ghose* (Junior) and *Nagendra Nath Ghose*, for the Appellant.

Babus *Mohendra Nath Roy*, *Probodh Chandra Mookerjee* and *Shiba Prosonna Bhattacharyya*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought by the plaintiffs to set aside a *putni* sale held under Regulation VIII of 1819 The Subordinate Judge allowed the plaintiffs' claim and this appeal is presented by Hariharnath Das, defendant No. 2, who was the auction-purchaser.

The facts are shortly as follows:—There was a *zemindari* which consisted of 7-annas share of *Mouza* Sirsha and *chak* Belahari. It belonged to one Sham Chand Mundle and one Saroda Sundari Dasi in equal shares. On 28th February 1886, the *zemindars* granted a *putni* lease to Dhiru Mundle, the predecessor-in-title of defendants Nos. 3 to 8. Sham Chand sold his moiety of the *zemindari*, *i.e.*, $3\frac{1}{2}$ annas to Ramkalpo Nayek, father of the plaintiffs, on 1st May 1889. Previous to this, the $3\frac{1}{2}$ annas share of Sarado Sundari had been purchased by Raja Ram Ranjan Chukrabarty, defendant No. 1, at a Court sale in April 1888. On 26th March 1891, Chayen Mundle, defendant No. 3 and son of Dhiru Mundle, executed a *kabuliat* in favour of defendant No. 1 for the $3\frac{1}{2}$ annas share which had been purchased by the defendant No. 1. On 7th August 1904, two usufructuary mortgages were executed (1) Exhibit 6 by Sheikh Abdu, defendant No. 4, and Hitu Bibi, defendant No. 5 and (2) Exhibit A by Chayen Mundle, defendant No. 3, in favour of the plaintiff, Sailaja Kanta Nayek. Shaikh Abdu and Hitu Bibi mortgaged a 4-anna 15-*gunda* share of the 7-annas while Chayen Mundle mortgaged a 6 anna 10-*gunda* share of the 7-annas. The rent of the *putni* for 1312 B. S having fallen into arrears, the defendant No. 1 brought the *putni* to sale on 15th May 1906. The defendant No. 2 purchased the *putni* at that sale and was put into possession. On 2nd May 1907, Chayen and his co-sharers executed a *kobala* of the *putni* in favour of the present plaintiffs. That sale was in pursuance of an agreement which was entered into about a month before, on 11th April 1907. In January 1907, defendant No. 9 had become the purchaser of 5-annas 15-*gundas* out of the share of Chayen under a mortgage-decree. On 13th May 1907, the plaintiffs filed the present suit just within the year allowed by law.

A question was raised at the hearing whether the sale to the plaintiffs was for good consideration and *bona fide*. The finding of the Subordinate Judge on this issue was in the affirmative and the learned Pleader for the appellant does not now question this finding. He raises two points (1) that the plaintiffs have no right to maintain the suit inasmuch as by their *kobala*, they purchased a mere right to sue which by section 6 (*e*) of the Transfer of Property Act cannot be transferred; and (2) that the formalities required for the sale were duly carried out and that the sale was binding against the plaintiffs or their vendors.

(1) With regard to the first point, it has

been held more than once by this Court that a *putni* sale is voidable only and not void by reason of any irregularities in the transaction and, moreover, that it can only be avoided by a suit under the provisions of section 14. [See *Suresh Chandra Mukhopadhya* v. *Akkori Singh* (1) and *Ram Sona Chowdhurani* v. *Nabakumar Sinha Choudhuri* (2).] It might, therefore, be a point of some difficulty as to what the plaintiffs had taken by their purchase, did that purchase stand entirely alone. We are, however, relieved from the difficulty of discussing and deciding that point as we find that one of the plaintiffs at least was interested in this property before the sale took place. Sailaja Kanta Nayek, by virtue of the two mortgages above referred to, was clearly entitled to bring a suit under section 14 (1) of Regulation VIII of 1819 to reverse the sale. It was argued that these mortgages were usufructuary and that no possession under them was given and, that, consequently, the Court must regard them as mere paper transactions not conferring any interest in the property. That we certainly are not prepared to do. There is no question whatever upon the evidence that monies were advanced under both these mortgages. The only reason why possession was not taken by the mortgagees was because Madhu Babu told the tenants not to pay rent to the mortgagees. The plaintiffs, therefore, are entitled to maintain this suit.

It was suggested at the hearing that any possible defect in the plaintiffs' title to sue might be remedied by transferring to the category of plaintiffs defendants Nos. 4, 6, 7 and 8 and an application was made to us on the 11th by those defendants to be so transferred. It is not certain that the defect could be remedied in that way. A number of cases were cited on both sides and the question is by no means free from difficulty. In the view that we take of the right of the present plaintiffs, it is unnecessary to decide it, and we accordingly refuse that application.

(2) We now proceed to consider the second question as to whether the requisite formalities of the sale were complied with. There is no doubt that the petition was duly stuck up in a conspicuous part of the Cutchery. A notice also appears to have been stuck up along with it in the Cutchery while a copy of the notice was stuck up at the *zemindar's* Sadar Cutchery and another copy published at *Mouza* Sirsha. The notice, however, which was stuck up at the Collector's Cutchery (Exhibit I), appears to us to be clearly defective. Section 8, clause (2) requires that there should be stuck up with the petition a notice that "if the amount claimed be not paid before the 1st of *Jeyt* following, the tenure of the defaulters will, on that day, be sold by public sale in liquidation." Section 10 provides that, at the time of the sale, the notice previously stuck up in the Cutchery shall be taken down and the lots be called up successively in the order in which they may be found in that "notice." It follows, therefore, that the notice must contain the various lots to be sold with the amounts claimed in respect of them. The notice in the present case relates to lot No. 21, which we find from the petition of the *zemindar* comprised three tenures: (1) Hadah Belta, (2) Hadah Srirampore and (3) 3-annas 10-*gundas* share of *taluk* Sirsha and Belahari. The notice, however, only specified Hadah Belta, etc., appertaining to lot 21 and, to make it the more misleading, the amount due was stated to be Rs. 328-3-6 which was the amount due in respect of Hadah Belta alone. It is obvious, therefore, that any one reading that notice would not be able to conclude from it that two other tenures were to be sold, the arrears of which were Rs. 786 11-3 and Rs. 322-15 3 respectively. It has been repeatedly held that the provisions of this Regulation, which allow of sales in a summary manner, must be strictly complied with, and we think that this defect in the publication of the notice was sufficient to justify the Court in setting aside the sale.

We do not think that the other informalities or defects to which the learned Subordinate Judge has referred are made out, that is to say, the alteration of the date on the notice from 14th May to 15th. The date may very well have been written by the peon as the 14th and corrected by him to the 15th when he wrote it, namely, on the 15th. His

(1) 20 C. 746.

(2) 13 C. L. J. 404, 10 Ind. Cas. 90; 16 C. W. N. 805.

evidence, which is entirely uncontradicted, goes to show that he took down the notice on the 15th and not on the 14th as he at first stated. With regard to the fact that the notice was not published at *chak* Belahari, we think that the Subordinate Judge has taken a wrong view of the words in section 8 clause (2): "At the principal town or village upon the land of the defaulter" cannot possibly mean at every village. As the notice was duly published at Sirsha, which was the principal village on the land of the defaulter in this case, we think that that publication was sufficient.

The defect, however, in the notice itself is much more than a formal defect. The notice is entirely misleading and would not convey to any person reading it the essential fact that this particular *putni* was to be sold on 1st *Jeyt*. This defect in the notice cannot, we think, be cured by saying that the reader might have referred to the petition. There is nothing upon the record from which we can ascertain the precise contents of the copies or extracts of the notice which were stuck up at the Sadar Cutchery of the *zemindar* or at *Mouza* Sirsha.

For the reasons above stated, we think that the decision of the learned Subordinate Judge is correct and that this appeal must be dismissed with costs, hearing fee Rs. 150.

Appeal dismissed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL NO. 123 OF 1911.
November 23, 1911.
Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Russell.
SAKHARAM BHAGWAN PATIL—
APPELLANT
versus
THE SECRETARY OF STATE—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 80—Notice—Suit against Government—Plaintiff taking steps before Revenue authorities against the order of a Government official.

A District Deputy Collector by an order directed that certain land belonged to Government and that the person in possession, one *A*, had trespassed upon the said land and should, therefore, be ordered to vacate and give possession of it. *A.* occupied himself in filing the necessary appeals against the orders of the different Government officials with reference to this original order of the District Deputy Collector.

Subsequently, *A.* sued the Secretary of State for a declaration of his ownership of the land:

Held, that *A.* was bound to give notice under section 80 of the Civil Procedure Code before bringing the suit, and the fact that *A.* was taking other steps before the Revenue authorities, with reference to the Deputy Collector's order, did not affect the question of notice.

Per Chandavarkar, J.—In order to take the case out of section 80, there must be something in the conduct of the Secretary of State which had brought about a state of things preventing the plaintiff from complying with the provisions of the section in question; that is to say, the evidence must be such as to show that humanly speaking it was impossible for the plaintiff to give a notice and comply with the provisions of the law as laid down in section 80.

Secretary of State v. *Gajana Krishna*, 13 Bom. L. R. 273; 35 B. 362; 10 Ind. Cas. 639, explained and distinguished.

First appeal from the decision of the District Judge of Khandesh, in Civil Suit No. 1 of 1911.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *G. S. Rao*, Government Pleader, for the Respondent.

JUDGMENT.

RUSSELL, J.—An important question is raised in this suit. The plaintiff, on the 21st July 1911, filed the present suit against the Secretary of State for India, the substance of which is that he complained that by an order, dated so long ago as 1909, by the District Deputy Collector, an officer in the service of the defendant, it was directed that the land which is described in clause 1 of the plaint belongs to Government and that he (plaintiff) has trespassed upon the said land, and, therefore, he (plaintiff) be ordered to vacate and give possession of the land. It is worthy of note that in that paragraph 3 of the plaint, no mention is made of the year in which that order was passed.

That being so, it is not necessary to set out the further details of the plaint. But it appears that from 1909, down to about the middle of July 1911, the plaintiff was occupying himself in filing the necessary appeals against the orders of different Government officials with reference to this original order of the District Deputy Collector.

The point we have to decide is: Is notice necessary for this suit, having regard to

the terms of section 80 of the Civil Procedure Code? Now, the words of that section, so far as they are material to this case, are as follows:

"No suit shall be instituted against the Secretary of State for India in Council, until the expiration of two months next after notice in writing has been delivered to, or left at the office of, a Secretary to the Local Government, or the Collector of the District, in the case where the suit is filed against the Secretary of State for India.

Now, the words there are absolutely imperative. An appeal has been made to us for our sympathy with regard to the expensive superstructure which the plaintiff has put up upon this land. But we have nothing to do with sympathy. We cannot decide cases according to our sympathies for either party. The words of the section, as I have said, are perfectly distinct.

Now, it appears to us that it cannot be too widely known that any person who is desirous of filing a suit against the Secretary of State for India in Council must give a previous notice of two months before that suit is filed. That is laid down by section 80.

It is suggested that the plaintiff was taking other steps before the Revenue authorities with reference to this order by which he says he has been damnified. But it appears to us that that does not affect the question at all. There are the words of the section which say that such a notice must be given, and there was nothing whatever in the present case to prevent the plaintiff giving the requisite notice as soon as he received the order in 1909, and simultaneously carrying on his various applications to the Revenue authorities, in which case, if he had done that, he would have complied with the section and this defence would not have been open to the defendant.

My learned colleague has dealt with his judgment, sitting with Heaton, J., in *Secretary of State* v. *Gajanan Krishna* (1), and it is unnecessary for me to do so.

For these reasons, we hold the decree must be confirmed and the appeal dismissed with costs.

(1) 13 Bom. L. R. 273; 35 B. 362; 10 Ind. Cas. 639.

CHANDAVARKAR, J.—With reference to certain observations of mine in my judgment in *Secretary of State* v. *Gajanan Krishna* (1), it is sufficient to say that there are no facts in the present case to bring it within the line of the principle which I endeavoured to lay down there. What I said was that in order to take the case out of section 80 of the Civil Procedure Code, there must be something in the conduct of the Secretary of State which had brought about a state of things preventing the plaintiff from complying with the provisions of the section in question. That means that the evidence must be such as to show that humanly speaking, it was impossible for the plaintiff to give a notice and comply with the provisions of the law as laid down in section 80. That is in accordance with the legal maxim "that the law does not expect a man to do what is impossible." It cannot be said that the plaintiff here had to do anything that was practically impossible. Therefore, I agree to the decree proposed.

Decree confirmed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2998 OF 1909.

April 11, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

MOHURRUDDIN KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUMERA GIRI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 21—Statement in writ of attachment as to rent payable—Admission—Whether statement admissible in favour of maker of statement.

A recital in a writ of attachment is not admissible in evidence in favour of the maker of the statement and as against persons who claim under an independent title.

Ramani Pershad Narain Singh v. *Mahanth Adaiya Gossain*, 31 C. 380, followed.

Appeal from the decree of the District Judge of Rungpur, dated August 16th, 1909, affirming that of the 2nd Munsif of Rungpur, dated April 7th, 1909.

Babu *Mohini Mohan Chakravarti*, for the Appellants.

Babu *Preo Sankar Majumdar*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in an action for rent. The case for the plaintiff was that the lands in respect of which rent is claimed were held by one Ishan Chandra Das as tenant, that in execution of a rent-decree obtained against him the holding was sold and purchased by one Khoyarunnessa and that the defendants as her heirs are liable for rent. The defence taken was that these lands did not belong to Ishan Chandra Das but were held by the defendants in their own right as tenants under the plaintiff. The point in controversy between the parties, therefore, was whether the holding belonged to Ishan Chandra Das as alleged by the plaintiff or to the defendants in their own right, as alleged by them. The Courts below have found in favour of the plaintiff on the basis of the recital in the writ of attachment in the proceedings in execution of the rent-decree. It has been contended before us, on the authority of the decision in *Ramani Pershad Narain Singh* v. *Mahanth Adaiya Gossain* (1), that the recital in the writ of attachment was not admissible in evidence in favour of the maker of the statement and as against the defendants. In our opinion, this contention is well founded and must prevail.

It is clear upon the terms of section 316 of the Civil Procedure Code of 1882, that the effect of an execution sale is to vest the title of the property in the purchaser only as between the parties to the suit and their representatives-in-interest. Here the defendants claim title independently of the lady, and not as her heirs. Even if it be admitted, therefore, that the recital in the writ of attachment would have been admissible as against the execution purchaser, we are of opinion that it was not admissible in evidence in favour of the person who made it, and as against the defendants who claim under an independent title. To hold that the recital is admissible as against them, because they are the heirs of the auction-purchaser, is to argue in a circle, because, if we do so, we assume in substance the answer to the very question which calls for consideration in this case, namely, whether these defendants have taken the disputed property as heirs of the auction-purchaser. The position, therefore, is that this document must be excluded from consideration. But if the document is excluded, it turns out that there is no evidence left upon the record to support the theory that the land belonged to Ishan Chandra Das.

The result, therefore, is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

Appeal allowed.

(1) 31 C. 380.

BOMBAY HIGH COURT.
CIVIL REFERENCE NO. 8 OF 1911.
November 14, 1911.
Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Russell.
HARI VENKATESH PAI—PLAINTIFF
versus
HARI VENKAPPA SHETTI—DEFENDANT.

Right to sue—Cause of action—Execution of decree—Obstruction by third person—Damages.

Where a judgment-creditor is obstructed by a third person in executing his decree by attachment of his judgment-debtor's property, he has a right of action to recover damages from the third person arising from the latter's act.

McCartney v. *Londonderry and Lough Swilley Railway Co. Ld.*, (1904) A. C. 301 at p. 313, 73 L. J. P. C. 73, 91 L. T. 105, 53 W. R. 385, relied upon.

Reference by the Subordinate Judge of Kumta.

The question referred for decision of the High Court in the case was, whether an obstruction by a third person to the attachment of the property of the judgment-debtor gives the judgment-creditor cause of action for a suit for damages.

Mr. *V. V. Bhadkamkar*, for the Plaintiffs.

Mr. *S. V. Palekar*, for the Defendant.

JUDGMENT.—In our opinion, we must answer the question referred to us by saying that the suit will lie. We have no doubt whatever that the legal maxim, namely, where there is a right there is a remedy, applies. The judgment-creditor had a legal right to get the decree executed through the means of the Court. The defendant obstructed him in the exercise of that right and the carrying out of that decree. Therefore, he must be held liable upon the principle

which we have mentioned. We would refer to the case of *McCartney* v. *Londonderry and Lough Sewilly Railway Co. Ld.* (1), where, citing the note to *Mellor* v. *Spateman* (2), it is said: "Wherever any act injures another's right,and would be evidence in future in favour of the wrong doer, an action may be maintained for an invasion of the right without proof of any specific injury." This principle has been repeatedly recognised and acted upon. It is clearly applicable to the present case. With this answer, the papers must be returned to the referring Court.

Papers returned.

(1) (1904) A. C. 301 at p. 313; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385.

(2) 1 Wm. Saund. 612.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1496 OF 1910.

February 2, 1912.

Present:—Mr. Justice Brett and Mr. Justice Carnduff.

RAJANI KANTA SARKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAKHAN LAL GOSWAMI—PLAINTIFF—RESPONDENT.

Probate and Administration Act (*V of* 1881), *s.* 82—*Letters of Administration—Suit by legatee for declaration of title—Decree in suit—Subsequent suit by legatee against tenant for rent for period subsequent to death of testator—Right of suit—Bengal Tenancy Act* (*VIII of* 1885), *ss.* 15, 16—*Deposit of landlord's fee subsequent to institution of suit, whether sufficient.*

Letters of Administration to the estate of a deceased person were granted to his widow. The present plaintiff in a previous suit obtained a declaration that he was entitled as a legatee to 4-annas share of the property left by the deceased. He now sued to recover a 4-annas share of the rent from a tenant of the deceased:

Held, that the suit was maintainable.

It is a sufficient compliance with the provisions of sections 15 and 16 of the Bengal Tenancy Act, if the landlord's fees, etc., be deposited with the Collector after the institution of rent suit.

Appeal from the decree of the District Judge of Barisal, dated January 24th, 1910, confirming that of the Sub-Judge of Barisal, dated June, 28th 1909.

FACTS.—This was a suit for arrears of rent. The tenure in arrears was a *mirash ijara* given in 1300 B. S. by the late Gopi Nath Roy to the late Tarini Kanta Sarkar the father of the defendants Nos. 1—5. The plaintiff was the *guruputra* (son of the spiritual guide) of Gopi Nath. According to the plaintiff, Gopi Nath left a Will by which he bequeathed a 4-annas share of all his properties to the plaintiff, a 6-annas share to his widow Ram Durga, a 2-annas share to his sister's son, Bipin Bihari Shaha, and the remaining 4-annas share to certain Brojobashis. All these other legatees have been made *pro forma* defendants in the plaint as they did not join the suit as co-plaintiffs. The claim in the suit was for the entire arrears that fell due from the year 1311.

Ram Durga, the widow of Gopi Nath, obtained Letters of Administration to the estate of her husband.

As the sons of Tarini Kanta Sarkar, the original tenant under Gopi Nath, refused to pay any rent to any of the legatees of Gopi Nath's Will, the present plaintiff instituted a suit against these defendants for declaration of his title to a 4-annas share of the properties left by Gopi Nath. All the other legatees of Gopi Nath's Will were made *pro forma* defendants in that suit also. That suit was decreed. Then the plaintiff got his name registered in a 4-annas share of the estate of Gopi Nath.

The main defence of the defendants was two-fold. They contended, *firstly*, that none but Ram Durga could maintain a suit for arrears of rent as she alone had obtained Letters of Administration, section 82 of the Probate Act; and *secondly*, that the plaintiff had no right to maintain the suit, as neither he nor any other legatee of Gopi Nath's Will had paid the necessary landlord's fee for their succession to the property, sections 15 and 16 of the Bengal Tenancy Act.

The lower Appellate Court, agreeing with the first Court, held that the suit was maintainable. It said on the first point:—

"The arrears fell due after Gopi Nath's death and on this ground alone, I do not think the objection would stand. In addition to this, the plaintiff got his right to a 4-annas share in the estate declared in suit No. 586 in which the defendants were parties. In the circumstances, I agree with the Subordinate Judge in disallowing this objection."

With regard to the second point, the learned District Judge observed:—

"Since the institution of the suit, the fees have been deposited with the Collector, though all the landlords have not been correctly named. * * The Subordinate Judge held that a mistake of this sort would not debar plaintiff from bringing his present suit. I agree with him. The objection seems to be a purely technical one."

The defendants appealed to the High Court.

Babus *Dwarka Nath Chakravarti* and *Asita Ranjan Chatterjea*, for the Appellants.

Babu *Siva Prosonna Bhattacharyya*, for the Respondents.

JUDGMENT.—The learned Pleader, who appears in support of this appeal, has very candidly admitted that his clients appear in the lower Court to have taken every possible point against the plaintiff's claim, that many of these points were unimportant, and that all of them have been decided against them. The only points to which he invites our attention in the present appeal are, first the question dealt with in Issue No. 2. The Letters of Administration of the estate, under which the present plaintiff claims as legatee, are granted to the widow, and it is suggested that she alone could bring the suit to recover the 4-annas share of the rent claimed by the present plaintiff. This point, has, however, been dealt with by the lower Court. It is clear that the present plaintiff has in another suit obtained a declaration that he is entitled to a 4-annas share of the land, and in these circumstances, we think that the lower Courts were right in holding that the suit brought by him for his share of the rent could be maintained.

The only other point taken was that the plaintiff had failed to get himself registered as tenant of all the landlords and it is suggested that the lower Courts erred in holding that there had been a proper service of notice to some of the landlords after payment of the necessary landlord's fees. We think, however, that the view taken by the Court of first instance, which has been accepted by the lower Appellate Court, is correct, and that the provisions of the law were substantially complied with by the plaintiff after the institution of the suit, and that the objection on that account cannot be maintained in the present appeal.

We, therefore, hold that the points raised in support of the appeal fail and the appeal is accordingly dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 574 OF 1910.

April 18, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

KENARAM AKHULI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SRISTIDHAR CHATTERJEE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Water—Land, use of, in ordinary manner—Damage to neighbour—Lowering level of land to make land culturable—Tank water coming upon land and overflowing into neighbour's land—No wilfulness or negligence—Liability.

Where an owner of land, without wilfulness or negligence, uses his land in the ordinary manner, though mischief thereby accrues to his neighbour, he is not liable for damages; but if, with a view to use the land in an unusual manner, he brings upon his land water which would not naturally have come upon it, he will be liable for damages for the escape of the water into the land of his neighbour.

Hodgson v. *York Corporation*, 28 L. T. 836 and *Chasemore* v. *Richards*, 7 H L. C. 349, 29 L. J. Ex. 81, 5 Jur. (N. S.) 873, 7 W. R. 685, relied upon.

Rylands v. *Fletcher*, L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220, referred to.

The defendants lowered the level of their land so as to render it culturable, with the result that the water from an adjoining tank passed to the land of the defendants and subsequently overflowed into the lands of the plaintiffs:

Held, (1) that as the defendants had not used their land in any artificial or unusual manner, they were amply within their rights in what they did;

Smith v. *Kenrick*, 7 C. B. 515, 18 L. J. C. P. 172, 13 Jur. 362, relied upon.

(2) that the plaintiffs were not entitled to an injunction as against the defendants, to compel the latter to raise a barrier for their protection.

Nield v. *North Western Railway Company*, L. R. 10 Ex. 4; 44 L. J. Ex. 10; 23 W. R. 66, relied upon.

Appeal from the order of the Sub-Judge of Bankura, dated September 2nd, 1910, reversing that of the Munsif of that place, dated August 2, 1909.

KENARAM AKHULI v. SRISTIDHAR CHATTERJEE.

Babu *Khettra Mohun Sen*, for the Appellant.

Babu *Bipin Bihari Ghosh* (Junior), for the Respondent.

JUDGMENT.—This is an appeal on behalf of two of the defendants in a suit for an injunction to restrain them from passing water from their land to the land of the plaintiffs, as also for recovery of damages. The plaintiffs are the owners of two parcels of land which adjoin a third parcel owned by the defendants. Towards the south of this property, there is a tank not owned by either of the parties to the suit. The case for the plaintiff is that the defendants have lowered the level of their own land with the result that the water from this tank passes to the land of the defendants and subsequently overflows into the lands of the plaintiffs. The question, therefore, arises whether upon these facts the plaintiffs are entitled to a mandatory injunction against the defendants to compel them to raise an embankment for the benefit of the plaintiffs and also to recover damages already caused. The learned Vakil for the plaintiffs-respondents has contended, upon the authority of *Rylands* v. *Fletcher*(1), that the defendants have no right to bring water upon their land which may subsequently flow out and cause damage to the land of the plaintiffs. The principle deducible from that decision is that the occupier of land who brings or keeps upon it anything likely to do damage, if it escapes, is bound at his peril to prevent its escape and is liable for all the natural and probable consequences of its escape even if he has been guilty of no negligence. In our opinion, this principle cannot be applied to the circumstances of the present case. It is not disputed and it cannot be seriously disputed that the defendants have not used their land in any artificial or unusual manner. They lowered the level of their own land so as to make it culturable, and they were amply within their rights in what they did [*Smith* v. *Kenrick* (2)]. It cannot be suggested that they had recourse to any artificial structures for the purpose of storing water in their land [*Hurdman* v. *North Eastern Railway Company* (3); *Broder* v. *Saillard* (4)], nor can it be suggested that they have freed water from their land into the land of the plaintiffs, *Whalley* v. *Lancashire Railway Company* (5). Under these circumstances, we are of opinion that the plaintiffs are not entitled to an injunction as against the defendants to compel the latter to raise a barrier for their protection. In support of this view, reference may be made to the case of *Nield* v. *London and North-Western Railway Company* (6), where it was ruled that an occupier is not bound to prevent damage to his neighbour by the natural escape of flood water from higher to lower levels. As Bramwell, B., observed—the neighbour is not entitled to say 'you have caused me an injury in law.' The law allows what may be termed a kind of reasonable selfishness in such matters. It says "let every one look out for himself and protect his own interest." If this view were not adopted, the result would be that a man could not reasonably use his property lest some neighbour of his might complain that he had caused him an injury. The true principle is that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner, though mischief thereby accrues to his neighbour, he is not liable for damages, but if with a view to use the land in an unusual manner, he brings upon his land water which would not naturally have come upon it, he will be liable for damages for the escape of the water into the land of his neighbour. This doctrine was recognised in the case of *Hodgson* v. *York Corporation* (7); see also *Chasemore* v. *Richards* (8). We are of opinion, therefore, that although the plaintiffs may have suffered damage, no legal right of theirs has been infringed and they have no cause of action against the defendants.

The result is that this appeal is allowed, the order of the Sub-Judge discharged and the decree of the Court of first instance restored with costs both here and in the Court of appeal below. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal allowed.

(1) L. R. 3 H. L. 330; 37 L.J. Ex. 161; 19 L. T. 220.
(2) 7 C. B. 515; 18 L. J. C. P. 172; 13 Jur. 362.
(3) 3 C. P. D. 168; 47 L. J. C. P. 368; 38 L. T. 339; 6 W. R. 489.
(4) 2 Ch. D. 692; 45 L. J. Ch. 414; 24 W. R. 1011.
(5) 13 Q. B. D. 131; 53 L. J.Q.B. 285; 50 L. T. 472 32 W. R. 711; 48 J. P. 500.
(6) (1874) L. R. 10 Ex. 4; 44 L. J. Ex. 15; 23 W. R. 60.
(7) 28 L. T 836.
(8) 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. (N. S.) 873; 7 W. R. 685.

DHANUK SINGH v. TULSI RAM.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1246 OF 1911.
June 20, 1912.
Present:—Mr. Justice Piggott.
DHANUK SINGH—DEFENDANT—APPELLANT
versus
TULSI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Declaration—Relief as to declaration of title ancillary to main relief—Limitation Act (IX of 1903), Sch. I, Art. 120.

Where a claim for a declaration is merely ancillary to the claim for some other relief put forward in the same suit and where the granting of such declaration appears to the Court clearly necessary in order to give the plaintiff suitable and adequate relief upon his main claim, the suit will be governed, as regards limitation, merely by the Article of the first Schedule of the Indian Limitation Act applicable in respect of the main relief claimed.

Francis Legge v. *Rambaran Singh*, 20 A. 35; *Akbar Khan* v. *Turaban*, 5 A. L. J. 637; A. W. N. (1903) 252; 4 M. L. T. 444; 31 A. 91; 1 Ind. Cas. 557, distinguished.

Second appeal from the decision of the Subordinate Judge of Farrukhabad, dated the 19th of May 1911.

Mr. *Brajnath Vyas*, for the Appellant.

Mr. *Ramakant Malviya*, (for Dr. *Tej Bahadur Sapru*), for the Respondents.

JUDGMENT.—This is a suit for redemption of a mortgage, dated the 19th of October 1870, by one Lachhman in favour of the defendant-appellant, Dhanuk Singh. The plaintiffs are transferees of the heirs of Lachhman. The deed in suit purports to be a mortgage of a 5-*biswansi* share and mutation was applied for by Lachhman and Dhanuk Singh of this share only and orders were issued accordingly by the Revenue Court which heard the application. I must take it, however, as settled by the finding of the lower Appellate Court, that, in consequence of a mere error or oversight by the subordinate officials entrusted with the carrying out of the orders of the mutation Court, the name of Dhanuk Singh was recorded in respect of a 15-*biswansi* share instead of a 5-*biswansi* share. The denomination of these shares, *i. e.*, their description in the village papers has since been altered in consequence of a partition of the *mahal* but for convenience sake, I propose to continue to speak of the share mortgaged as a share of 5 *biswansis* and the share in respect of which Dhanuk Singh's name was recorded by mistake as a share of 10 *biswansis*. The plaintiffs now come to Court on the allegation that Dhanuk Singh has possession as mortgagee only over a share of 5 *biswansis* but the extent of his mortgagee's rights continues to be wrongly recorded in the village papers as if a share of 15 *biswansis* was actually mortgaged to him. It is clear from the documentary evidence which I have had to examine in the course of the argument that Dhanuk Singh's actual possession consists substantially in the receipt of profits from the *lambardar* of the *mahal*. According to the rule of law now affirmed by this Court, Dhanuk Singh would be entitled year by year to sue the *lambardar* of the *mahal* for profits calculated on the basis of his mortgage possession over a share of 15 *biswansis* and so long as the entries in the Revenue papers stand uncorrected, there would be an unrebuttable presumption that Dhanuk Singh actually possesses the right claimed by him and profits would have to be decreed on the basis of this presumption. Of course, if the plaintiffs had been prepared to admit that Dhanuk Singh was actually in possession as mortgagee over a share of 15 *biswansis*, their course would have been simple. They would have sued to redeem on the basis of the mortgage-deed of 1870 pleading at the same time that there was no other valid mortgage-debt on the share in Dhanuk Singh's possession and claiming to be entitled to redeem the whole on payment of the debt secured by the aforesaid deed of the 29th of October 1870. The plaintiffs, however, were not prepared to admit Dhanuk Singh's possession over this share of 10 *biswansis* and, inasmuch as it has been found in their favour by the lower Appellate Court that Dhanuk Singh is not in fact in possession of this share, I must take it that they were right in this attitude. They have accordingly asked the Court to decree redemption of the mortgaged share and at the same time to give them a declaration that Dhanuk Singh is not in possession as mortgagee of any other share in the *mahal*. I have referred to the written statement filed by the defendant in order to satisfy myself as to the precise grounds upon which he resisted the claim. In the judgment of the lower Appellate Court, it is noted that Dhaunk Singh endeavoured in the course of the trial to put forward the case that there had been an

oral mortgage of a share of 10 *biswansis* for a sum of Rs. 200 over and above the registered mortgage of the 29th of October 1870. My attention has also been drawn to a document on the file which shows that some contention like this was put forward by Dhanuk Singh in the year 1898. The Court below has swept this contention aside as wholly unsupported by evidence and so far as the record goes, it is obvious that it rests only on Dhanuk Singh's own word and that it is contradicted by the mutation proceedings of 1872, the record of which certainly goes to support the learned Subordinate Judge in his finding that it was a pure mistake and nothing else which led to Dhanuk Singh's being recorded as mortgagee of 15 *biswansis* instead of 5 *biswansis*. I felt much inclined at one stage to remit an issue on this point in order to allow the defendant-appellant an opportunity of producing further evidence if available. I am satisfied, however, that this course is unnecessary, because the plea in question was not taken in the written statement. Dhanuk Singh there resisted the plaintiff's claim on the ground that he had acquired by adverse possession a prescriptive right as proprietor or mortgagee in respect of a share of 10 *biswansis* and he also pleaded certain foreclosure proceedings, with which I have now no concern, as they are found to have been abortive. I suppose the written statement may also be understood as raising the further question of limitation to which I shall come presently but it certainly contains no plea to the effect that Dhanuk Singh's possession over this share of 10 *biswansis* is based upon good and valid title derived from a mortgage transaction other than that embodied in the deed of 1876. This point, therefore, goes against the defendant on the pleadings, and there is no need to remit any issue concerning it.

The Court of first instance framed very proper issues in the case and took all the evidence tendered by either party. It decreed the plaintiff's suit for redemption but refused to allow him any further relief on the ground that a suit for a mere declaration was barred by limitation under Article 120 of the first Schedule to the Indian Limitation Act (IX of 1908). The finding on this question of law was reversed by the lower Appellate Court which thereupon proceeded to determine all the questions of fact involved in the issues framed by the first Court. On the question of possession, the finding of the lower Appellate Court is entirely against the defendant and is binding on me in second appeal. The effect of that finding is that the defendant is not shown to have acquired any prescriptive title as mortgagee or otherwise in respect of the share of 10 *biswansis* by 12 years' adverse possession and further that the plaintiffs and not the defendant Dhanuk Singh were in actual possession of this share at the time of the institution of the suit. The lower Appellate Court has accordingly granted the plaintiffs their claim for redemption and has added to its decree a declaration making it clear that the defendant is not in actual possession as mortgagee of any share in this *mahal* over and above the share ordered to be redeemed

Now, the question raised before me in second appeal is only whether that portion of the decree of the lower Appellate Court, which grants the plaintiffs this declaration ought not to be set aside, on the ground that any suit for a declaration in respect of this share of 10 *biswansis* was, under the circumstances, barred by limitation. The law on this subject was laid down by this Court in *Francis Legge* v. *Rambaran Singh* (1) and in *Akbar Khan* v. *Turaban* (2). I am bound by these rulings and I have only to see whether they precisely cover the facts of the present case. If this were a mere suit for a declaration, the plaintiffs would have to show on what date the right to obtain the declaration sought for accrued to them and would have to satisfy the Court that the said right did not accrue to them more than six years before the suit. As a matter of fact, there was nothing said on the point in the plaint and the plaintiffs' case is not that they are coming to Court for a mere declaration so as to be bound by the provisions of Article 120 aforesaid but that the relief sought by them in the way of declaration is ancillary to their claim for redemption and is of such a nature that the Court is bound to entertain it so long as the suit for redemption itself is within time. I have

(1) 20 A. 35.

(2) 5 A. L. J. 637; A. W. N. (1908) 252; 4 M. L. T. 444; 31 A. 9; 1 Ind. Cas. 557.

pointed out that the circumstances of this case are peculiar and there is no doubt that the nature of the presumption laid down in section 201 of the Agra Tenancy Act (Local Act II of 1901) will operate very seriously against the plaintiffs if they are not allowed relief in this suit. If it were not for that presumption, it might be contended that the declaration sought for by the plaintiffs was superfluous and that it could be refused on the mere ground that no adequate necessity for granting it was shown. As the case stands, unless the plaintiffs can obtain from the Civil Court some form of decree on the strength of which the Revenue Courts will be prepared to correct the mistaken entry in the papers, they stand to lose the benefit of the finding in their favour on the question of possession arrived at by the lower Appellate Court. I incline to think that where a claim for a declaration is merely ancillary to the claim for some other relief put forward in the same suit and where the granting of such declaration appears to the Court clearly necessary in order to give the plaintiffs suitable and adequate relief upon his main claim, the suit will be governed as regards limitation merely by the Article of the first Schedule of the Indian Limitation Act applicable in respect of the main relief claimed. To put the matter from a different point of view, I am of opinion that a Civil Court has an inherent right so to frame its decree as to embody in that decree any finding upon a question of fact, which it has arrived at in the course of the suit in the determination of an issue fairly arising out of the pleadings and the determination of which was necessary in order to grant the plaintiffs appropriate relief in respect of their main claim.

Now, in the present case, I think that the plaintiffs were entitled in their suit for redemption as such to ask the Court to give them some adjudication regarding the extent of the share actually mortgaged to the defendant Dhanuk Singh or the extent of the share actually in his possession as mortgagee. The incorrect entry in the village papers threw a doubt upon the extent of that share and left the plaintiffs in such a position that a decree simply ordering redemption of the mortgage of the 29th of October 1870 as such would fail to give the plaintiffs the full relief to which they were entitled. It has occurred to me that the plaint might have been framed so as to ask the Court to decree in favour of the plaintiffs possession by redemption upon payment of the mortgage-debt provided in the deed of the 29th of October 1870 either of the share of 5 *biswansis* or of such share in the *mahal* in suit as might be found to be actually in possession of Dhanuk Singh mortgagee A suit thus framed might have evaded the difficulty which has been raised regarding the operation of Article 120 of the first Schedule to the Indian Limitation Act but it would have been a mere evasion. On the findings which have been actually arrived at, the lower Appellate Court would have given the plaintiffs upon a suit framed as I have suggested in substance the very decree which it has passed, that is to say, a decree for redemption of the 5-*biswansi* share coupled with a formal expression in the decree of the Court's finding that nothing over and above this 5-*biswansi* share was in the possession of the mortgagee. I think, therefore, that no sufficient case has been made out in second appeal for interference with the decree which has been passed in this case. I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL RULE.

January 19, 1912.

Present:—Mr. Justice Fletcher.

RAMGOPAL JHOONJHOONWALLA—PLAINTIFF

versus

JOHARMALL KHEMKA—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Erroneous decision on question of limitation by the Court below.

An erroneous decision by a lower Court on a question of limitation, would not justify interference in revision by a High Court under section 115 of the Civil Procedure Code.

Amritrav Krisna Deshpande v. *Balkrishna Ganesh Amrapurkar*, 11 B. 488 at p. 492, *Sundar Singh* v. *Doru Shankar*, 20 A. 78 and *Amir Hassan* v. *Sheo Baksh*, 11 I. A. 237, 11 C. 6 (P. C.), referred to.

Rule obtained by the defendant against the decree of the Second Judge of the Calcutta Small Cause Court, dated September 19th, 1911, by which the claim of the plaintiff was decreed.

Mr *S. C. Mukerjee*, instructed by Mr. *K. N. Dey*, Solictor, in support of the Rule.

Mr. *Sircar*, instructed by Mr. *G. C. Dey*, Solicitor, showed cause.

JUDGMENT.—This is an application by the defendant to set aside the order passed by the Small Cause Court of Calcutta. The plaintiff sues in respect of certain items which on the plaint appeared to have been barred by limitation. But the plaintiff sets out in the plaint that his claim was not barred by limitation, as his cause of action had arisen in September 1909, and also because of the acknowledgment made by the defendant in his written statement in Suit No. 6581 of 1909. It has been admitted for the purpose of this argument by Mr. Sircar, who shows cause on behalf of the plaintiff, that the decision on the question of limitation was wrong. I think, so far as one can gather from the records and papers, the Court did make a mistake; apparently, the case was barred by limitation. That is not the point here. The point is, has the Court jurisdiction to interfere, under section 115 of the Civil Procedure Code, 1908, on the ground that the Small Cause Court acted in the exercise of its jurisdiction illegally or with material irregularity? The point made by Mr. Mukerjee is that section 3 of the Limitation Act casts upon the Court the duty of dismissing all suits barred by limitation. Therefore, the Small Cause Court, having gone wrong on the question of limitation, acted with material irregularity or illegality in not dismissing the suit. In my opinion, that is not so.

Mr. Sircar referred me to three cases. One is *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar* (1). The failure to decide on a question of limitation does not justify a superior Court in interfering any more than if the whole case is wrongly decided. Then he refers to *Sundar Singh* v. *Doru Shankar* (2), where the case of *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar* (1) is followed, and a similar view is taken by the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (3). This being so, I cannot interfere in this matter under section 115 of the Civil Procedure Code. The Rule, therefore, is discharged with costs.

Rule discharged.

(1) 11 B. 488, at p. 492.
(2) 20 A. 78.
(3) 11 C. 6; 11 I. A. 237.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 584 OF 1911.

November 22, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

Syed SHAH HAMID HUSSAIN—PLAINTIFF—APPELLANT

versus

CHAIRMAN OF PATNA MUNICIPALITY—DEFENDANT—RESPONDENT.

Municipality—Assessment—Lands forming part of revenue paying estate—Whether exempted from assessment—'Holding', basis of—Occupation—Bengal Municipal Act (III B.C. of 1884), *ss.* 6 *cl.* (3), 101, 103, 110 *—Jurisdiction—Civil Court—Declaration that assessment illegal.*

The mere circumstance that the lands assessed by a Municipality form part of a revenue-paying estate is no ground for exemption from an assessment of rates.

The basis of a 'holding' is occupation, and the term 'holding' is used with reference to land held by an occupier under one title and surrounded by one set of boundaries.

When a Municipal Corporation has acted in contravention of the provisions of the statute, it is open to a Civil Court to declare that the assessment is illegal.

Chairman of Giridh Municipality v. *Suresh Chandra Mozumdar*, 35 C. 859, 12 C. W. N. 709, 7 C. L. J. 631 and *Chairman, Municipal Board, Chapra* v. *Basudeo Narain Singh*, 5 Ind. Cas. 321; 14 C. W. N. 437; 37 C 374; 11 C. L. J. 400, relied upon.

Where there is some indication that the assessment has possibly been illegal, but the plaintiff has not been able to establish, with regard to any particular holding, that the assessment has been, on the facts, made in contravention of the statue and is liable to be declared *ultra vires* by a Civil Court, the suit should be dismissed.

Appeal from the decree of the Additional District Judge of Patna, dated March 9th, 1911, reversing that of the first Munsif of Bankipur, dated July 30th, 1910.

Moulvis *Syed Shamsul Huda*, and *Mohamed Mustafa Khan*, for the Appellant.

Babus *Umakali Mukherjee* and *Chandra Sekhar Pershad Singh*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for declaration that an assessment of rates made by the Municipality of Patna under the Bengal Municipal Act of 1884 is *ultra vires*. In the Court of first instance, the claim of the plaintiff was allowed; but that decision has been reversed on appeal by the District Judge. In the present appeal, the assessment has been questioned on four distinct grounds, namely, *first*, that, as the plaintiff is the owner of a revenue-paying estate, he is not liable to be assessed under the Bengal

Municipal Act; *secondly*, that the holdings. in respect of which he has been assessed, have been arbitrarily created by the Municipal authorities in contravention of the provisions of the statute; *thirdly*, that as there are intermediate holders between the plaintiff and the actual occupiers of the land, the plaintiff is not liable to be assessed; and *fourthly*, that inasmuch as the occupiers of some of these holdings have been assessed in respect of houses and gardens standing thereon, the plaintiff ought to be exempted from assessment.

Before we deal with these grounds, it is necessary to mention that the plaintiff is the proprietor of a large tract of land situated within the Patna Municipality. Many years ago, these lands were divided into two holdings and assessed under the Bengal Municipal Act. In 1904, the Municipal authorities added four new holdings, to the two which had existed from before. The plaintiff brought an action to test the legality of the course adopted by the Municipality and it was held that as the lands comprised in the new holdings were included in the two pre-existing holdings the creation of fresh holdings was *ultra vires*. Thereupon, in 1907, the Municipality treated all the lands as comprised in one holding. The plaintiff was dissatisfied and preferred an objection under the provisions of the Bengal Municipal Act. The result was that the lands were constituted into five separate holdings. The plaintiff has commenced this suit for declaration that the action of the Municipality was without jurisdiction.

The first of the grounds upon which the assessment is assailed, is obviously without substance. Under section 103 of the Bengal Municipal Act, the rate upon a holding is payable in quarterly instalments by the owner of the holding. Section 85 defines the circumstances under which a rate may be imposed on the annual value of a holding situated within the Municipality. There is no exemption, either express or implied, in favour of the holders of revenue-paying estates within a Municipality. The mere circumstance, therefore, that the lands assessed form part of a revenue-paying estate is no ground for exemption. The first ground, consequently, fails.

To determine the validity of the second, third and fourth grounds, it is essential to examine the meaning of the term 'holding' as used in the Bengal Municipal Act. Section 6, clause (3), of the Act provides that the term 'holding' means land held under one title or agreement and surrounded by one set of boundaries. On behalf of the plaintiff, it has been contended that the term 'holding' refers to land held by an occupier under one title or agreement and surrounded by one set of boundaries. On behalf of the respondent, it has been argued, on the other hand, that the term 'holding' means land held by an owner under one title or agreement and surrounded by one set of boundaries. The question, therefore, arises whether the term 'holding' is used with reference to the occupier or the owner. In our opinion, there is no room for reasonable controversy that the basis of a 'holding' is occupation, and the term 'holding' is used with reference to land held by an occupier under one title and surrounded by one set of boundaries. To take a concrete instance, an owner may have ten *bighas* of land which he holds under one title and which is surrounded by one set of boundaries. He lets out different parcels to ten different occupiers. The question arises, whether the land constitutes one holding or ten holdings for the purposes of the Bengal Municipal Act. The learned Vakil for the Municipality has contended that we must confine our attention to the title of the owner and cannot have regard to the occupation of different parcels by different occupiers. But if this contention is accepted, extremely anomalous results obviously follow. For instance, if we look to section 105, we find that the tax due from a non-resident owner may be recovered from the occupier and may be deducted by the latter from his rent. If, therefore, there are ten distinct occupiers of what is called one holding by the respondent, and if the owner makes default in payment of the rate primarily payable by him under section 103, it is open to the Municipal authorities to proceed at their choice against any one of those occupiers and make him responsible for the payment of the entire amount. This could hardly have been intended. If again we turn to section 110, we find that there is a provision for remission or refund on account of vacant holdings. If

in the case before us, there is one occupier, who ceases to occupy his parcel, there is no room for the application of section 110, because the remainder of the holding, as interpreted by the respondent, is occupied by other persons. The provisions of the Municipal Act, in our opinion, make it reasonably plain that the basis of the assessment of rates is occupation. We are concerned primarily with land as occupied by a person; the land in the occupation of such a person, if held under one title and comprised within one set of boundaries, constitutes a holding for the purposes of the Bengal Municipal Act. The rate is determined upon the annual value which is defined, in section 101, as the gross annual rent at which that holding may be reasonably expected to let. Section 103 then provides that the rate so determined is to be paid in quarterly instalments by the owner of the holding. Consequently, when the owner himself is in occupation, he is himself liable for the rate. When there is an occupier under the owner who is in actual occupation of the holding, although the rate is assessed upon the annual rent, yet it is the owner who is held primarily liable for the payment thereof. If the view suggested by the respondent were adopted, the consequence would be that every person interested in a particular parcel of land, whatever the grade of his interest might be, would be liable to be assessed with the rates. For instance, in respect of a parcel of land, there might be, under the Government, a *zemindar*; under the latter, there might be successively a *patnidar*, or *dar-patnidar*, and, ultimately, the last in the series, the actual occupier. According to the contention of the respondent, the *zemindar* would be liable to be assessed in respect of the 'holding' because he held the land under one title and surrounded by one set of boundaries. The *patnidar* under the *zemindar* would be equally liable to be assessed, because his interest falls within the definition of the term 'holding' as given in section 6 clause (3); and similar remarks would apply to the *dar-patnidar*. It must further be observed in this connection that each of these persons would be liable to be assessed, not in respect of his net profits from the land, but upon the gross annual rent at which the holding may be reasonably expected to let. But it can hardly be maintained that the Legistature intended that the same parcel of land should be liable to be assessed twice or thrice over. We are, therefore, of opinion that the term 'holding' as used in the Bengal Municipal Act means land held by an occupier under one title or agreement and surrounded by one set of boundaries. If this interpretation be adopted, it is fairly clear that the second and the third objections must be deemed substantial. Under the statute as interpreted by us, it is the duty of the Municipality to ascertain whether a particular parcel of land is held by an occupier under one title, and whether it is comprised within one set of boundaries. If it is land of this description, the rate is assessed upon it in accordance with the principle laid down in section 101. That rate becomes payable by the owner, that is to say, the person above the occupier, if the occupier himself is not the owner under section 103.

But, although we are of opinion that the second and third grounds urged by the appellant are substantial, we are unable, to give effect to them, by reason of the manner in which the suit has been framed and conducted in the Courts below. It may be conceded that when a Municipal Corporation has acted in contravention of the provisions of the statute, it is open to a Civil Court to declare that the assessment is illegal. In support of this proposition, reference may be made to the cases of *The Chairman of Giridh Municipality* v. *Suresh Chandra Mozumdar* (1) and *The Chairman, Municipal Board, Chapra* v. *Basudeo Narain Singh* (2). In the case before us, however, although there is ample indication that the assessment made by the Municipality has been based upon an erroneous interpretation of the term 'holding' as used in the Bengal Municipal Act, yet it is plain that the two specific objections now urged before us, were not taken either before the Municipal authorities or before the Courts below. It is clear from an examination of the record that although the plaintiff urged that the sub-division of his land into five holdings was beyond the competence of the Municipal authorities, he never invited the Municipality to assess his land after constituting it into

(1) 35 C. 859; 12 C. W. N. 709;7 C. L. J. 631.
(2) 37 C. 374; 5 Ind. Cas. 321; 14 C. W. N. 437; 11 C. L. J. 409.

holdings according to the occupation of the land by different tenants. In fact, it is clear that after the Municipality had treated the entire land as constituting one holding, the plaintiff objected, and upon his objection the land was divided into five holdings. The plaintiff ought to have urged at that stage that the holdings were improperly constituted and that it was obligatory upon the Municipality to determine the land in the occupation of each separate tenant. But not only did the plaintiff not take any such objection before the Municipal authorities, he did not urge any such objection in the Court of first instance, nor was it presented before the Court of appeal below. The result is, that although the documents upon which the assessment of the Municipality is based, indicate that in 1884 there were numerous tenants in occupation of different parcels of land, it is impossible for us to hold in respect of any of the holdings now assailed by the plaintiff, that it is not in the occupation of one tenant. Before the plaintiff can succeed in respect of the assessment for any one of these five holdings, he must satisfy the Court that the particular holding has been constituted in contravention of the provisions of the statute. He is unable to do so, because there are no materials on the record to show how many tenants are in occupation of the different holdings. Similar observations apply to the third ground urged by the appellant. No doubt the documents, upon which the assessment has been made, indicate that there were intermediate holders between the plaintiff and the occupiers in 1884; there is no evidence, however, to show whether these intermediate holders now exist; if they do, according to the view we take, the plaintiff is not liable to be assessed. But the plaintiff has not established by evidence that in respect of the land comprised in any one of these five holdings, he is not the immediate landlord of the tenants in occupation. Consequently, although the second and the third grounds are substantial and might possibly have succeeded in part or in their entirety, if they had been urged in a properly framed suit and had been sought to be supported by evidence, we are not in a position to give effect to them. Nor do we think that this is a case in which a remand should be made at this stage to the Court of first instance to enable the plaintiff to establish these objections. The effect of a remand would be that the plaintiff would escape payment of rates, while he is indubitably liable for a considerable amount of rates, even though it is conceded, upon the view of law we take, that some of the parcels of land assessed may be entitled to exemption from assessment under section 85, on the ground that the annual value is less than six rupees.

In so far as the fourth ground is concerned, it is clear that the separate assessment of the houses and gardens of the tenants has been based upon an erroneous view of the meaning of the term 'holding'. But the District Judge has correctly pointed out that this is a matter which does not concern the plaintiff. It is possible that the tenants have been improperly assessed; and they may have their remedy against the Municipal authorities.

The conclusion follows that, although we are of opinion that the statute has been misinterpreted, and there is some indication that the assessment has possibly been illegal, the plaintiff has not been able to establish with regard to any particular holding that the assessment has been, on the facts, made in contravention of the statute and is liable to be declared *ultra vires* by a Civil Court. We, therefore, dismiss the appeal but direct that each party do bear his own costs throughout the litigation.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 5565 OF 1911.
February 5, 1912.

Present:—Mr. Justice Brett and
Mr. Justice Carnduff.

NEPAL CHANDRA ROY CHOWDHURY AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

NIRODA SUNDARI GHOSE—DEFENDANT—OPPOSITE PARTY.

Limitation Act (XV of 1877), Sch. II, Art. 164—Limitation Act (IX of 1908), Sch. I, Art. 164—General Clauses Act (X of 1897), s. 6—Limitation—Ex parte *decree, application to set aside.*

If the right of a defendant to make an application to set aside an *ex parte* decree, on the ground of non-service of summons on him, was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before the passing of Act IX of

1908, the provisions of Article 164 of Schedule I of the Limitation Act of 1908 cannot revive the right, for section 6 of the General Clauses Act, 1897, distinctly provides that the repeal of an Act would not have the effect of reviving any right not in force or existing at the time the repeal was made.

Rule against the order of the Additional Sub-Judge of Khulna, dated September 7th, 1911, setting aside an *ex parte* decree obtained by the plaintiff, on an application of the defendant on the ground of non-service of summons on the defendant, and another order, dated September 19th, 1911, rejecting an application for review of the previous order, made by the plaintiffs.

Babu *Charu Chandra Biswas*, for the Petitioners.

JUDGMENT.—This rule was issued to show cause why an order passed by the Subordinate Judge setting aside an *ex parte* decree should not be reversed on the ground that the application on which it was made was barred by limitation. The present applicant brought a suit to recover the amount due on an instalment-bond, and obtained an *ex parte* decree on the 28th March 1906. Execution was applied for on the 19th February 1907, and the property of the judgment-debtor was sold and purchased by the decree-holder on the 27th May 1907. The present application by the opposite party to set aside the *ex parte* decree was made on 27th June 1911, that is to say, more than four years after the conclusion of the previous proceedings. Before the lower Court, it was contended, on behalf of the present applicant, that the application was barred on the ground that the application to set aside the *ex parte* decree obtained by the applicant could only have been made when the provisions of the Limitation Act of 1877 were in force, and that, as under Article 164 of the second Schedule of that Act, the application ought to have been made within thirty days from the date of executing the process for enforcing the judgment, the application was barred by limitation long before it was made on the 27th June 1911, and the right of the opposite party to make the application was lost long before the passing of Act IX of 1908, the present Limitation Act. The learned Subordinate Judge was, however, of opinion that the limitation provided in Article 164 of the First Schedule of Act IX of 1908 was applicable, and that the application was in time, as it was within thirty days of the time when the applicant had knowledge of the decree. The rule was issued to set aside the order of the Subordinate Judge, and no one has appeared to contest it. In our opinion, the view taken by the learned Subordinate Judge cannot be accepted. The right of the opposite party to make the application was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before Act IX of 1908 was passed, and section 6 of the General Clauses Act distinctly provides that the repeal of the old Act would not have the effect of reviving any right not in force or existing at the time the repeal was made. We think, therefore, that on this ground the Rule must be made absolute, and the order of the Subordinate Judge set aside. The applicant is entitled to his costs of this hearing.

Rule made absolute.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 183 OF 1910.

December 19, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

ERFAN MANDAL—DEFENDANT—APPELLANT

versus

SAMIRUDDIN MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaration, suit for—Consequential relief—Suit for declaration that defendant not mutwalli *or not legally appointed* mutwalli—*No prayer for possession or appointment of another* mutwalli—*Whether suit maintainable.*

The plaintiff asked (1) for a declaration that a certain *wakfnamah* was invalid and that the defendant had not acquired any valid title as *mutwalli* under that document, or (2) that if the *wakfnamah* be valid, then the defendant had not been legally appointed *mutwalli*. But the plaintiff did not ask for recovery of possession or for the removal of the defendant and the appointment of a trustee duly appointed:

Held, that under section 42 of the Specific Relief Act, the suit was incompetent as the plaintiff, being able to seek further relief, had not done so.

Shyamanand v. *Raj Narain*, 4 C. L. J. 568, *Lokenath* v. *Keshab Ram*, 13 C. 147, *Chokalinga Peshana* v. *Achiyar* 1 M. 40 and *Ganpatgir Guru Bholagir* v. *Ganpatgir*, 3 B. 230, referred to.

The further relief referred to in the proviso to section 42 of the Specific Relief Act, is further relief in relation to the legal character or right to any property to which the plaintiff is entitled and whose title

to such character or right the defendant denies or is interested in denying, and it must be relief appropriate to and consequent on the right or title asserted.

Kannan v. *Krishnan*, 13 M. 324, relied upon.

Appeal from the decree of the District Judge of Nadia, dated January 17, 1910, reversing that of the Sub Judge of that District, dated June 30, 1909.

Babu *Amarendra Nath Bose*, for the Appellant.

JUDGMENT.—The substantial question of law raised in this appeal is whether the suit is barred by reason of the proviso to section 42 of the Specific Relief Act, which lays down that no Court shall make any declaration in a declaratory suit where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The plaintiffs commenced this suit for declaration that the first defendant had not been properly appointed *mutwalli* of the properties in suit. Their case was that in 1888 a deed of *wakfnamah* had been executed by the owners of the property and that pursuant thereto in 1906 a deed was executed by which the first defendant was appointed *mutwalli*. The plaintiff set out facts which, if true, go to show that the defendant has taken possession of the property and has dealt with it on the footing that he has been properly appointed its *mutwalli*. The plaintiffs put their case in the alternative. In the first place, they ask for a declaration that the *wakfnamah* of 1888 is collusive and inoperative, and that, consequently, the first defendant has not acquired any valid title as *mutwalli*. In the second place, they ask for a declaration that if the *wakfnamah* be treated as valid, the defendant has not been legally appointed *mutwalli* because the entire body of persons competent to appoint a *mutwalli* did not join in making his appointment. The defendant resisted the claim on the ground amongst others that the suit was improperly constituted and was bound by reason of the proviso to section 42 of the Specific Relief Act. This objection has been overruled and a decree has been made by the District Judge in favour of the plaintiffs.

In support of the appeal, it has been argued that there is no answer to the objection in respect of the competency of the suit as framed and that the decision of this Court in the case of *Fakir Chand Audhikari* v. *Anunda Chunder Bhuttacharji* (1), upon which the learned District Judge placed reliance in support of his view, is clearly distinguishable. In our opinion, the appeal must succeed.

The proviso to section 42 of the Specific Relief Act makes it clear that no Court shall make a declaration in a declaratory suit where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. No doubt, as pointed out by this Court in the case of *Fakir Chand Audhikari* v. *Anunda Chunder Bhuttacharjee* (1), the further relief referred to in this proviso is further relief in relation to the legal character or right as to any property which the plaintiff is entitled to and whose title to such character or right the defendant denies or is interested in denying, and it must be relief appropriate to and consequent on the right or title asserted. *Kannan* v. *Krishnan* (2). The learned Judges went on to hold that a claim for arrears of rent was not further relief within the meaning of the proviso. It is not necessary for us to consider whether this was intended to be a broad statement of an unqualified proposition of law, because it is clear from the facts of that particular case that the plaintiff could not have joined with the prayer for a declaration, a claim for recovery of arrears of rent. In the case before us, it is indisputable that the plaintiffs are competent to ask for a further relief. If the first alternative case set up by them is established to be true, the plaintiffs are entitled to recover possession as owners. If the second alternative case is established to be true, the plaintiffs are entitled to seek for the removal of the defendant and for the appointment of a trustee duly appointed by persons competent in that behalf. It is plain, therefore, that, in either view of the case, it was competent to the plaintiffs to ask for further relief. As was pointed out by Mr. Justice Muthusami Ayyar and Mr. Justice Wilkinson in the case of *Kombi* v. *Aundi* (3), the object of this provision is to avoid a multiplicity of suits and to prevent a person getting a declaration of right in one suit and immediately after, the remedy already available, in another. In

(1) 14 C. 586.
(2) 13 M. 324.
(3) 13 M. 75.

other words, the Legislature intends that if the plaintiff, at the date of his suit, is entitled to claim as against the defendant to the cause some relief other than and consequential upon a bare declaration of right, he must not vex the defendant twice, but he is bound to have the matter settled once for all in one suit. The object of the plaintiffs here is to get a declaration of their title upon payment of a Court-fee of Rs 10 and in the event of their success, to institute a suit against the defendant for his removal. In our opinion, the proviso to section 42 is a bar to the maintenance of a suit of this description, for this is not one of the class of cases where it is needless or impracticable for the plaintiff to seek any relief other than declaration as in *Shyamanund* v. *Raj Narain* (4); *Lokenath* v. *Keshab Ram* (5). Here the plaintiffs are able and bound to ask for consequential relief, as in *Chokalinga Peshana* v. *Achiyar* (6); *Ganpatgir Guru Bholagir* v. *Ganpatgir* (7).

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

Appeal allowed.

(4) 4 C. L. J. 568.
(5) 13 C. 147.
(6) 1 M. 40.
(7) 3 B. 230.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4029 OF 1911.
November 23, 1911.
Present:—Mr. Justice Stephen and
Mr. Justice Coxe.
Lala CHET NARAIN SAHI—DEFENDANT—PETITIONER
versus
RAMPAL MANJHI AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLVII, r. 1—Ex parte decree—Application to set aside—Prevented by sufficient cause from appearing—Review.

A defendant, against whom an *ex parte* decree has been made, may, instead of applying to set aside the decree, under Order IX, rule 13 of the Civil Procedure Code, apply for a review of judgment under Order XLVII, rule 1 on the ground that he was prevented from appearing on the day, fixed for the hearing of the case, by sufficient cause.

Raj Narain Purkait v. *Ananga Mohan Bhandari*, 26 C. 598, followed.

Rule against the order of the Judicial Commissioner of Chota Nagpur, dated May 27th, 1911, reversing that of the Sub-Judge of Ranchi, dated January 4th, 1911.

Babu *Nagenda Nath Ghose* and Mr *S. K. Sahay*, for the Petitioner.

Mr. *I. B. Sen* and Babu *Jyotish Chandra Hazrah*, for the Opposite Party.

JUDGMENT—The case out of which the Rule arises was instituted so far back as the 25th June 1903. It was at one time dismissed for default; but was again revived, and after innumerable applications for adjournments, it was finally decreed *ex parte* on the defendant's failing to appear on the 18th May 1910. Early in July, the defendants applied under Order XLVII, rule 1 to have the case revived on the ground that their Pleader had been prevented from appearing on the day of hearing. This application dragged on until the present year and was finally granted by the Subordinate Judge without giving any reasons for his decision.

The case then went on appeal before the Judicial Commissioner and he held that the Subordinate Judge could not have dealt with the matter under Order XLVII, rule 1, inasmuch as it came properly within the scope of Order IX, rule 13, and was accordingly barred by limitation. It appears to have been argued before him that the appellants in this Court were not entitled to take this plea inasmuch as they had consented to the revival of the case; but this contention was not accepted by the learned Judicial Commissioner and he accordingly held that the order of the Subordinate Judge was wrong, set it aside and directed that the case should be dismissed.

The defendants obtained a Rule from this Court to show cause why that order should not be set aside or why such other order should not be passed as to this Court might seem fit. The view of the learned Judicial Commissioner that the Subordinate Judge could not deal with this matter under Order XLVII, rule 1 does not appear to be in accordance with the decision in the case of *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (1), and cannot be sustained. The point which really arises for decision in

(1) 26 C, 598.

this case is whether the defendants were or were not prevented from appearing on the day fixed for the hearing of the case. This point has not been considered or decided by either of the Courts below. We have not thought it necessary to send back the case inasmuch as there is but little evidence on the point and we have been able to consider it. On reading that evidence, we think that the Subordinate Judge acted with undue haste in finally disposing of the case, and, therefore, the case ought on certain conditions to be re-heard. We would, however, invite the attention of the learned Subordinate Judge to the extreme delay that has occurred in disposing of this case and express our hope that the trial may be conducted more expeditiously in future. In particular, when the Subordinate Judge directs the payment of costs as a condition precedent to proceeding with the suit, it is not sufficient for him to order the payment, but he should see that the money is paid before he proceeds further. For instance, in the present case he directed payment of Rs. 40 to the plaintiff, apparently as a condition precedent to reviving the case, but in the end, he appears to have revived the case without ever attempting to see whether that order had been complied with. We think, therefore, that the proper order to pass will be that, on the present petitioner's depositing in Court the sum of Rs. 40, which they were ordered to pay by the Subordinate Judge, within one week from the arrival of the records in the Court of first instance, the case shall be re-heard.

If the money is not paid within this period, this Rule will stand discharged with costs. If the money is paid in time, the costs in this Court, which we assess at two gold *mohurs*, will abide the result.

Rule made absolute.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 1835 OF 1909.

May 22, 1912.

Present:—Mr. Justice Kensington.

TULSI—DEFENDANT—PETITIONER

versus

KIRPA RAM—PLAINTIFF—RESPONDENT.

Custom—Adoption—Right of collateral six degrees removed to contest adoption—Laddu Rajputs *of Una Tahsil, District Hoshiarpur.*

Among *Laddu Rajputs* of the Una Tahsil, a collateral, six degrees removed from the adopter, has *locus standi* to contest an adoption.

Khazan Singh v. *Relu*, , 35 P. R. 1906, referred to.

Petition, under section 70 (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Hoshiarpur Division, dated 20th March 1909, confirming that of the Munsif, 1st class, Hoshiarpur, dated 18th December 1908 decreeing the claim.

The Hon'ble Mr. *Shadi Lal*, for the Petitioner.

Mr. *Sundar Das*, and Pundit *Rambhaj Datta*, for the Respondent.

JUDGMENT.—This is a revision admitted under clause (*b*) of section 70 (1) of the Punjab Courts Act, solely on the question whether the plaintiffs, who are remote collaterals, have any *locus standi* to bring a declaratary suit in respect of the adoption in dispute. The learned Judge who directed notice to issue considered that the only other ground upon which the defendant sought revision had been disposed of correctly under the ruling of *Bishen Singh* v. *Amir Chand* (1). I have examined that ruling which is the only one at all in point now referred to on the several questions of adoption amoing *Laddu Rajputs* of Una Tahsil and though it appears to me to go somewhat far, I do not regard the point involved as being one which I am at liberty to now go into in the revision. The case has, therefore, to be determined solely on the first ground referred to above.

The plaintiffs are collaterals, six degrees removed, of one Praga, who, on the 21st September 1901, adopted the defendant Tulsi by a registered deed stating that the actual adoption had taken place seven years before. Tulsi is also a remote collateral one degree further removed than the plaintiffs

(1) 13 P. R. 1894.

i.e., he traces his descent from one Santa, while the plaintiffs and Praga were the descendants of Santa's son Parsa Ram. This declaratary suit has been instituted on the 30th August 1907, only just before the expiration of six years' limitation. Praga died soon after the institution of the suit leaving about 92 *kanals* which have since been entered in the name of his widow notwithstanding the adoption deed in favour of Tulsi.

The lower Courts have both given a decree to the plaintiffs declaring that the adoption will not affect their reversionary rights after the death of the widow. The greater part of Counsel's arguments on behalf of the defendant Tulsi was directed to showing that the ruling of *Bishen Singh* v. *Amir Chand* (1) goes much too far in laying down a general principle for *Laddu Rajputs* of Una Tahsil seeing that

(1) the case then involved covered an adoption of a daughter's son, and

(2) the previous case dealt with *Taluqa* Amb of the Una Tahsil for which the *Riwaj-i-am* denied rights of adoption of any sort, while the present case deals with *Taluqa* Una for which the *Riwaj-i-am* recognizes the rights of males but not of females to adopt with the customary ceremonies.

There is some force in both these arguments but, as noted above, I do not consider that I am entitled to go into the point under the terms of the admitting order. I am, moreover, as a Single Judge bound by the terms of a Division Bench ruling of *Bishen Singh* v. *Amir Chand* (1), and, although it is permissible to doubt whether that ruling is not too widely expressed, the case is not a suitable one for reference to a Full Bench as the point involved is not directly before me.

Turning then to the first ground of revision, which alone I have to decide, the main argument of Counsel is that ordinarily a reversioner of so remote a degree as the plaintiffs cannot contest an alienation of any sort whether by adoption or otherwise. It is admitted that there is no precise rule on the point and there is at least one definite ruling to the contrary in *Khazan Singh* v. *Relu* (2), where the collaterals concerned were ten degrees removed, and it was held that they could contest an alienation. Counsel's further argument is that the plaintiffs should not be allowed to contest the adoption inasmuch as services were rendered by the adopted Tulsi. There is not much force in this latter argument. Tulsi who was present before me stated his age at 26 or 27 and by appearance he is not more than that. He was stated in the adoption deed of 1901 to be then 13 which gives about the same result. He cannot have rendered any service at all to Praga by 1901 or any service worth mentioning up to the time of Praga's death in 1907. This alone disposes of the argument about services rendered, which was one of the points taken up in *Khazan Singh* v. *Relu* (2). My conclusion is that sufficient ground has not been shown for disagreeing with the lower Courts and for interfering on revision. The defendant's petition is, therefore, dismissed but as the case is of a very doubtful nature and plaintiffs have made great delay in suing for a declaration, the parties will pay their own cost in this Court.

Petition dismissed.

(2) 35 P. R. 1906.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 400 OF 1911.

June 4, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

Musammat MEHTAB BIBI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat HUSSAIN BIBI—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Muhammadan Law—Will—Kashmiris of Jhelum town—Succession—Pleadings—Suit by widow—Presumption.

In matters of succession, Muhammadan *Kashmiris* of the Jhelum town in general and the family of the parties in particular do not follow Muhammadan Law.

A bequest by a male proprietor of the whole of his self-acquired property in favour of his daughter or her issue, to the exclusion of his widow and brother, is valid by custom.

By custom among these *Kashmiris*, widows do ordinarily succeed to a life-interest, daughters are excluded by sons, sisters by brothers and a right of representation is allowed.

MEHTAB BIBI *v.* HUSAIN BIBI.

Where among a Muhammadan tribe, large inroads are made into the provisions of Muhammadan Law relating to inheritance, there is a very strong presumption that Muhammadan Law is not followed by them.

Where a widow sues for possession of the entire property left by her husband on the allegation that the parties are governed by custom and it is proved that the property was the self-acquired property of her husband and was left by him by Will to his daughter, the widow is not entitled to a share of her husband's property according to Muhammadan Law.

Second appeal from the order of the Additional Divisional Judge, Jhelum, at Rawalpindi, dated 12th December 1910, confirming that of the District Judge, Jhelum, dated 16th March 1910, decreeing the claim.

Lala *Hukam Chand*, for the Appellants.

Khawaja *Kamal ud-din*, for Amir Bux, Respondent No. 2.

JUDGMENT.—This appeal and Civil Revision No. 748 of 1911 are connected and both can be conveniently disposed of by one judgment.

The pedigree-table set out in the judgment of the Divisional Judge explains the relationship of the parties. On the 11th February 1908, Jan Muhammad, who owned the property in dispute, made a Will by which he bequeathed the whole of his property to his daughter, *Musammat* Mehtab Bibi, and her issue. He died early in 1909. Towards the end of that year, two suits were instituted, (1) by his widow, *Musammat* Hussain Bibi, for possession of the entire property left by him, said to consist of a house and some 6 *kanals* 8 *marlas* of land and of moveables and cash, on the allegation that the succession to the property of the deceased was governed by custom and that, as his widow, the plaintiff was entitled to succeed to the whole of it on the usual life-estate; and (2) by the deceased's brother, Amir Bux, for possession of 3/8ths of the property left by him, on the ground that in matters of inheritance the parties were governed by Muhammadan Law, and that under that law he was entitled to a 3/8ths share in the property left by the deceased. The defendants in both the suits were *Musammat* Mehtab Bibi and her son, Mumtaz Ahmad; and by consent of parties, both the suits were tried together, the whole of the evidence produced on both sides being recorded in the suit brought by *Musammat* Hussain Bibi.

Upon the pleadings of the parties, several issues were drawn by the District Judge, the most important issue being whether the parties were governed by custom or by Muhammadan Law. It may be noted here that though at first there was some dispute as to whether or not part of the property left by Jan Muhammad was ancestral, it is now conceded that the whole of it was his self acquired property, and it follows that if Jan Muhammad was not governed by strict Muhammadan Law, he had power to dispose of it by Will in favour of his daughter and her issue.

Jan Muhammad was a *Kashmiri* and resided and carried on the business of comb-making in the city of Jhelum. The District Judge was of opinion that although the provisions of the Muhammadan Law as regards succession had not been consistently followed by members of his tribe in Jhelum, Jan Muhammad was governed by Muhammadan Law as regards his testamentary powers and that, therefore, the Will made by him in favour of his daughter and her issues was invalid. The District Judge accordingly passed decrees in the two suits dividing the property in dispute according to the rule of succession prescribed by Muhammadan Law; in other words, he decreed the claim of Amir Bux *in toto* and gave $\frac{1}{8}$th of the property to *Musammat* Hussain Bibi, leaving the remaining one-half of it in the possession of *Musammat* Mehtab Bibi.

Two appeals were filed by *Musammat* Mehtab Bibi and her son in the Divisional Court, one in each suit, and the Divisional Judge dismissed both the appeals, except that he varied decrees of the District Judge as to costs.

From the decree of the Divisional Court in the suit brought by *Musammat* Hussain Bibi, a further appeal has been preferred to this Court: and as the value of the other suit brought by Amir Bux is less than Rs. 1,000, a petition for revision of the decree of the Divisional Court in that suit was filed here at the same time, and it has been admitted with reference to the question whether the parties are governed by Muhammadan Law or by custom. After hearing arguments, we think that both the appeal and the revision petition must succeed and that both the suits brought by *Musammat* Hussain Bibi and by Amir Bux must be dismissed.

A good deal of oral evidence has been produced on both sides and there are also on the

record copies of certain mutation proceedings which have been relied upon by the defendants, as showing that in matters of succession, Muhammadan Law has not been followed among the *Kashmiris* of Jhelum. It is unnecessary to discuss in detail the instances given by the witnesses produced by the parties, as we think that the Divisional Judge has summarized the result accurately when he says:—"It appears to be the case that there is a custom by which widows do ordinarily succeed to a life-interest, daughters are excluded by sons, and a right of representation is allowed." In an earlier part of the judgment, the learned Judge says:—"Now the evidence in the present case shows that widows do usually take their husband's inheritance for life. There is no apparent instance on record of the exclusion of the widow, and over half a dozen of the widows excluding their husbands' brothers. There are quite eight instances of sons excluding daughters, and of brothers excluding sisters. There is an instance of the right of representation being allowed. On the death of Jan Muhammad's own brother, Imam Bux, (an obvious mistake for Umar Bux), the nephew, Wazir Bux, was not excluded." This is a fair summary of the evidence on the record; and the conclusion is irresistible that the rules of succession laid down by Muhammadan Law are not strictly observed by the *kashmiris* of Jhelum. Despite the finding recorded by the Divisional Judge that in matters of succession, strict Muhammadan Law is not followed in this tribe, he has concurred in the view taken by the District Judge in decreeing the claim of Amir Bux and that of *Musammat* Hussain Bibi in accordance with Muhammadan Law, solely on the ground that no definite custom empowering a Muhammadan *Kashmiri* to make a Will in regard to his property contrary to the rules of his personal law has been established by the defendants and that, therefore, the provisions of that law must apply to the case. In our opinion, the view is erroneous.

Both the Courts below have overlooked the fact, which is very important in this case, that *Musammat* Hussain Bibi based her claim upon the allegation that the parties were governed by custom and that by custom she was entitled, as the widow of the deceased, to a life-estate in the whole of the property left by him. That was her sole ground of claim, and throughout the litigation, she has consistently urged that as the widow of the deceased, she had a right to hold possession of the property in dispute for her life. In the face of her own claim, it is incomprehensible how the Courts below could have decreed in her favour $\frac{1}{8}$th share of the property in dispute absolutely and not for her life. Furthermore, when it was held by the Divisional Judge that the property in dispute was self-acquired of Jan Muhammad, he ought to have held that under Customary law, by which, according to *Musammat* Hussain Bibi's statement of claim, the parties were governed, Jan Muhammad had every power to dispose of that property by Will; and on that ground alone, *Musammat* Hussain Bibi's suit ought to have been dismissed. If pleadings have any value, this result was inevitable in *Musammat* Hussain Bibi's case; and there is no reason why, because Amir Bux in his suit based his own claim upon Muhammadan Law, the claim of *Musammat* Hussain Bibi should also have been adjudicated upon with reference to the provisions of the same law. We think that the evidence in the case points to the conclusion that *Musammat* Hussain Bibi had a life-interest in the estate of her husband; but, unfortunately for her, her husband made a Will bequeathing that estate in favour of his daughter and her issue, and it is clear that, even supposing that Jan Muhammad had no power to make the Will (which he clearly had as the property was self-acquired by him), *Musammat* Hussain Bibi as his widow had no right to dispute his act of alienation. We accordingly accept this appeal and dismiss *Musammat* Hussain Bibi's suit with costs.

As regards Amir Bux's claim, we hold, in agreement with the Divisional Judge, that in matters of inheritance, the parties are not governed by Muhammadan Law, and that while *Musammat* Mehtab Bibi would have been excluded by a son of Jan Muhammad, she excludes her uncle, Amir Bux, from succession to her father's property. According to the evidence, such large inroads are made into the provisions of Muhammadan Law in matters of inheritance in the parties' tribe that it is impossible to hold that Amir Bux and *Mussammat* Mehtab Bibi had a right to succeed upon Jan Muhammad's death to their respective share in his property

in accordance with their personal law; and the net result of the evidence seems to be that *Musammat* Hussain Bibi had a right to succeed to a life-estate as a widow and that after her death or re-marriage, *Musammat* Mehtab Bibi had a right to come in to the exclusion of Amir Bux, or very possibliy Amir Bux had a right to exculde her from succession altogether. Whichever way we may look at the case, it is clear that Amir Bux and *Musammat* Mehtab Bibi were not co-heirs according to Muhammadan Law, and that being so, it is clear to our minds that the provisions of the Muhammadan Law as regards the invalidity of a Will in favour of one heir to the exclusion of other heirs are not applicable to this case. If Amir Bux was the sole heir after *Musammat* Hussain Bibi's death or re-marriage, he has been deprived of his rights by the Will of Jan Muhammad, the property in dispute being self-acquired by him, and if *Musammat* Mehtab Bibi was entitled to succeed in preference to Amir Bux, then she can resist Amir Bux's suit apart from the Will and with the Will in her favour, Amir Bux is clearly out of Court. In short, Amir Bux could succeed only in the event of his proving that the succession to Jan Muhammad's property was governed by strict Muhammadan Law, and not only has not this been proved, but on the contrary it has been shown that custom at variance with Muhammadan Law governs the inheritance in this family, according to which both Amir Bux and *Musammat* Mehtab Bibi cannot succeed as co-heirs to the property in dispute.

For these reasons, we accept this revision and dismiss Amir Bux's suit with costs throughout.

Both appeal and revision accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 102 OF 1912.

May 31, 1912.

Present:—Sir Arthur Reid, Kt., Chief Judge.

RALLA—DEFENDANT—APPELLANT

versus

Musammat MANGLAN—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 39(h)—Civil Procedure Code (Act V of 1908), s. 114—Guardian appointed residing outside jurisdiction—Removal—Review.

Where a person, who, at the time, was residing outside the jurisdiction of the Court, is appointed the guardian of a minor, he cannot be removed from such guardianship subsequently, under section 39 (*h*) of the Guardians and Wards Act, on the ground that he does not live within the jurisdiction of the Court.

The provisions of section 114, Civil Procedure Code, do not apply to orders passed under the Guardians and Wards Act.

Farid v. *Mitho*, 143 P. R. 1906, 105 P. L. R. 1907, relied upon.

First appeal from the order of the District Judge, Ambala, dated 28th October 1911, removing the appellant from the guardianship of the minors.

Lala *Moti Lal*, for the Appellant.

Mr. *Roshan Lal*, for the Respondent.

JUDGMENT.—The District Judge's order removing the appellant from the guardianship of the minor purports to be under section 39 (*h*) of the Gurdians and Wards Act, VIII of 1890, and the reason recorded is that the appellant "lives outside the jurisdiction of the Court" and is for that reason less eligible and "removeable." This is obviously a misinterpretation of the sub-section (*i*). Section 39 (*h*) provides for removal when the guardian ceases to reside within the Court's jurisdiction but the appellant was admittedly residing outside the jurisdiction when appointed.

The District Judge's action was in effect a review of his judgment appointing, and of Mr. Rahim Bux's order refusing to remove, the appellant, and *Farid* v. *Mitho* (1) is authority for holding that section 114 of the Code of Civil Procedure, providing power to review, does not apply to this Act and the inapplicable section 39 (*h*) was apparently cited in default of an applicable provision of the Act.

I allow the appeal, and set aside the order appointing *Musammat* Manglan guardian and the order removing the appellant from guardianship with costs.

Appeal allowed.

(1) 143 P. R. 1906; 105 P. L. R. 1907.

SAHIB JAN *v.* GHULAM HAIDAR.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 330 OF 1910.
PETITION FOR REVIEW No. 136 OF 1911.
April 1, 1912.
Present:—Mr. Justice Chevis.
Musammat SAHIB JAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
GHULAM HAIDAR—PLAINTIFF—RESPONDENT.

Restitution of conjugal rights—Marriage of a Muhammadan minor girl by doubtful guardian—Husband taking second wife when the girl was about to attain her puberty—Effect of her repudiating marriage—Court not to help such a husband to take custody of his wife—Costs.

A., a minor Muhammadan girl, was married at the tender age of 6 to *B.* She was given in marriage by a person about whom there were doubts as to his competency to give her in marriage.

When *A.* was about to attain puberty, *B* took a second wife. Thereupon *A.* eloped with another person, took up her abode with him and finally married him. *B.* then sued for restitution of conjugal rights with *A*:

Held, (1) that this was a case in which the discretionary power of the Court should be exercised and *B.* should not be granted the custody of *A.*;

(2) that *A.* should not be allowed her costs against *B.* but the parties should be left to bear their own costs.

Second appeal from the decree of the Court of the Divisional Judge, Shahpur, dated the 21st day of August 1909, reversing the order of the Munsif 1st Class, Bhakkar, District Mianwali, dated 24th May 1909, dismissing plaintiff's claim.

Mr. *Fazal-i-Husain*, for the Appellants.

Lala *Kishan Lal*, for the Respondent.

JUDGMENT.—(28th February, 1911).—The plaintiff sues for custody of *Musammat* Sahib Jan. The first Court dismissed the suit, thinking the evidence as to the *Nika* unsatisfactory, but the learned Divisional Judge has decided the case in plaintiff's favour holding that Sahib Jan's father Kattu married her to plaintiff.

That a marriage was performed in 1897 between the girl and plaintiff is scarcely denied before me. The main point urged is that it was no valid marriage as Kattu was not the girl's father; Kattu posed as her father and took Rs. 60 from plaintiff's uncle. The girl was then a child of 6, Kattu handed her over to plaintiff's uncle. If Kattu was her father, he had the power to marry her.

If, on the other hand, he was merely her step father, such a marriage would not be legal.

When the girl was about 15, she eloped with Hasna whom she married. A conviction under section 494 was upset by the Sessions Judge, on appeal, on the ground that Kattu was not the girl's father. The evidence in the present case is rather brief. I am rather inclined to think, and in spite of the unusual fact of Kattu handing over the girl at the tender age of 6, that he was her father. But the fact remains that just about the time she attained puberty, her husband married a widow and she eloped and took up her abode with Hasna whom she married. Of course, a man can marry as many as four wives according to Muhammadan Law, but in the absence of any good explanation, I fail to see why a man who has already a young wife, who has just attained, or is just about to attain, the age of puberty, should take a second wife. It is hard enough for a minor girl to be married without her own inclination being consulted; for her to find just about the time of her attaining the age of puberty, that her husband takes a second wife, seems to me to be adding insult to injury. I am not at all surprised at her eloping. She has twice lived with Hasna and borne him a child.

In these circumstances, I think it is a case in which the discretionary power of the Court should be exercised, especially in view of the fact that it is not altogether beyond doubt whether Kattu was her father. I, therefore, accept the appeal and reversing the decree of the learned Divisional Judge, I dismiss the suit with costs in all Courts.

Appeal accepted.

An application for review made on the grounds noted below was also rejected except as to question of costs.

(1) This Hon'ble Court, having held that Kattu was the girl's father and the rule of Muhammadan Law making the marriage with plaintiff irrevocable and perfectly valid, has obviously erred in reversing the decree of the Divisional Judge and in dismissing the plaintiff's claim.

(2) In any case, the plaintiff's marriage being valid and *Musammat* Sahib Jan's connection with Hasna being illegal, this Hon'ble Court has erred in burdening the petitioner with costs in all Courts.

Petition under section 114, Order XLVII, rule 1, of the Civil Procedure Code, for revision of the judgment passed by the Judge of the Chief Court of the Punjab, dated the

28th February 1911, in the appeal case noted above.

The Hon'ble Mr. *Muhammad Shafi*, for the Petitioner.

Mr. *Nihal Chand Mehra*, for the Respondents.

JUDGMENT.—The facts are given in my order of 28th February 1911. This is an application for review of that order. I have issued notice only as regards costs, for I still adhere to my opinion that the plaintiff's conduct has been such that he does not deserve to have custody of his wife. But still she is (at least I think she is) his wife, and she is living with another man, and I think it would be a step of very doubtful policy to allow her costs against her husband. I did not consider this matter fully when passing my previous order.

I so far accept this application for review as to leave the parties to bear their own costs in all Courts, in other respects my order of 28th February 1911, will still stand good.

Application rejected except as regards costs.

CALCUTTA HIGH COURT.
CIVIL RULE No. 6442 OF 1911.
April 19, 1912.
Present:—Mr. Justice Mookerjee and
Mr Justice Beachcroft.
RANJIT KUMAR GHOSH—AUCTION-PURCHASER—PETITIONER
versus
JOGENDRA NATH ROY—OPPOSITE PARTY.

Bengal Tenancy Act (*VIII of* 1885), *s.* 174—*Execution of rent-decree—Sale of holding—Deposit of decretal amount—Deposit to be made only by judgment-debtor—Deposit by judgment-debtor's alleged attorney—Authority of attorney to be proved if challenged.*

An application, under section 174 of the Bengal Tenancy Act, to set aside the sale of a holding in execution of a rent-decree, by deposit of the decretal amount, can be made by the judgment-debtor alone and by no other person.

Rajendro Narain Roy v. *Phudy Mondul*, 15 C. 482, followed.

Consequently, if a person deposits money by professing to act on behalf of the judgment-debtor, his authority to do so, if challenged, must be duly established.

Rule against the order of the Munsif of Burdwan, dated September 20th, 1911.

Babus *Mohendra Nath Roy* and *Jyotish Chandra Sarkar*, for the Petitioner.

Babus *Bipin Bihary Ghosh* and *Jadu Nath Kanjilal*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order made under section 174 of the Bengal Tenancy Act. A holding was sold in execution of a decree for arrears of rent on the 13th September 1911 and purchased for Rs. 2,500 by the present petitioner. Two days later, an application was made for reversal of the sale under section 174 of the Bengal Tenancy Act. That application on the face of it purported to be made on behalf of two of the judgment-debtors by one Jogendra Nath Roy, who alleged that he held a power-of-attorney from them, executed in his favour on the 31st January 1908. The auction-purchaser resisted the application. He impugned the authority of Jogendra Nath Roy to act on behalf of the judgment-debtors in this matter, and suggested that the application was not made on behalf of the judgment-debtors but for the benefit of a person who claimed to have acquired an interest in the holding by purchase and was, consequently, not competent to apply under section 174. The Court did not investigate the question whether Jogendra Nath Roy did really hold a power-of-attorney from two of the judgment-debtors nor did it determine whether under such power-of-attorney, he was competent to act on behalf of the judgment-debtors in this matter. The Court proceeded, on the other hand, upon the assumption that as the application was made in the name of the judgment-debtor by an unregistered transferee of the holding, the application could be entertained and the sale reversed. In support of this view, the Court relied upon the decision of this Court in the case of *Behary Lal Mukerjee* v. *Basarat Mandal* (1). In our opinion, the case mentioned is clearly distinguishable. It was there ruled that an application under section 61 of the Bengal Tenancy Act for deposit of rent could be made by any person on behalf of the tenant inasmuch as neither section 145 nor section 188 applies to a case of that description nor was any provision made as to how applications other than those in suits were to be made by or on behalf of the parties in a case under section 61. In the case before us, the application for reversal of the sale is made in the course of execution

(1) 25 C. 289.

proceedings, which are but a continuation of the suit. Now, it is clear from section 143, sub-section (2), of the Bengal Tenancy Act, that in a case of this description, the Code of Civil Procedure is applicable, and consequently, if a person professes to act on behalf of the parties to the proceeding, his authority to do so, if challenged, must be duly established. If any other view were maintained, the policy of the Legislature by which applications under section 174 are restricted to judgment-debtors would be completely defeated. It is well known that shortly after the Bengal Tenancy Act came into force, it was ruled in the case of *Rajendro Narain Roy* v. *Phudy Mondul* (2) that section 174 must be strictly construed. When section 310A was inserted in the Civil Procedure Code of 1882, it was held applicable to sales in execution of decrees for rent though it had a much wider scope than section 174 of the Bengal Tenancy Act [*Janardhan Ganguli* v. *Kali Kristo Thakur* (3)]. The result, therefore, was that provisions of section 174 were practically superseded. But in 1907, section 170, sub-section (1), of the Bengal Tenancy Act, was so amended as to make section 310A of the Code of 1882 and, therefore, also rule 89 of Order XXI of the Code of 1908, inapplicable to sales in execution of decrees for rent. Consequently, the view taken in *Rajendro Narain Roy* v. *Phudy Mondul* (2) that an application under section 174 can be made by the judgment-debtor alone and by no other person is now good law. The provisions of section 174 cannot, consequently, be allowed to be frittered away, as it has been, by the Court below in the present case.

The result is that this Rule must be made absolute, the order of the Court below set aside, and the case remitted to that Court in order that the question raised may be decided on evidence to be adduced, namely, whether Jogendra Nath Roy was competent to make the application on behalf of the judgment-debtors. The costs of this Rule will abide the result. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

(2) 15 C. 482.
(3) 23 C. 393.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 40-B OF 1911.

November 28, 1911.

Present:—Mr. Stanyon, A. J. C.

Musammat SAKU—APPELLANT

versus

MAROTI—RESPONDENT.

Appeal—Practice—Time-barred appeal admitted in exercise of discretion before issue of process—Discharge of order of admission on respondent's objection—Limitation Act (IX of 1908), s. 5.

An order admitting a time-barred appeal by exercise of the discretion given by section 5 of the Limitation Act, if made before issue of process to the respondent, is not conclusive on the respondent.

But such an order should not be discharged on objection by the respondent, unless upon grounds which have not already been considered before the order was made; especially when the respondent's objection to the order of admission comes before a Judge other than the Judge who, in the exercise of his discretion, made the order of admission.

Bishendut v. *Nandan Pershad*, 12 C. W. N. 25, followed.

Appeal against the decree of the District Judge, East Berar, Amraoti, dated the 22nd December 1910, confirming that of the Second Munsif, Yeotmal, dated the 2nd May 1910.

Mr. *M. Chuckerbutty*, for the Appellant.

Mr. *Atmaram Bhagwant*, for the Respondent.

JUDGMENT.—In this case, an appeal was filed on 9th July 1910 in the District Court of East Berar. The endorsement by the Clerk of Court does not contain the year of institution—a pernicious habit in judicial proceedings which the District Judge should firmly repress. The appeal was then two days beyond time. The District Judge, Mr. Prideaux, heard appellant's Pleader on the 17th July 1910, and, having, presumably, acquainted himself with the appellant's version of the facts causing the delay, extended time under section 5 of the Limitation Act, and admitted the appeal. The hearing was set down for the 30th November 1910, the order of admission having been made *ex parte* the respondent. The appeal came for hearing before Mr. Prideaux's successor, the present District Judge, and, on objection taken by the respondent, he dismissed the appeal as time-barred. The respondent alleged no new matter—nothing that Mr. Prideaux had not already considered: and the appeal has been dismissed on the ground that the appellant's explanation of the delay does not constitute

sufficient cause for extending time. This amounts to a review of Mr. Prideaux's order upon grounds already considered by Mr. Prideaux, and when Mr. Prideaux returns from leave, he may again re-open the case upon the same grounds. I have no doubt that an order admitting a time-barred appeal by exercise of the discretion given by section 5 of the Limitation Act, if made before issue of process to the respondent, is not conclusive on the respondent. But I concur with the *dictum* in *Bishendut Tewari* v. *Nandan Pershad* (1) that such an order should not be discharged on objection by the respondent, unless upon grounds which have not already been considered before the order was made; especially when the respondent's objection comes before a Judge other than the Judge who, in the exercise of his discretion, made the order of admission.

I allow this appeal, and, reversing the decree of the lower Appellate Court, I remand the case for decision on the merits. The respondent must pay the costs of this appeal. I allow Rs. 15 as Pleader's fees herein.

Appeal allowed.

(1) 12 C. W. N. 25.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 432 OF 1910.

June 1, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott Smith.

GEHNA AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHUDA BAKHSH—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2)—Preliminary decree—Decision on the question of res judicata.

The decision of a Court on a preliminary issue framed on a plea of *res judicata* is not a preliminary decree and is, therefore, not appealable.

Kashi Nath v. *Nathu Ram*, 41 P. R. 1911, 9 Ind. Cas. 1019, 115 P. L. R. 1911, 179 P. W. R. 1911, *Umar Ali* v. *Nasib-un-Nissa*, 13 Ind. Cas. 800, 82 P. R. 1911, *Gur Das* v. *Bhag*, 96 P. R. 1911, 143 P. W. R. 1911, 216 P. L. R. 1911, 11 Ind. Cas. 231, followed.

The expression "preliminary decree" explained.

Miscellaneous first appeal from the order of the District Judge, Shahpur, dated 14th April 1910, setting aside the decree of 15th March 1907, for the purpose of deciding the case on its merits.

Mr. *Fazl-i-Hussain*, for the Appellants.

The Hon'ble Mr. *Shadi Lal*, for the Respondents.

JUDGMENT.—The facts of this case are briefly these. On the 13th November 1906, the present plaintiff-respondent, who was then a minor, brought a suit through his next friend, Muhammad (who was brother-in-law of his uncle Mokhu), against the present defendants-appellants for a declaration of his proprietary rights in 1/6th share of a large area of land left by Saadat, common ancestor of himself and of defendants. The suit was compromised between Muhammad and the defendants, and in accordance with the compromise, which was sanctioned by the Court in which the suit was instituted, a decree for 18 *bighas* of land was passed in favour of the plaintiff on the 15th March 1907, the rest of the claim being dismissed. The plaintiff attained the age of majority in 1909, and on the 5th January 1910, he brought the present suit against the defendants for a declaration to the effect that he was owner of 1,359 *kanals* 15 *marlas*, out of 5,501 *kanals* of land left by Saadat which was in possession of the defendants, and that he was bound neither by the compromise effected by his next friend, Muhammad, in the former suit, nor by the decree for 18 *bighas* of land which was passed in plaintiff's favour on the strength of that compromise. On the 27th January, the defendants filed their written statement in answer to the plaintiff's claim; and one of the pleas raised was that in the suit of 1906 the plaintiff's next friend having effected a compromise in good faith for the benefit of the plaintiff and the Court having sanctioned the compromise, the decree passed in that case in accordance with the compromise on the 15th March 1907 was binding upon him, and that the present suit was barred by section 11 of the Civil Procedure Code. Upon the question of law thus raised, the District Judge framed a preliminary issue in the following terms:—

"Whether in view of the previous suit between the parties, decided on the 15th March 1907 by Mian Abdul Hamid, the present suit is maintainable; and whether section 11 of the Code of Civil Procedure does not operate as a bar?"

GEHNA v. KHUDA BAKHSH.

Upon this issue, the District Judge has held, in his order, dated the 14th April 1910, that since Muhammad, who was the next friend of the plaintiff in the former suit, was neither a guardian of his property under the Muhammadan Law, nor a near relation of his, and since he had compromised the case by accepting 72 *kanals* of land instead of 1,359 *kanals* now claimed by the plaintiff, the decision in the former suit in terms of the compromise was not binding on the plaintiff and the present suit was maintainable. The order of the District Judge concludes with the remark that other issues shall, therefore, be framed.

From the District Judge's order, an appeal has been preferred to this Court by the defendants; and the first point for decision in this appeal is whether the order of the 14th April 1910 amounts to a "preliminary decree" within the meaning of section 2 (2) of the Civil Procedure Code, for if it is not a preliminary decree, there can be no appeal, therefore, to this Court. After hearing the appellant's Counsel, we think that this question must be answered in the negative. The definition of the 'decree' as given in sub-section (2) of section 2 of the new Civil Procedure Code has formed the subject of consideration in some recent decisions of this Court—*Kashi Nath* v. *Nathu Ram* (1); *Umar Ali* v. *Nasib-un-nissa* (2) and *Gur Das* v. *Bhag* (3)—and we entirely concur in the view expressed in those decisions as to the meaning of the word 'decree' in the present Code. As observed by Rattigan, J., in *Kashi Nath* v. *Nathu Ram* (1), "a preliminary decree properly understood is passed only in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand for the time being until it is in a position to pass a final decree in the suit. This happens in suits for administration, for partition of property, for dissolution of partnership, for foreclosure, for sale of mortgaged property and by a principal for accounts from his agents." This view is supported by the *explanation* to sub-section (2) of section 2, which says:—"A decree is preliminary when *further proceedings have to be taken* before the suit can be completely disposed of." It must be admitted that the phraseology of the sub section in question is far from clear and precise, for the words "conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit", as used in the sub-section, appear at first sight to cover a decision embodied in an interlocutory order of almost every description upon any question of law or fact which may be the subject of dispute between the parties in a suit. But we think that the better view to hold is, as held in *Umar Ali* v. *Nasib-un-nissa* (2), that (generally speaking) the words "rights of the parties" in the definition of 'decree' must be taken to be the rights of the parties *inter se* in regard to the subject-matter of the suit. Applying that test to the present case, it cannot be said that the order of the District Judge, dated the 14th April 1910, determines the rights of the parties with regard to any part of the subject-matter of the suit. If the argument of the appellant's Counsel as to the meaning and scope of the word 'decree' were accepted, then each separate order passed by a Court in the course of the same suit upon each of several questions of law raised by the parties, *e.g.*, the question of limitation, the plea of *res judicata*, the plea of bar by reason of Order XI, rule 2 of the present Code, the question of the *locus standi* of the plaintiff to sue, and other similar questions, must necessarily be deemed to be a "preliminary decree" from which an appeal would lie to a higher Court. The result would be that in some cases there may conceivably be no less than half a dozen preliminary decrees, from each of which a separate appeal would be competent; and after the complete disposal of the suit on the merits, there would be a final decree from which yet another appeal would lie, after the Appellate Court had dealt with and disposed of the various points raised in the appeals from the preliminary decrees. Such an anomalous result could never have been contemplated by the Legislature, and we, therefore, think that the restricted meaning placed upon the expression "preliminary decree" in the above-mentioned decisions of this Court is correct. The ruling of their Lordships of the Privy Council in *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (4),

(1) 41 P. R. 1911, 9 Ind. Cas. 1019, 115 P. L. R. 1911; 179 P. W. R. 1911.

(2) 13 Ind. Cas. 800, 82 P. R. 1911.

(3) 96 P. R. 1911: 143 P. W. R. 1911, 216 P. L. R. 1911, 11 Ind. Cas. 231,

(4) 23 A. 152 at pp. 156, 157; 10 M. L. J. 290; 5 C.W. N. 52; 27 I. A. 209.

which has been relied upon by the appellant's Counsel, is not in point, inasmuch as the appeal in that case arose out of execution proceedings and the sole question for decision before their Lordships was as to whether the order made by the executing Court to the effect that the decree-holder was entitled to mesne profits for the period of three years from the date of the original decree, passed by the District Judge, was or was not a final order amounting to a decree.

In the present case, no decision has been given by the District Judge on the question whether the present plaintiff's next friend in the suit of 1906 had or had not acted fraudulently or in collusion with the defendants in entering into the compromise; the sole point decided is that notwithstanding the decision of the Court of the 15th March 1907, which was based upon a compromise, the present suit was maintainable, and we have no hesitation in holding that this decision does not amount to a preliminary decree within the meaning of section 2 (2) of the Civil Procedure Code. No appeal could, therefore, lie to this Court from the order of the District Judge, dated the 14th April 1910, and we dismiss this appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE NO. 29 OF 1911.

January 19, 1912.

Present:—Mr. Drake-Brockman, J. C.

WASUDEO—APPLICANT

versus

CHINBA—NON-APPLICANT.

Ex parte *decree—Supersession by appellate decree—Jurisdiction of original Court to set aside decree—Application made before appeal preferred—Practice—Power of High Court to transfer application to itself—Civil Procedure Code (Act V of 1908), s. 24 (1) (b), O. IX, r. 13.*

Where an *ex parte* decree has been superseded by an appellate decree, the Court of first instance has no jurisdiction to set aside the *ex parte* decree, even though the application to set it aside was made before the appeal was preferred.

Sankara v. *Subraya*, 30 M. 535; 17 M. L. J. 436, *Moriram* v. *Daryao*, 6 C. P. L R. 142; *Lala Brij Narain* v. *Tejbal*, 32 A. 295 at p. 300; 14 C.W. N. 667; 7 A.L.J. 507; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57; 6 Ind. Cas. 669; 20 M. L. J. 587; (1910) M. W. N. 392, relied upon.

Ramanadham v. *Narayanan*, 27 M. 602; 14 M. L. J. 321; *Chenna* v. *Pedda Obi*, 32 M. 416; 6 M. L. T. 135; 2 Ind. Cas. 802; 19 M. L. J. 388, *Damodar* v. *Sarat Chandra*, 13 C. W. N. 846; 3 Ind. Cas. 468, explained and distinguished.

Where, in such a case, the appellate decree is passed by the High Court, that Court can withdraw to itself, under section 24 of the Civil Procedure Code, the application made to the lower Court to set aside the *ex parte* decree.

Application for transfer of a Miscellaneous Case, pending in the Court of the Additional District Judge, Nagpur, to the Judicial Commissioner's Court.

Mr. *G. L. Subhedar*, for the Applicant.

Messrs. *Atmaram Bhagwant* and *A. C. Roy*, for the Non-applicant.

JUDGMENT.—This application arises out of a remark made at the close of my judgment, dated the 12th October 1911, in First Appeal No. 26 of 1911, to which the present applicants and non-applicants were all parties.

The applicants were defendants in the suit out of which the said first appeal arose. The decree of the Court of first instance was passed on the 10th February 1911, the proceedings having been *ex parte* against those defendants. On the 18th idem, they applied to have the decree set aside. Pleadings were recorded and the case was adjourned to the 13th July for evidence. In the meantime, on the 16th June, the plaintiffs had appealed from the decree, which was eventually modified on the 13th October. Some of the evidence required in connection with the application to set aside the *ex parte* decree of the 10th February 1911, has still to be recorded.

This Court is now asked to withdraw to itself the proceeding to set aside the lower Court's decree. This application is opposed on the ground that the lower Court ought to be allowed to complete the inquiry begun before the appeal from the *ex parte* decree was preferred. The decision in *Sankara* v. *Subraya* (1) is sought to be distinguished on the ground that there the appeal was disposed of before an application to set aside the decree appealed from was filed.

Ramanadham v. *Narayanan* (2), which was cited and followed in *Sankara* v. *Subraya* (1), has been overruled by a Full Bench in *Chenna*

(1) 30 M. 535; 17 M. L. J. 436.
(2) 27 M. 602; 14 M. L. J. 321.

Reddi v. *Pedda Obi* (3). The first and third of those cases were concerned with applications for review of judgment presented by a party to a suit in which an appeal was afterwards preferred. Neither of them lays down that a Court of first instance can review its judgment after its decree has actually been modified in appeal. In *Damodar* v. *Sarat Chandra* (4), it was held by Jenkins, C. J., and Mookerjee, J., that the mere fact that an appeal has been preferred from an *ex parte* decree and is pending does not preclude a defendant against whom the decree was passed from applying under section 108, Civil Procdeure Code of 1882, for an order to set it aside. The position is, however, different when by decision of the appeal the decree appealed from has been superseded by that of the Appellate Court. In these Provinces, it has long been settled that a decree cannot be amended by the Court of first instance even after it has been confirmed by the Appellate Court: see *Moriram* v. *Daryao* (5). That this view is correct is now settled by the judgment of the Privy Council in *Lala Brij Narain* v. *Tejpal* (6). It seems to follow clearly from the fact that the appellate decree supersedes the one appealed from, that there is no decree left which the Court of first instance can set aside once the Appellate Court's decision has been given. I hold accordingly and, under sub-section (1) (*b*), section 24, Civil Procedure Code, withdraw from the District Judge's Court the application under rule 13, Order IX, preferred to the Additional Judge of that Court by the present applicants. The costs of this application will follow the result of the one withdrawn to this Court. I allow Rs. 10 as Counsel's fee.

(3) 32 M. 416; 6 M. L. T. 135; 2 Ind. Cas. 802; 19 M. L. J. 388.

(4) 13 C. W. N. 846; 3 Ind. Cas. 468.

(5) 6 C. P. L. R. 142.

(6) 32 A. 295 at 300; 14 C. W. N. 667; 7 A. L. J. 507; 11 C. L. J. 560: 12 Bom. L. R. 444; 8 M. L. T. 57; 6 Ind. Cas. 669, 20 M. L. J. 587; (1910) M. W. N. 392.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 73 OF 1911.

May 29, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Banerji.

PARSOTAM RAO TANTIA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

RADHA BAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2)—Preliminary decree—Decision on the question of res judicata.

The decision of a Court on a preliminary issue framed on a plea of *res judicata* is not a preliminary decree and is, therefore, not appealable.

First appeal from the decision of the Subordinate Judge of Cawnpore, dated the 12th of September 1910.

Dr. *S. C. Banerji*, for the Appellants.

Mr. *S. N. Sen*, for the Respodents.

JUDGMENT.—A preliminary objection has been taken to the hearing of this appeal on the ground that no decree has been passed in the suit and, therefore, no appeal lies. What happened in the Court below was this. A plea of *res judicata* was urged on behalf of the defendants. Arguments were heard in regard to that plea and the Court came to the conclusion that the matter was not *res judicata* between the parties. A number of other issues were framed and the Court, after determining the preliminary point referred to above, proceeded to try the other issues. It is from the decision upon the issue as to *res judicata* that this appeal has been preferred. We are of opinion that the determination of such an issue is not a decree within the definition of that term as given in the Code of Civil Procedure. No preliminary decree has been passed in the suit. What the definition means is that a Court may pass a preliminary decree in certain circumstances, which is appealable, and a final decree subsequently. It could never mean that the determination of each issue would give rise to an appeal and that such determination would be deemed to be a decree.

We accordingly allow the preliminary objection and dismiss the appeal with costs including fees on the higher cale.

Appeal dismissed.

NIWA *v.* RAGHO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 57-B OF 1911.

January 25, 1912.

Present:—Mr. Batten. A. J. C.

NIWA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAGHO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Mahars *in Berar—Right to carcases and hides of dead animals disposed of by owners—Unreasonable custom.*

It is the duty of working village *mahars* in Berar to remove and bury the bodies of dead animals not disposed of by the owners.

Where the *mahars* dispose of a carcase, they are ordinarily allowed by custom to appropriate the hides and flesh as remuneration for their service.

The *mahars* have no right by custom to appropriate the carcases and hides of animals whose owners dispose of the carcases in a sanitary manner without calling in the services of *mahars*.

The *mahars* cannot claim the carcases and hides of dead cattle which the owner has not abandoned and which he himself disposes of.

One of the principal requisites to the validity of a custom is that it shall not be unreasonable. Nothing can be more unreasonable than an invasion of the rights of property without any benefit to the common weal.

Appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 20th October 1910, reversing that of the Junior Munsif, Akola, dated the 3rd February 1910.

Mr. *J. Hornby*, for the Appellants.

Mr. *M. R. Dixit*, for the Respondents.

JUDGMENT.—The admitted facts of this case are that the two plaintiffs-appellants, are, by rotation, the *watandar mahars* of the village of Anbhora in the Murtizapur Taluk of the Akola District in Berar. The two defendants, who are brothers, are members of the Patelki family of that village, though neither of them is actually the Patel. A bullock belonging to the defendants died, and the defendants sent for the plaintiffs to remove the dead animal; the plaintiffs said that they would remove the dead bullock if they were allowed to keep the hide; the defendants refused to let the plaintiffs remove the dead bullock on these terms, and the defendants themselves buried the carcase; what became of the hide does not appear from the record, but the learned Counsel for the defendants-respondents says his clients, no doubt, sold it.

On these facts, the plaintiffs have sued the defendants for Rs. 10, Rs. 5 being the value of the hide and Rs. 5 being the value of the flesh of the bullock.

For the plaintiffs, it was contended that by local custom when a bullock or cow or other animal belonging to a villager dies, the *watandar mahars* are entitled as of right to dispose of the carcase and to retain for their services the flesh and hide, whether the owner of the animal be a member of the Patelki family or not.

For the defendants, it was contended that though such a custom might exist as regards the cattle of other villagers, the members of the Patelki family were entitled to have the carcase removed by the *watandar mahars* who were bound to return the skin, or its price, to the owner of the dead animal, the *mahars* receiving for their services 8 *pailis* of jowari.

Issues were framed on these pleas and each party adduced evidence. The Munsif found the evidence on both sides to be interested and worthless, but, as it is the duty of *mahars* to remove and bury dead animals, he held that they were entitled to the flesh and hide; he also held that it was not established that any member of the Patelki family, except the Patel himself, was exempt from this rule, and that the fact that the defendants had themselves buried the bullock in no way lessened the plaintiffs' rights; on these grounds, he decreed the plaintiffs' claim. On appeal, the learned Additional District Judge held that the plaintiffs had failed to prove the custom as set up by them. He held *firstly*, that the plaintiffs' evidence was insufficient to prove any custom by which the *watandar mahars* of the village had the right to remove the dead body of a bullock or other domestic animal and appropriate its carcase and hide irrespective of the wishes of its owner; *secondly*, that such a custom would be unreasonable, and *thirdly*, that the defendants' evidence shows that members of the Patel family were in the habit of keeping for themselves the hides of their cattle.

It is to be observed that the two witnesses for the plaintiffs, who are themselves *watandar mahars* who work as such in rotation, and who are obviously interested witnesses, are anxious to show that the *watandar mahars* are entitled to

the hides of all cattle that die whether the owner wishes to use the services of the *mahars* in disposing of the carcase or not, while the two witnesses for the defendants, who are members of the Patel family and thus very interested witnesses, are mainly concerned with showing that members of the Patel's family are to be distinguished from other villagers.

The evidence being what it is, the learned Additional District Judge was quite justified in finding that the custom as set up by the plaintiffs has not been proved as regards any villagers. On this finding, the question whether the members of the Patel family would not be bound by the custom if it existed does not really arise, and it cannot be said that in this suit the question, whether a member of the Patel family has privileges beyond those of other villagers as regards the hides of cattle, whose carcases have been disposed of by the *watandar mahars* with the concurrence of the owners, has been disposed of, even as regards this one village.

It is a fact, as pointed out by the Munsif, that one of the duties of village *mahars* is removing and burying the bodies of dead animals. This is laid down by rule 437 (8) of the rules framed under section 216 (*i*) of the Berar Land Revenue Code, to be found at page 161 of Volume 1 of the Berar Revenue Manual. This duty, however, is in the interests of sanitation, and must, in my opinion, be held to refer in the case of domestic animals only to the bodies of such animals as are not disposed of by the owners. The rule does not give the village *mahars* any right to appropriate the carcase and hide of animals whose owners dispose of the carcase in a sanitary manner without calling in the services of the *mahars*. The custom, which undoubtedly exists in at least some villages for the *mahars* to take the hides of dead cattle, no doubt, has its origin in the view that when the duty of disposing of a carcase is cast on the *mahars*, they are entitled to some remuneration, which conveniently takes the form of allowing them, if they wish to claim, the flesh, and dispose of the hide for what it will fetch. Such a custom also must relate back to the time when hides were of trifling value, but now that, owing to improved communications and other causes, there is a strong demand for hides with a consequential great rise in their value, disputes between villagers and *mahars* have naturally arisen.

My judicial experience in connection with Berar has lasted for many years, as Judge and Judicial Commissioner in Berar and as Additional Judicial Commissioner in the Central Provinces with jurisdiction over Berar cases, and many cases relating to the claims of *watandar mahars* to the hides of cattle have come to my notice. In many cases, the right of *mahars* to the skins of abandoned cattle has been recognised, in some cases relating to certain villages it has been held proved that members of the Patelki family are exempt from any such claims by *mahars*, but in no case, to my knowledge, has it been held that *mahars* can claim the carcases and hides of dead cattle which the owner has not abandoned. The subject, apart from the special claim of members of Patelki families, has been succinctly put by Bullock, J. C., in Berar Second Appeal No. 16 of 1891, where he says: "The plaintiffs claim as a right, belonging to them as *watandar mahars*, the skins and carcases of dead cattle, saying that the owner of the dead cattle had no right to make over the carcases to the *Mangs* of the village. The evidence is rather unsatisfactory but the lower Appellate Court in deciding the appeal has gone on grounds which cannot, in my opinion, be opposed, *viz.*, that the owner of cattle has as much right over his cattle when dead as when alive and may give the skins to whomsoever he likes. This is the view taken by the Bombay High Court [*Yellappa* v. *Mankia*(1)] and I see no argument that can possibly be set against it. The *mahars* are, no doubt, entitled to the carcases of abandoned dead cattle. But if a bullock dies in the possession of its owner, they cannot as a right claim it against the owner's right of disposal."

One of the principal requisites to the validity of a custom is that it shall not be unreasonable. Nothing could be more unreasonable than an invasion of the rights of property without any benefit to the common weal.

Malus usus est abolendus, and the Additional District Judge was justified in holding not only that the custom as set up was not proved, but would be an unreasonable custom.

(1) 8 B. H. C. R. (A. C. J.) 27.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 2557 TO 2570 OF 1912.

May 20, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

BHOJA HARI PARIA—PLAINTIFF—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 24—Withdrawal of suit by District Judge—When should be made—Scope of section 24—Erroneous view of law.

A District Judge should not withdraw a suit under section 24 of the Civil Procedure Code, merely because in an analogous case a Subordinate Judge had taken what, in his opinion, was an erroneous view of the law. If the District Judge does not intend to try a suit finally, the case ought not to be transferred merely to enable him to dispose of it on a preliminary ground.

Rules granted against the orders of the District Judge of Midnapore, dated April 15th and 23rd, 1912.

Mr. *B. Chakravarti*, Counsel and Babu *Biraj Mohan Majumdar*, for the Petitioner.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order made by the Court below on the 15th April 1912, under section 24 of the Civil Procedure Code of 1908. It appears that thirty-one suits were instituted under section 104H of the Bengal Tenancy Act; four of them were instituted in the Court of the Munsif, twelve in the Court of the first Subordinate Judge and the remaining fifteen in the Court of the second Subordinate Judge. Upon the application of the plaintiff, the cases were, shortly after their institution, transferred to the Court of the second Subordinate Judge. On the 19th September 1911, an applicalion by the defendant, the Secretary of State for India in Council, praying that the under-tenants ought to be joined as parties defendants, was refused by the Subordinate Judge. On the 26th March 1912, the Subordinate Judge tried a group of eight cases and decreed the suits. One of the issues raised before him was whether the under-tenants were necessary parties; he held that although it might be desirable to have them on the record, the suits could not be dismissed on the ground that they had not been joined as parties. Subsequently, the matter was brought to the notice of the District Judge, in what manner it has not been explained, and on the 15th April 1912, he made an order for transfer of the pending suits to his own file: this is the order now assailed on behalf of the petitioner.

The District Judge states explicitly that in his opinion the order of the Subordinate Judge in the cases already finally tried by him, was contrary to two decisions of this Court and that he transferred the pending cases to his own file as otherwise the Subordinate Judge might erroneously hold that the suits were properly constituted and could be heard in the absence of the under-tenants. The District Judge thereupon proceeded to hear the cases which he had transferred to his own file by what he himself characterises as "an unusual procedure" and came to the conclusion that the under-tenants ought to be joined as parties defendants. He accordingly directed the plaintiff to join the under-tenants as defendants within a week and added that if his order was not carried out, the suits would be dismissed on the ground that they were improperly constituted. The District Judge further stated that should it be ultimately held by the High Court that his view of the law was erroneous, the cases would have to be re-transferred to the Subordinate Judge because he had no time to hear original suits of this description. In our opinion, upon the circumstances stated in the order of the District Judge, the order for transfer ought not to have been made.

Section 24 of the Code of 1908 authorises a District Judge to withdraw a suit pending in any Court subordinate to his and to try and dispose of the same. The object of the Legislature is obvious; it was never intended that a District Judge should withdraw a suit merely because in an analogous case a Subordinate Judge had taken what in his opinion was an erroneous view of the law. If the District Judge does not intend to try the suit finally, the case ought not to be transferred merely to enable him to dispose of it on a preliminary ground. We may add that the motive of the District Judge has not been called in question before us, and it

has not been disputed that he acted with a view to prevent what, he thought, might otherwise involve a waste of public time. It has only been argued and, in our opinion, correctly, that, in the admitted circumstances, the order for transfer should not have been made. The Rule will, consequently, be made absolute and the order of the 15th April 1912 discharged, in each of the cases. The result will be that the cases will be re-transferred to the file of the second Subordinate Judge. The Secretary of State will be at liberty to prefer appeals against the decrees of the Subordinate Judge in the cases decided on the 26th March 1912; if such appeals have already been preferred, the Secretary of State may apply to the Subordinate Judge to defer the trial of the other suits pending the result of the appeals. The Subordinate Judge will make such order as he considers appropriate; if he refuses to stay the hearing of the suits, the Secretary of State will be at liberty to apply to this Court.

The Rules are made absolute with costs, hearing fee one gold *mohur* in each case. All orders of the District Judge subsequent to the order of the 15th April will necessarily stand discharged.

Rule made absolute.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 685-B OF 1910.

February 3, 1912.

Present:—Mr. Batten, A. J. C.

RAMJI—APPELLANT

versus

Musammat MUKTAI—RESPONDENT.

Berar Land Revenue Code, ss. 205, 211—Pre-emption—"Co-occupant having a right of pre-emption"—Subsequent transferee from person having right of pre-emption.

The words "co-occupant having a right of pre-emption" in section 211 of the Berar Land Revenue Code, refer only to the person who was co-occupant at the date of the transfer on which the claim for pre-emption is based or a transferee from that co-occupant by inheritance. The words do not include an entire stranger to whom the co-occupancy right has passed by voluntary transfer, that is, by sale or gift, subsequent to the sale sought to be pre-empted.

A right to sue for pre-emption, which has already accrued, cannot be transferred to an entire stranger. Consequently, a stranger, who has become a co-occupant by a transfer subsequent to the sale sought to be pre-empted, is not entitled to the right of pre-emption.

Sheo Narain v. *Hira*, 7 A. 535; A. W. N. (1885) 142, relied upon.

Faquir Ali Shah v. *Ram Kishan*, 133 P. R. 1907, 84 P. W. R. 1907 and *Muhammad Yusuf Ali Khan* v. *Dal Kuar*, 20 A. 148, referred to and explained.

Appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 31st August 1910, confirming that of the Senior Munsif, Akola, dated the 23rd December 1909.

Mr. *A. C. Roy*, for the Appellant.

Mr. *G. P. Dick*, for the Respondents.

JUDGMENT.—*Musammat* Reshmai was a co-occupant in the field Survey No. 24 in *mouza* Manki, Balapur *Taluk*, with respect to a demarcated one-third share of the field. On her death, which occured early in 1909, her daughters became, according to the plaintiff-appellant, her heirs, and on the 4th March 1909, one of them, with the consent, it is said, of her sisters, gifted this one-third share to the plaintiff-appellant, who was not previously a co-occupant in the field. On the 20th April 1908, nearly a year before the plaintiff became, as he claims, a co-occupant by the deed of gift, the first defendant *Musammat* Muktai, who was a co-occupant in the field with respect to a demarcated half share, sold her share to Raoji, the second defendant, a stranger. On the 19th April 1909, the last day within limitation, the plaintiff has brought this suit for pre-emption as regards the half share sold to the second defendant. A preliminary issue was framed as to whether, even if the plaintiff had become a co-sharer by the deed of gift, the suit was maintainable. The learned Munsif held that it was not, and the same view was taken on appeal by the learned Additional District Judge. The plaintiff appeals to this Court. For the appellant, it is argued that *Musammat* Reshmai or her daughters could certainly have brought a suit for pre-emption with reference to section 211 (1)(*a*) of the Berar Land Revenue Code, and that as the appellant has by the deed of gift succeeded to the rights of *Musammat* Reshmai, he is equally entitled to pre-empt. The plaintiff was not a co-sharer at the date of the sale to the second defendant, *Musammat* Reshmai was a co-sharer and could have brought this suit if she had lived. The question is whether the right to sue has passed to the plaintiff. It may be conceded

that the right to sue did pass to the daughters of *Musammat* Reshmai as her heirs or rather as heirs of her husband. It has been laid down, in *Faquir Ali Shah* v. *Ram Kishan* (1), that as regards transfers by inheritance, the general principle should apply that the right of pre emption passes with the land. This ruling was with reference to the Punjab Pre-emption Act, II of 1905. But the same view was taken in *Muhammad Yusuf Ali Khan* v. *Dal Kuar* (2), with reference to the rights of pre-emption under the *wajib ul-arz*, and the principle was carried further to apply to a relinquishment by a widow of her rights in favour of her daughter who was the reversioner, and the right of pre-emption in respect of a sale which had taken place prior to the relinquishment was held to pass to the daughter. Thus, the plaintiff is in the same position, neither better nor worse, as he would have been in if the gift had been made to him by *Musammat* Reshmai, who fully represented the estate, with the consent of the reversioners. The question is whether the plaintiff, having got possession of the land by a gift, has also acquired the right to sue for pre-emption in respect of a sale prior to the date of the gift. He cannot be in a worse position than a person who acquired the share by sale. In *Sheo Narain* v. *Hira* (3), the Full Bench answered the following question in the negative: "Where there is a right of pre-emption under the *wajib-ul-arz*, which a share-holder could claim and enforce in respect of a sale of property, can a person, purchasing the said share-holder's interest in the village subsequently to sale, claim and enforce pre-emption just as his vendor might have done?"

Mahmood, J., was the only Judge who gave reasons for his opinion, and the reasons he gave were three in number. The *first* was that the whole object of the law of pre-emption is to prevent the intrusion of strangers, and at the time of the sale to the plaintiff, the earlier purchaser was not a stranger but had become a co-sharer, and was less of a stranger than the later purchaser. The *second* was that the earlier purchaser could sue the later, just as well as the later purchaser could sue the earlier, and if both suits were brought, they would result either in nothing or in an exchange. The third was that as the original co-sharer had not taken steps to object to the earlier sale, his successor could not do so. The third of these reasons has been shown to be erroneous in *Muhammad Yusuf Ali Khan* v. *Dal Kuar* (2), cited above, for, until the period of limitation had expired, abstinence from objection for only some portion of that time could not raise any inference of the abandonment of a claim to pre-empt. In *Fakir Ali Shah* v. *Ram Kishen* (1), also cited above, transfers by inheritance were distinguished from voluntary tranfers by some act of the owner, and the arguments of Mahmood, J., in the case in *Sheo Narain* v. *Hira* (3), were held to be applicable only to voluntary transfers, and not to transfers by inheritance. As regards transfers not by inheritance, Clark, C. J., remarked: "There is good reason why voluntary transfers should not pass a right of pre-emption as regards properties previously sold." This remark is no doubt an *obiter dictum* but it nevertheless carries great weight. The views of Mahmood, J., on which it is based, seem to me to be applicable in the case of a suit for pre-emption brought under the statutory rights conferred by the Berar Land Revenue Code. The later purchaser is just as much a stranger as the earlier purchaser, more so in fact, for the earlier purchaser has ceased to be a stranger and has become a co-occupant. In the present case, the plaintiff is not a later purchaser, but a donee. I do not see how this improves his position, except that his acquisition of the co-occupancy-right does not give the earlier purchaser a claim for pre-emption. I am of opinion that the words "co-occupant having a right of pre-emption", in section 211 of the Code, refer only to the person who was co-occupant at the date of the transfer on which the claim for pre-emption is based, or a transferee from that co-occupant by inheritance; the words may possibly include a transferee in whose favour the inheritance has been accelerated. But the words do not include an entire stranger to whom the co-occupancy right has passed by a voluntary transfer, in the sense in which those words are used in the case of *Faqir Ali Shah* v. *Ram Kishan* (1) including both a sale and a gift. In other words, a right to sue for pre-emption which

(1) 133 P. R. 1907; 84 P. W. R. 1907.
(2) 20 A. 148.
(3) 7 A. 535; A. W. N. (1885) 142.

has already accrued cannot be transferred to an entire stranger. On these grounds, I consider the view taken in the lower Courts was correct, and I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL APPLICATION No. 3148 OF 1912.

May 31, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.

KANCHAN MANDAR AND OTHERS—DEFENDANTS—PETITIONERS

versus

KAMINI PRASHAD CHOWDHURY—PLAINTIFF—OPPOSITE PARTY.

Court-fee—Appeal—Suit for possession and mesne profits—Value of suit—Value of land at Rs. 1,020 *and mesne profits at Rs.* 4,199*—Decree—Appeal with Court-fee on Rs.* 4,199 *mesne profits—Subsequent assessment of mesne profits at only Rs.* 2,570*—Whether Court-fee is to be paid a second time on memorandum of appeal.*

The plaintiff, in a suit for recovery of land and mesne profits, valued the relief for recovery of land at Rs. 1,020 and for the mesne profits antecedent to the suit at Rs. 4,199. The Courts below made a decree in favour of the plaintiff. The defendants appealed to the High Court and valued their appeal at Rs. 5,291 and paid Court-fees on their memorandum of appeal *ad valorem*. During the pendency of this appeal, mesne profits were assessed at Rs. 2,570 and a decree made in favour of the plaintiff for this amount. The defendants desired to appeal against this decree:

Held, that as the defendants had already paid Court-fees upon the claim for mesne profits valued at Rs. 4,199, they could not be called upon to pay Court-fees a second time, and that this appeal would be filed without any Court-fee being paid on the memorandum of appeal.

This is an application for the admission of an appeal without payment of further Court-fees.

Babu *Provash Chandra Mitter* and Moulvi *Khurshed Hussain*, for the Petitioners.

Baba *Ram Charan Mitra*, Senior Government Pleader, for the Crown.

JUDGMENT.—This application raises a question apparently of first impression. The petitioners were the defendants in an action for recovery of land and mesne profits. The plaintiff valued the relief for recovery of the land at Rs. 1,020 and of the mesne profits antecedent to the suit at Rs. 4,199-8. The Court below made a decree in favour of the plaintiff, which entitled the plaintiff to recover possession of the land and also to realise mesne profits to be subsequently ascertained. The defendants appealed to this Court, valued their appeal at Rs. 5,219-8 and paid Court-fees on the memorandum of appeal *ad valorem*. During the pendency of this appeal, proceedings for the assessment of mesne profits have been carried on in the Court below and mesne profits have been assumed at Rs 2,570-1-10. A decree for this sum has now been made in favour of the plaintiff. The defendants now desire to appeal against this decree for mesne profits. The question arises, whether they can be called upon to pay Court-fees upon the memorandum of appeal. They have already paid Court fees upon the claim for mesne profits valued at Rs. 4,199-8, and they cannot, in our opinion, be called upon to pay Court-fees a second time. Under section 97 of the Code of 1908, they were bound to appeal against the preliminary decree and they have done so upon payment of full Court-fees. That preliminary decree has meanwhile been carried into effect and a final decree made by which the liability of the defendants has been fixed at a sum, smaller than what is claimed by the plaintiffs. Consequently, it is not incumbent upon the defendants to pay Court-fees a second time. If mesne profits had been decreed for a higher sum than what is claimed in the plaint and if the plaintiff had obtained a decree for such sum upon payment of additional Court-fees, the defendants might have been called upon to pay the difference between the Court-fees payable on the sum ultimately determined and the sum originally mentioned, respectively. The reason why a question of this character has not been raised before, is explained in the decision in *Bunwari Lal* v. *Sheo Sanker Misser* (1), where it was pointed out that an erroneous practice has hitherto been followed by which the defendant was allowed to prefer an appeal to this Court against a preliminary decree for mesne profits upon payment of Court-fees of Rs. 10. We hold, therefore, that the appellants are not liable to pay Court-fees upon the present memorandum of appeal, and we may add that the learned Government Pleader, who has appeared on notice, concedes that this is the correct view of the law.

(1) 1 Ind. Cas. 670; 13 C. W. N. 815.

The appeal will accordingly be registered.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 85 OF 1911.

April 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

VEMUSAMI GAVARAMMA AND ANOTHER —APPELLANTS

versus

CHILUKURI PITCHAMMA—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, r. 14 —Arbitration—Conditional award—Refusal of Court t o remit award—Appeal.

It is competent to an arbitrator, who is empowered to decide whether a sale should be set aside, to pass an award setting aside the sale on the vendor re-paying the purchase-money.

Obiter:—A refusal by Court to remit an award under rule 14 of Schedule II of the Civil Procedure Code is not appealable.

Suryanaraiana Row v. *Sarabaya*, 21 M. L. J. 263; (1911) 2 M. W. N. 151; 9 Ind. Cas. 173; 9 M. L. T. 251, referred to.

Second appeal against the decree of the Subordinate Judge of Ellore, in A. S. No. 272 of 1909, presented against the decree of the District Munsif of Ellore, in O. S. No. 402 of 1907.

Mr. *P. Narayanamurty*, for 2nd Appellant.

Mr. *V. Ramesam*, for the Respondent.

JUDGMENT.—The matter in dispute before the arbitrator was whether the plaintiff was entitled to have a sale-deed set aside. The arbitrator was of opinion that while the plaintiff was entitled to have it set aside, she was also bound as a matter of equity to repay the money that she had received in connection with the sale-deed. It cannot be said that he acted beyond the limits of his jurisdiction in passing what in substance was a conditional award in plaintiffs' favour and the District Munsif was right, therefore, in holding that there was no ground under rule 14, Schedule II of the Civil Procedure Code, to remit the award. The Appellate Court's decision on the merits modifying the decree of the District Munsif is wrong. In this view of the case, it is, perhaps, unnecessary to consider whether an appeal lay to the Subordinate Judge at all against the Munsif's decree. The Procedure Code provides no appeal against an order refusing to remit an award and the Full Bench decision of this Court in *Suryanaraiana Row* v. *Sarabaya* (1) is in favour of the appellant's contention that no appeal would lie in such a case. But it is unnecessary to decide that point as we hold that on the merits the Subordinate Judge is wrong. His decree must be set aside and that of the District Munsif restored with costs both here and in the lower Appellate Court.

Appeal allowed.

(1) 21 M. L. J. 263; 9 Ind. Cas. 173; 9 M. L. T. 251; 2 M. W. N. 151.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 537 OF 1910.

April 15, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

UPENDRA CHANDRA SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

SAKHI CHAND—DECREE-HOLDER—RESPONDENT.

Appeal—Order directing application for assessment of mesne profits to be registered as execution case—Interlocutory order, not appealable.

An order directing an application for assessment of mesne profits, to be registered as an execution case, is an interlocutory order and does not determine the rights of the parties. It is, therefore not open to appeal.

Dalgleish v. *Nandan Misser*, 13 Ind. Cas. 186; *Srinivas Prosad Singh* v. *Kesho Prosad Singh*, 12 Ind. Cas. 745: 14 C. L. J. 489 and *Behary Lal Pandit* v. *Kedar Nath Mullick*, 18 C. 469, relied upon.

Appeal from the order of the District Judge of Bhagalpur, dated August 19th, 1910, affirming that of the Sub-Judge of that District, dated May 4th, 1910.

Babus *Basanta Kumar Bose* and *Sailendra Nath Palit*, for the Appellants.

Babu *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.—This appeal is directed against an order of the Court of appeal below made in affirmance of an order of the primary Court, directing an application for assessment of mesne profits to be registered as an execution case on the basis whereof inquiry into the amount of mesne profits is to proceed. A preliminary objection has been taken to the competency of the appeal on the ground that

the application is in reality an application in the suit and the order made thereon cannot be treated as a decree under section 2 read with section 47 clause (1) of the Code of Civil Procedure of 1908. In reply to this contention, it has been urged by the learned Vakil for the appellant that the respondent has treated the application for assesement of mesne profits as an application in execution, that, at his instance, it has been registered as such, and consequently, it is not open to the respondent now to urge that the matter is not really one in execution. In support of this view, reliance has been placed upon the case of *Bindeswari Prosad Singh* v. *Thakur Lakpat Nath Singh* (1).

In our opinion, the preliminary objection must prevail.

Even if it be assumed, on the principle explained in *Bindeswari Prosad* v. *Thakur Lakpat* (1), that it is not open to the respondent to urge that the application is not properly an application in execution, still the order in question is an interlocutory order and does not determine the rights of the parties. An order of this description is clearly not open to appeal as pointed out by this Court in the cases of *Dalgliesh* v. *Nandan Misser* (2) and *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (3). A similar view was taken by this Court in the case of *Behary Lal Pundit* v. *Kedar Nath Mullick* (4).

The result is that the appeal is dismissed with costs. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal dismissed.

(1) 15 C. W. N. 725; 8 Ind. Cas. 26.
(2) 13 Ind. Cas. 186.
(3) 14 C. L. J. 489; 12 Ind. Cas. 745.
(4) 18 C. 469.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 86 OF 1911.
April 23, 1912.
Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.
KOLAKKOT KUNTAMBI VYDIAR—APPELLANT
versus
PUDIKAKANDYIL PARKUM MURATATH MUMACHA AND OTHERS—RESPONDENTS.

Landlord and tenant—Permanent lease—Stipulation for payment of Government revenue—Increase in Government revenue on re-settlement—Whether tenant liable to pay the increase.

Where, under the terms of a permanent lease, the lessee agreed to pay a fixed annual rent and a certain sum which was the Government revenue:

Held, that the lessee was not liable for any increase in the revenue imposed by Government on a subsequent re-settlement.

Second appeal against the decree of the Temporary Subordinate Judge of North Malabar, in A. S. No. 337 of 1909, presented against that of the District Munsif of Kuttuparamba, in O. S. No. 38 of 1909.

Mr. *J. L. Rosario*, for the Appellant.

Mr. *K. Govinda Marar*, for the Respondent.

JUDGMENT.—In this case, the appellant before us is the holder of a *Saswatham* or permanent lease. The '*Marupat*' or counterpart executed by him contains these stipulations:—(2nd para).

"The *purapad* settled to be paid by us to you hereafter annually is 1,200 seers of paddy worth Rs. 96. We agree to pay the said 1,200 seers of paddy before 30th *Makaram* every year and take a receipt and to pay Rs. 16-2-9, the revenue of the said properties, along with the said *varam* and take a receipt." The question raised for decision is whether the landlord is entitled to recover from the tenant the increase in the Government revenue in consequence of a fresh settlement made by Government after the date of the lease. The covenant on the part of the tenant is to pay a certain sum, namely, Rs. 16-2 9, to the landlord which was the revenue on the properties at the time of the lease. There is no provision in the deed that the tenant should pay the Government revenue, whatever it may be, in addition to the rent fixed in the lease. He was to pay rent and a specified sum which was the revenue. On the words of the lease, it is impossible to hold that there is any covenant on the part of the tenant to pay anything more than Rs. 16-2-9 on account of the revenue of the land leased. There is nothing in the plaint to show that the tenant is bound to make any payment except on the covenant contained in the lease. We may also mention that, on the date of the lease, the parties must have been well aware that a re-settlement of Government revenue would soon be made, and with that anticipation before them, the covenant is specific as to what the tenant should pay on account of

Government revenue. We must, therefore, hold that the tenant is not liable to pay to the *jenmi* the increase in the revenue. The decree of the lower Appellate Court in so far as it modifies that of the District Munsif is set aside and the District Munsif's decree is restored with costs here and in the lower Appellate Court. The time for payment of revenue will be extended to the 15th day of June 1912.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2362 OF 1909.
April 11, 1912.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

BANAMALI CHOWDHURY—PLAINTIFF—APPELLANT
versus
RAM KINKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Permanent lease—Condition that if lessor in future take up cultivation, lessee will have to give up land—Whether condition valid—Bengal Tenancy Act (VIII of 1885), *s.* 178.

A lease, which embodied a permanent settlement for agricultural purposes, contained a clause to the effect that if the lessor took up cultivation in future, that is, after twelve years, then the lessee would have to give up the land:

Held, that the clause was inconsistent with the interest created in the lessee, was bad for remoteness and because it contravened the provisions of section 178 of the Bengal Tenancy Act, as it tended to bar the acquisition of a right of occupancy by the lessee.

Bhagwan Sahai v. *Bhagwan Din*, 12 A. 387; 17 I. A. 98, distinguished.

London and South Western Railway Company v. *Gomm*, 20 Ch. D. 562; 46 L. T 449; 30 W. R. 620; 51 L. J. Ch. 530; *Gosavi* v. *Rivett-Carnac*, 13 B. 463 and *Ray* v. *Walker*, (1892) 2 Q. B. 88; 61 L. J. Q. B. 718, relied upon.

Appeal from the decree of the Sub-Judge of Chittagong, dated June 17th, 1909, reversing that of the Munsif of Satkania, dated December 17th, 1908.

Babu *Mohini Mohan Chakravarti* for Babu *Khitish Chandra Sen*, for the Appellant.

Babu *Girija Prosonna Roy Chowdhury* for Moulvi *Shamsul Huda*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in an action to eject the defendants who hold under a lease, dated the 31st May 1886. That lease, on the face of it, embodies a permanent settlement for agricultural purposes, and the defendants have been in occupation of the disputed land thereunder from the date of the settlement up to the present time. The plaintiff, however, contends that he is entitled to eject the defendants by virtue of the following clause in the lease: "Be it further stated that if I myself take up cultivation in future, that is, after twelve years, then you shall give up the said land to my cultivation." The question, therefore, arises whether this condition is operative in law. In support of the view that it entitles the landlord legally to terminate the tenancy at any time after the expiry of twelve years from the commencement of the lease, reliance has been placed upon the decision of the Judicial Committee in *Bhagwan Sahai* v. *Bhagwan Din* (1). But it is clear that the decision is of no assistance to the appellant. In that case, there was a conveyance with a clause for re-purchase within the term of ten years. No question, therefore, obviously arose as to the validity of the covenant. It does not follow, however, that a covenant for re-purchase at a period of time which may be indefinitely postponed, is valid in law. In fact, the decision of Sir George Jessel, M R, in *London and South Western Railway Company* v. *Gomm* (2), shows that a covenant of this description may be bad on the ground of remoteness. This view accords with the principle recognised in *Gosavi* v. *Rivett-Carnac* (3) and *Ray* v. *Walker* (4). It is further plain that the clause upon which the learned Vakil for the appellant relies is bad, because it contravenes the provisions of section 178 of the Bengal Tenancy Act. That section provides in clauses (*a*) and (*c*) of sub-section (1) that nothing in any contract between a landlord and a tenant, made before or after the passing of the Act, shall bar in perpetuity the acquisition of an occupancy-right in land or shall entitle the landlord to eject a tenant otherwise than in accordance with the provisions of the Act. The effect of the clause in substance is to reduce the defendants to the level of tenants-at-will after they have been in possession for more than twelve years

(1) 12 A. 337; 17 I. A. 98.
(2) 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620; 51 L. J. Ch. 530.
(3) 13 B. 463.
(4) (1892) 2 Q. B. 88; 61 L. J. Q. B. 718.

and have acquired a right of occupancy in accordance with the statutory provisions on the subject. The appellant, therefore, invites us to support a clause in the lease, which is inconsistant with the interest created in the lessee, is bad for remoteness, and tends to bar the acquisition of a right of occupancy. The validity of a clause of this character cannot possibly be maintained.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 1416 AND 1639 OF 1910.

April 30, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

IN No. 1416

THANDAN VALAPPIL EASUF'S SON, HYDERMAN KUTTI AND ANOTHER—APPELLANTS

versus

KOTUSERI VALAPPIL KOYA'S SON, SYED ALI AND ANOTHER—RESPONDENTS

IN No. 1639

CHIDAMBARAM PILLAY *alias* SUBBAYAN PILLAY—APPELLANT

versus

KADERSA ROWTHER AND OTHERS—RESPONDENTS.

Muhammadan Law—Guardianship—Sale by de facto *guardian of minor—Valid necessity, whether justifies alienation—Benefit to minor—Partition—Decree directing division of a shop into a number of shares—Non-reservation of power to sell if division not effected—Power of Court to make order after decree.*

The *de facto* guardian of a minor can, under Muhammadan Law, alienate the minor's property in cases of urgent and imperative necessity, whether the property be moveable or immoveable. He can also do acts on behalf of the minor which, from their nature, must necessarily be beneficial to the minor. In either class of cases, there is no substantial difference between the power of such a person who has assumed the duties of guardian without lawful authority and of a legal guardian, though there are cases wherein the powers exercisable by a lawful guardian are not within the competence of other persons.

According to the general principles of Muhammadan Law, the sale of a minor's property by an unauthorized guardian, even if it was not made for a valid cause, *i.e.*, for necessity, or under circumstances which would make the transaction purely advantageous to the minor, would, strictly speaking, be neither void nor voidable in the ordinary sense of the term. An alienation of the minor's property without any justifying cause is regarded as *maugut*, *i. e.*, its validity will depend upon the minor accepting the transaction on attaining majority. It is not inoperative until it is avoided, nor is it invalid unless and until it is ratified. It is a transaction in a state of suspense. Its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of the inception of the transaction. If he decides to adopt the transaction, it becomes valid from the inception; otherwise, it will be treated as void and of no effect from the very commencement.

A sale by a Muhammadan mother of her minor son's property to find money for the expenses of the minor's sister's marriage or for the discharge of family debts or for family purposes is not for a justifying cause, according to Muhammadan Law, and is, therefore, invalid.

Kali Dutt Jha v. *Abdul Ali*, 16 C. 627, 16 I. A. 96, distinguished.

Pathummabi v *Vittil Ummachabi*, 26 M. 734; *Durgozi Row* v. *Fakeer Sahib*, 30 M. 197; 1 M. L. T. 433; 17 M. L. J. 9; *Abdul Khadar* v. *Chidambaram Chettair*, 32 M. 276; 3 Ind. Cas. 876; 5 M. L. T. 201; *Mata Din* v. *Sheikh Ahmed Ali*, (1912)1 M. W. N. 183; 13 Ind. Cas. 976; 16 C. W. N. 338; 11 M. L. T. 145; 9 A. L. J. 215; 14 Bom.L.R. 192; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 15 C. L. J. 270; *Aliyumma* v. *Kunhammed*, 34 M. 527; 8 Ind. Cas. 1093; 20 M. L. J. 946; 9 M. L. T. 100; *Musammat Bukshun* v. *Musammat Doolhin*, 12 W. R. 337; *Bhutnath Dey* v. *Ahmed Hosain*, 11 C. 417; *Moyna Bibi* v. *Banku Bihari*, 29 C. 473; 6 C.W.N. 667, *Mafazzal Hussain* v. *Basid Sheikh*, 34 C 36; 4 C. L. J. 485; 11 C. W. N. 71; *Ram Charan Sanyal* v. *Anukal Chandra Acharyya*, 34 C. 65, 11 C. W. N. 160; 4 C. L. J. 578; *Hasan Ali* v. *Mehdi Husain*, 1 A. 533; *Hamir Singh* v. *Musammat Zakia*, 1A. 57; *Sitaram* v. *Amir Begam*, 8 A. 324 at p. 330; *Nizamuddin Shah* v. *Anandi Prasad*, 18 A. 373; *Baba* v. *Shivappa*, 20 B. 199 and *Hurbai* v. *Hirajee Byramjee Shanja*, 20 B. 116, referred to.

Where a decree directed the division of a shop into 54 shares, without making any provision for the sale of the shop in case such a division could not be conveniently effected:

Held, that it was competent to the Court to make the latter order at any time subsequently.

Bai Hirakore v. *Trikamdas*, 32 B. 103, 10 Bom. L. R. 23; 3 M. L. T. 141, referred to.

Second appeals against the decree of the Subordinate Judge of Palghat, in A. S. Nos. 1030 of 1909 and 53 of 1910, presented against that of the District Munsif of Palghat, in O. S. Nos. 248 of 1908 and 4 of 1909.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Appellants (in No. 1416).

Mr. *A. Nilakanta Aiyar*, for the Appellant (in No. 1639).

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents (in both).

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

JUDGMENT.

ABDUR RAHIM, J.—In both these appeals one common question arises, whether the sale of a minor's property by his mother acting as *de facto* guardian is valid under the Muhammadan Law, and if so, under what conditions. In one case, Appeal No. 1416, the deed of sale alleges that the shop which was sold had been vacant as the Municipality prohibited the selling of fish and flesh in that shop, that it was in a dilapidated condition, and the mother of the minor, who is the 8th defendant, was unable to execute repairs. The sale-proceeds, it is alleged, were applied to the discharge of certain debts contracted for the marriage of a sister of the minor and for other purposes. It was to meet the expenses of this marriage that money was required and the other facts mentioned apparently furnished the reason for selecting this particular property for sale. In Suit No. 4 of 1909, which has given rise to Second Appeal No. 1639 of 1910, the allegation in the plaint is that the minor's mother, who was managing the family affairs and maintained the children, utilised the money obtained by sale of certain mortgage rights belonging to the minor for the discharge of proper family debts and for other family necessity. The Court of first instance and the Appellate Court, relying on the authority of *Pathummabi* v. *Vittil Ummachabi* (1); *Durgozi Row* v. *Fakeer Sahib* (2) and *Abdul Khadar* v. *Chidambaram Chettiar* (3), have held in both the suits that the sales, even if the allegations as to the purpose be true, would not be binding on the minor in Muhammadan Law.

The decisions of the Courts on the question how far the mother or other near relative of a minor, who is not a guardian of the minor according to Muhammadan Law with respect to his property but has the custody and up-bringing of the minor, is authorised to alienate the minor's property are more or less conflicting. There are two decisions of the Privy Council bearing on the question which must be noted first; one of these is reported as *Kali Dutt Jha* v. *Abdul Ali* (4). That was the case of a guardian, and, with respect to his power, their Lordships of the Judicial Committee approved of the statement of the law as contained in Macnaghten's Principles of Muhammadan Law, Chapter VIII, clause 14, but they upheld the transaction in question in that case on the ground that there was dispute as to the title of the minor to the property and, therefore, the rule laid down in Macnaghten did not apply, and also on the ground that the sale was for the benefit of the minor. In *Mata Din* v. *Sheikh Ahmad Ali* (5), the sale was effected by the minor's mother who had custody of the minor's person and was in possession of his property, in order to pay certain debts binding on the minor and their Lordships held that a person, by *de facto* guardianship, may assume important responsibilities towards the minor though he cannot clothe himself with legal power to deal with the estate. They declared the sale not binding although it was made for the payment of an ancestral debt as it was not made of necessity, nor was beneficial to the minor inasmuch as the facts of the case showed that the sale of the property was unnecessary. It is not clear what their Lordships' decision would have been if the sale was made of necessity or was for the benefit of the minor. Another question was raised before the Judicial Committee in that case, whether a sale under the circumstances found there would be void or voidable. Their Lordships refrained from deciding that question. It should also be noted that one of the members of the Committee, Mr. Syed Ameer Ali, observed with some emphasis during the argument that there was no warrant in the Muhammadan Law for sale by the mother of her minor sons' immoveable property, even for necessity, but though much weight must, of course, be attached to this observation, it cannot be said that the decision of their Lordships was based on such broad and general grounds. In this Court it was held, in *Pathummabi* v. *Vittil Ummachabi* (1), that the principles of Hindu Law relating to alienation by a Hindu widow are not applicable to alienations by the mother of a Muhammadan minor, although the sale for the purpose of paying ancestral debts by a co-heir in possession of all the effects of the deceased, if *bona fide*,

(1) 26 M. 734.
(2) 30 M. 197; 1 M. L. T. 433; 17 M. L. J. 9.
(3) 32 M. 276; 3 Ind. Cas. 876; 5 M. L. T. 201.
(4) 16 C. 627; 17 I. A. 96.
(5) 16 C. W. N. 338; 11 M. L. T. 145; 9 A. L. J. 215; 15 C.L.J. 270; (1912) 1 M.W.N. 183; 13 Ind. Cas. 976; 14 Bom. L. 192; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6.

would be binding on the other co-heirs. The principle of this ruling has been followed in *Durgoji Row* v. *Fakeer Sahib* (2); *Abdul Khadar* v. *Chidambarasam Chettiar* (3). In none of these cases was any definite opinion expressed on the general question, how far an alienation by a *de facto* guardian which is made for neccessity or for the benefit of the minor is valid. Nor was this question decided in Second Appeal No. 1443 of 1907, an unreported judgment of Mr. Justice Benson and one of us. It was held in *Thattoli Kothiian Aliyumma* v. *Kunhammad* (6) that a guardian's powers in respect of the immoveable property of the ward are very restricted in Muhammadan Law and urgent necessity or clear benefit to the ward must be shown before an alienation by the guardian could be upheld. In laying down this proposition, the learned Judge followed the Privy Council ruling already mentioned [*Kali Dutt Jha* v. *Abdul Ali* (4)] and certain decisions of the Bombay and Calcutta High Courts.

In the Calcutta High Court the law seems to be in a somewhat uncertain state. The earlier decisions confined within very narrow limits the power of the *de facto* or *de jure* guardian in dealing with a Muhammadan minor's property, while in more recent decisions this view has undregone considerable modification. In *Musammat Bulshun* v. *Musammat Doollin* (7), a sale by a guardian of a minor's property was held not to be permitted by the Muhammadan Law except for urgent necessity. In *Bhutnath Dey* v. *Ahmed Hosain* (8), a mortgage by a person purporting to act as a guardian was held to be void as it was not shown that the money raised by the mortgage and utilised for paying arrears of rent could not have been raised otherwise than by mortgaging the minor's property. Similarly, in *Moyna Bibi* v. *Banku Bihar* (9), Justices Rampini and Brett set aside a sale by a *de facto* guardian because such a person has no authority to deal with the minor's estate, doubting whether even if the sale was for the manifest advantage of the minor it, could be upheld under the Muhammadan Law. In *Mafazzal Hosain* v. *Basid Sheikh* (10), however, Rampini and Woodroffe, JJ., decided that a sale for urgent necessity in order to pay the debts due by the deceased and for the maintenance of the minor was valid in Muhammadan Law. Mr. Jutsice Woodroffe was inclined to place the validity of such a transaction also on grounds of justice, equity and good conscience inasmuch as it was not made out that it was prohibited by Muhammadan Law. It should be noted that the learned Judges distinguished the decision in *Moyna Bibi* v. *Banku Bihar* (9) on the ground that in that case it was not shown that the transaction was for the benefit of the minor. Chief Justice Maclean and Mr. Justice Caspersz, in a case reported as *Ram Charan Sanyal* v. *Anukul Chandra Acharyya* (11), followed the ruling of Rampini and Woodroffe, JJ., in the last mentioned case and held that a sale by the mother as *de facto* guardian of her minor son is good and valid if it is found to have been made *bona fide* for the benefit of the minor. Referring to the case in *Moyna Bibi* v. *Banku Bihar* (9), they point out that the effect of that ruling is considerably modified by the ruling in *Mafazzal Hosain* v. *Basid Sheikh* (10). In fact, however, they have laid down a broader proposition than what forms the basis of Rampini and Woodrofe, JJ.'s judgment in *Mafazzal Hosain* v. *Basid Sheikh* (10), placing the ruling on general grounds of justice, equity and good conscience. But, with all deference to the learned Judges, there can be no doubt that the question must be determined in accordance with the provisions of Muhammadan Law. Moreover, it is difficult to see how a man who chooses to buy a minor's property from a person who has no power to deal with it, however *bona fide* his action may have been, can invoke any principles of justice and good conscience to support the transaction itself, though, no doubt, such considerations may be a good ground for the Court refusing to render any help to the minor when he seeks to recover the property except on the condition of his restituting whatever benefit he has derived from the transaction. The other principle indicated in the decision of Rampini and

(6) 34 M. 527; 8 Ind. Cas. 103; 20 M. L. J. 943; 9 M. L. T. 100.
(7) 12 W. R. 337.
(8) 11 C. 417.
(9) 29 C. 473; 6 C. W. N. 667.
(10) 34 C. 36, 4 C. L. J. 485; 11 C. W. N. 71.
(11) 34 C. 63; 11 C. W. N. 160, 4 C. L. J. 578.

Woodroffe, JJ. and in other rulings, *viz.*, that in Muhammadan Law urgent necessity and benefit of the minor is a justifying cause of such a transaction, though the person who acted on behalf of the minor had no legal authority of a guardian, seems to be a more intelligible ground and requires careful consideration.

In the Allahabad High Court, in *Hasan Ali* v. *Mehdi Husain* (12), a sale by the mother was upheld on the ground that it was made for necessary purposes, namely, the payment of ancestral debts and the charge of maintaining the minor. In *Hamir Singh* v. *Musammat Zakia* (13), a Full Bench of that Court held that a decree duly obtained against one heir, who is in possession of the entire estate of the deceased, is binding on the minor. In *Sitaram* v. *Amir Begam* (14), there are certain general observations of Mr. Justice Mahmood to the effect that the powers of alienation, such as those enjoyed by a Hindu widow, are not known to the Muhammadan law, a Muhammadan widow being merely a co-heir with her children and has not the authority of a guardian with respect to their property: and Chief Justice Edge, in *Nizam-ud-din Shah* v. *Anandi Prasad* (15), set aside a mortgage executed by a Muhammadan minor's uncle, which was apparently not created for necessity on the ground that he had no power of alienation over the property.

Two decisions of the Bombay High Court were brought to our notice, reported as *Baba* v. *Shivappa* (16) and *Hurbai* v. *Hiraiee Buramjee Shanja* (17). In the first case, a sale by the mother professing to act as guardian of her minor son was set aside although it was made to discharge certain debts of the minor's deceased ancestor; and in the other case, a mortagage by the mother was declared not to be binding as it was made neither for absolute necessity nor for the benefit of the minor. Both the rulings enunciated the general principle that a mother, not a legal guardian, cannot bind the estate of the minor by any act of hers.

In this state of the rulings, it becomes necessary to examine the text-books on Muhammadan Law to ascertain how a person who is not a legal guardian, but is in fact acting as guardian, is regarded in Muhammadan Law.

We may take it that the powers of such a person cannot be greater than those of a guardian recognised by the law. The question is, whether they have any power at all to bind the minor's estate or rather, in what circumstances, if any, dealings of a *de facto* guardian with the minor's estate will be upheld.

It seems to us to be quite clear from the authoritative pronouncement of Muhammadan jurists, as well as upon principles of Muhammadan jurisprudance, that while the general rule is that the dealings with such a person do not *ipso facto* bind the minor, the law recognises certain exceptions to this rule. The exceptions are mainly based on the general principle of Muhammadan Jurisprudence that necessity is a valid ground for relaxing a strict rule of law and the application of the principle in cases where a minor has no legally appointed guardian seems to be well recognised. The author of Hedaya (see Hamilton's Translation, Grady's Edition), in laying down that a person who has the protection of an orphan may lawfully take possession of a gift made to the orphan in order to make the gift valid, observes:— "Acts in regard to infant orphans are of three descriptions. (I) Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him (here we may point out that the proper translation of the word in the original, namely, * * * which is translated as 'goods' should be animals for breeding purposes), a power which belongs solely to the *walee* or natural guardian whom the law has constituted the infant's substitute in those points. (II) Acts arising from the wants of an infant such as buying or selling for him on occasions of need. Strictly speaking, the translation of the passage in the original Hedaya ought to be purchase of what the minor cannot do without and sale of it or hiring a nurse for him for the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle or (in the case of a

(12) 1 A. 533.
(13) 1 A. 57.
(14) 8 A. 324 at p. 330.
(15) 18 A. 373.
(16) 20 B. 199.
(17) 20 B. 116.

fondling) the *mooltakit* or the mother, provided, she be maintainer of the infant; and as these are empowered with respect to such acts, the *walee* or natural guardian is also empowered with respect to them in a still superior degree, nor is it requisite with respect to the guardian that the infant be in his immediate protection. (III) Acts which are purely advantageous to the minor, such as accepting presents or gifts and keeping them for him, a power which may be exercised either by a *mooltakit*, brother or uncle and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant receiving benefactions of an advantageous nature to the infant, therefore, he is empowered in regard to these acts, provided he be discreet, or any person under whose protection he may happen to be." It should be observed that the sale and purchase, mentioned as belonging to the first category of enumerated transactions, which are stated to be within the power of lawful guardian but not of a person who is not such a guardian but has in fact the custody of the minor, are in the nature of transactions entered into for purposes of profit. This text, however, be it also noted here, does not deal with the question, under what conditions such sales and purchases by the guardian will be binding on the minor. Stated in plain language, the law according to the Hedaya is this: a person who is in actual charge of the property and person of the minors is empowered to do acts which are of imperative necessity having regard to the wants of the infant and acts which by their nature are necessarily advantageous to the infants; such acts are not confined to dealings with any particular form of property of the minor so far as it can be gathered from the language of Hedaya and the other text-books which will be presently noticed and the very principle upon which the validity of such acts is based precludes the idea of any such limitation. The rule enunciated by the Hedaya is accepted as good law by other jurists of the Hanafi School. Imam Zellai, in his well-known commentary on *Kanz*, *viz.*, Tabinul Haquors, Vol. VI, at page 34, in the Chapter on Sales, also states the law in similar terms. He says that the power which the law allows to be exercised over a minor is of three kinds; (1) What must be advantageous to the minor and such power exists in all who have charge of the minor, whether guardians or not,; for example, the acceptance of a gift or alms, and such acts can be done by the infant himself if he is of the age of discretion: (2) what is absolutely injurious, such as divorcing the minor's wife or emancipating a slave: such authority is not recognised in any one; (3) what is midway between the two, that is, what may be advantageous or hurtful to the minor, such as sale or hiring of property for the purpose of profit; such power is possessed only by the father, the grandfather and their executors, whether they have the actual custody of the minor or not, because their power to deal in this manner with the minor's property is by reason of their guardianship. Therefore, it is not a necessary condition of the exercise of such power by them that the minor should be in their actual custody. This is how it is stated in Alkafi:—The hiring of a house belongs to the first category; and (4) giving the minor in marriage, this is a power possessed by all *asha*, or paternal kindred as it is usually translated, and also by *zavilarham* or distant kindred in the absence of paternal kindred. None others possess this power. In Majmaul Anhar, which is a commentary of Multakal Abhar, it is pointed out that according to Ashshafai and Malik, a *de facto* guardian can buy or sell for the minor only with the permission of the Judge but the author does not doubt that the Hanafi law, which is the law governing the parties in this suit, is, as stated in the text of Altagwa, in the same terms as in the Hedaya and *Kanz*. It is not necessary to refer to the Arabic text-books on this point, as there seems to be no difference of opinion so far as the Hanafi jurists are concerned and all the text-books repeat the statement of the law as cited above. The principle of the rule is also forcibly illustrated in the provisions of Muhammadan Law regarding the powers of an executor in connection with the question whether, where more than one executor have been appointed by the testator, one of them can act singly. The general rule is that one of the two joint

executors cannot act alone. But an exception is recognised in such matters as are of urgent necessity and purely for the benefit of the estate. Thus, in the Hedaya (see Hamilton's Translation, Grady's Edition, Vol. IV, Ch. 7, page 699), the matters in which one of two executors can act singly are thus enumerated:—Payments of funeral charges or for purchasing victuals or cloths for an infant, the hiring of a nurse, the selling of goods of a perishable nature, preserving the property of the deceased. In all such matters, one of the joint executors is permitted to act alone on two grounds, urgent necessity or clear benefit and advantage to the estate. We may also point out here that, according to the general principles of Muhammadan Law, the sale of a minor's property by an unauthorised guardian, even if it was not made for a valid cause, *i.e.*, of necessity, or in circumstances which would make the transaction purely advantageous to the minor, would, strictly speaking, be neither void nor voidable in the ordinary sense of the terms. An alienation of the minor's property without any justifying cause is regarded as *maugat* or dependent, that is to say, its validity will depend upon the minor accepting the transaction on attaining majority. It cannot be said to be inoperative until it is avoided nor can it be said to be invalid unless and until it is ratified. It is a transaction in a state of suspense; its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of inception of the transaction. If he decides to adopt the transaction, it becomes valid from the inception; otherwise it will be treated as void and of no effect from the very commencement. Some Hanafi Jurists are inclined to classify such transactions under the head of *Sa'ibs* or legally correct transactions on the ground that the subject-matter dealt with being fit for the purpose and the parties to the transaction being majors, the contract is validly constituted and that is all that is required to make a transaction *Sa'ib* or legally correct, though it will not be operative until the minor on whose behalf the transaction was entered into notifies his assent on attaining majority. But the question as to the exact nomenclature applied to such a transaction in Muhammadan Jurisprudence is of no substantial importance. All that we are concerned with is its legal effect. (See *Baharurraiq*, Vol. VI, p. 78). The law, as regards the effect of dealings with a minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor, is but a corrolary of the general rule to sales by a person professing to deal with another's property but without having legal authority to do so, *i.e.*, by a *Feroli* as he is technically called; such sales generally are treated as *malikuf* or dependent. The subject is discussed in Hedaya, Vol. VI, Chapter X, Section of *Feroolez Bez* or the sale of the property of another without his consent; Grady's Edition of Hamilton, page 296, Baillie on the Muhammadan Law of Sale, pp. 218, 220 and 221, 249, Kazi Khan, Vol. II, p 172(original) Talimulhaqu, Vol. IV, p. 44 (original), Radd-ulmuhtar, original, Vol IV, p. 110; *Bahrurraiq* (original) Vol. V, pp. 75 and 76; Almajallah (original), p. 53; Fatwai Alamgiri original II, Calcutta edition, page 235. The result of the above discussion is, that according to Muhammadan Jurists, in case of urgent and imperative necessity such as those mentioned, the *de facto* guardian can alienate the property of the minor, no distinction being made between moveable and immoveable property. Also such a person can do acts on behalf of the minor which from their nature must necessarily be beneficial to the minor. In either class of cases, there seems to be no substantial difference between the power of such a person who has assumed the duties of a guardian without lawful authority and of a legal guardian. But there are other powers which a lawful guardian can exercise which are not within the competence of other persons. It may be observed here that an act by which the wants of the minor are met, must, to that extent, be also advantageous to the minor, and that is apparently why some of the text-writers regard acts done of necessity in the same light, as acts which are purely for the benefit of the minor. (See Fathul Mubeen, Vol III, Chapter on Abomination, section Sale, page 410).

It should be pointed out that, in Macnaghten's Precedents of Muhammadan

Law, it is stated in case 6, at page 171, that a mother, who assumed the guardianship of her minor son, cannot exercise any right over the property of the minor. This, as a statement of the general rule, is undoubtedly correct, but leading authorities, as we have shown, recognize certain exceptions to this rule. The case cited by Macnaghten in which a mother sells a small portion of her minor son's property for resuming the estate and recovers judgment in a suit would seem to be a case of absolute necessity and pure advantage to the minor. Such a sale is, however, stated to be totally illegal and inadmissible. This would seem to be in conflict with the case in Chapter VII, page 305, where it is laid down that, where the uncle of a minor jointly interested in the property sells both his own share and the share of the minor, such a sale may be valid under certain circumstances, such as when the minor's share is sold for double its value, or where there is no means of supporting him without recourse to sale of his property, or where the land is in danger of being lost, or with a view to save the minor's property from usurpation or when some similar emergency has arisen. At all events, according to the authoritative Hanafi Jurists, there can be little doubt that the law is as we have stated it and the general trend of decisions of the Courts seems to be substantially to the same effect.

In the present cases, the sales were clearly not of the character which would be upheld on the ground either of their being made of necessity or being by their nature necessarily beneficial to the minor. The sale, which is in question in S. A. No. 1416, was really made to find money for the expenses of the minor's sister's marriage and neither this nor the grounds on which the sale, which is in dispute in S. A. No. 1639, was made, are justified nor the discharge of family debts and other family purposes, can be said to be justifying causes according to the rule of Muhammadan Law.

In Appeal No. 1416, an objection was taken to the decree which directs the division of the shop in as many as 54 shares on the ground that it does not make any provision for the sale of shop in case such a division cannot be conveniently effected. But the objection was not taken in the lower Courts and we are not prepared to hold that such an order, if found to be necessary, cannot subsquently be made by the Court which passed the decree. See *Bai Hirakore* v. *Trikamdas*(18). In Appeal No. 1639, it was argued by the Pleader for the applicant that the suit was barred on two grounds, *firstly*, even if the findings of the Court be accepted that Jamil Mohamad Rular, the 10th defendant, attained majority in January 1906, the suit which was instituted on the 3rd January 1909 was time-barred. We find that the verification of the plaint is dated the 23rd of December 1908, but the plaintiff did not apparently file the plaint until 4th January 1909.

If the Court re-opened after the Christmas vacation on the 4th January 1909, the suit would be within time and if the objection now taken had been taken in the lower Courts, this apparently would have been the answer. The question not having been raised before the lower Courts and being one involving an investigation of facts, cannot be entertained for the first time in second appeal. The second ground on which it is contended that the suit is barred is that although the 10th defendant could avail himself of three years' time after attainment of majority, the plaintiff, as his assignee, cannot be allowed such extension of time. This question again was not raised in the lower Courts and, in the circumstances which are stated in paragraphs 15 and 16 of the judgment of the District Munsif in Suit No. 248, we do not think we should allow the objection to be raised for the first time here. The result is both the appeals are dismissed with costs.

AYLING, J.—I agree.

Appeals dismissed.

(18) 32 B. 103; 10 Bom. L. R. 23; 3 M. L. T. 141.

SHASHEE BHUSHAN *v.* RASIK LAL ROY.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1303 OF 1909.
April 12, 1912.
Present:—Mr. Justice Mookerjee and
Mr. Justice Carnduff.
SHASHEE BHUSHAN DAS AND OTHERS —PLAINTIFFS—APPELLANTS
versus
RASIK LAL ROY AND OTHERS— DEFENDANTS—RESPONDENTS.

Plaint—Verificaiton, improper—Trial on merits, effect of—Second appeal—Objection as to defect in verification—Civil Procedure Code (Act XIV of 1882), ss. 53, 578.

A plaint was verified by the first three plaintiffs, who were *sui juris*, for themselves, and on behalf of the mother of the other three plaintiffs, who were minors, by her son who was the first plaintiff. The first plaintiff had no authority from the mother of the infants to verify the plaint on their behalf. The first Court held that the plaint had not been properly verified, but yet proceeded to try the suit on the merits and dismissed it. That decision was affirmed by the lower Appellate Court. The plaintiffs contended in second appeal that, so far as the minor plaintiffs were concerned, the plaint ought to have been taken off the file as it was not properly verified:

Held, that the proper procedure here was not to frame any issue but to decide the preliminary question, whether the plaint was properly verified, first, for then the plaintiff would have had an opportunity of curing the defect; that, therefore, there was no substance in the plaintiffs' contention; and further, that the defect, if any, was completely cured by section 578 of the Code of 1882.

Basdeo v. *Smidt*, 22 A. 55 and *Shama Soondaree* v. *Rahimooldeen*, 24 W. R. 71, relied upon.

Appeal from the decree of the District Judge of Burdwan, dated May 22nd, 1909, affirming that of the Munsif of that place dated September 21st, 1908.

Babus *Baidya Nath Dutt* and *Jnanendra Nath Sarkar*, for the Appellants.

Babu *Bipin Bihari Ghosh* (Junior), for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in an action for recovery of possession of immoveable property, which has been concurrently dismissed by the Courts below. It is plain that the decision on the merits cannot be successfully challenged in second appeal. But it has been ingeniously argued by the learned Vakil for the appellants that no decision on the merits ought to have been given by either of the Courts below inasmnch as the defendants successfully urged before the Court of first instance that the plaint had not been properly verified. In support of this proposition, reliance has been placed upon the case of *Baroda Prosad Bose* v. *Girija Nath Roy Chowdhury* (1). In our opinion, this position cannot be supported.

There were six plaintiffs in the suit, of whom three were *sui juris* and the rest were infants on whose behalf their mother acted as next friend. The plaint was verified by the first three plaintiffs for themselves, and on behalf of the mother of the other three plaintiffs, by her son who was the first plaintiff. Objection was taken by the defendants that the plaint had not been properly verified, as it transpired that the first plaintiff had no authority from the mother of the infants to verify the plaint on their behalf. The Court of first instance, therefore, held that the plaint had not been properly verified, but proceeded to try the suit on the merits. As we have already stated, the case of the plaintiffs was negatived on the merits and that decision has been affirmed on appeal by the District Judge. The plaintiffs now contend that as in respect of the three infants, the plaint was not properly verified, so far as they were concerned, the plaint ought to have been taken off the file. There is obviously no substance in this contention. No doubt, it was held, in the case of *Baroda Prosad Bose* v. *Girija Nath Roy Chowdhury* (1), that the provisions of section 53 of the Code of 1882 for amendment of the plaint, when it has not been signed and verified as recognised by section 51, cannot be put into operation after the issues have been framed. It is clear, however, that the proper procedure to follow in cases of this description, where the verification is challenged, is not to frame any issue but to decide the preliminary question first. In fact, it is obvious from the definition of the term 'issue' as given in section 146 of the Code of 1882 that no issue, that is material proposition of fact or law affirmed by one party and denied by the other, can arise till there is a proper plaint. Consequently, as pointed out in the case of *Port Canning and Land Improvement Company* v. *Dharanidhar Sardar* (2), the Court should first decide the preliminary objection to the validity of the plaint. But the learned Vakil for the appellant has argued that if issues have been, as a matter of fact, raised, the power of the Court to act under section 53 completely ceases. This contention

(1) 2 C. L. J. 11.
(2) 9 C. W. N. 608.

is inconsistent with the decision in *Ganga Sahai* v. *Muhammad Ali Jan Khan* (3), where it was explained that the mere fact that issues have been raised does not stand in the way of the return of the plaint by the Court for amendment under section 53. It is the duty of the Court to return the plaint before the settlement of issues and the mere fact that issues have been improperly settled, cannot deprive the plaintiff of the opportunity which he might otherwise have had and ought to have had of curing the defect in the plaint. If, therefore, the proper procedure had been followed in this case, the position would have been that the plaintiffs might have got an opportunity to verify the plaint properly, and, if it had been so amended, there is no question that it could not have been rejected as laid down in the cases of *Fateh Chand* v. *Mansab Rai* (4) and *Munshi Fakir Chand* v. *Mahesh Das* (5). There is, therefore, no substance in the objection taken on behalf of the appellants. We may further add that, as laid down by the learned Judges of the Allahabad High Court in the case of *Basdeo* v. *John Smidt* (6), the defect, if any, has been completely cured by the provisions of section 578 of the Code of Civil Procedure of 1882. See also *Shama Soonduree* v. *Rahim-ud-deen* (7).

The result is that the decree made by the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(3) 20 A. 444 *note*.
(4) 20 A. 442.
(5) 20 A. 445 *note*.
(6) 22 A. 55.
(7) 24 W. R. 71.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1783 OF 1911.

April 29, 1911.

Present:—Mr. Justice Sundara Aiyar.

In re ARMUGAM PILLAY—DEFENDANT—APPELLANT.

Practice—Procedure—Trial of suit—Summoned witnesses of party absent—Application by party for issue of warrants to witnesses—Another application for adjournment of case—Order granting adjournment—Failure of Court to pass orders on application for warrants—Applicant's failure to secure attendance of witnesses at adjourned hearing—Refusal of Court to grant further adjournment—Landlord and tenant—Suit to eject tenant—Denial of landlord's title—Absence of notice to quit.

In a suit to eject a tenant, the latter denied plaintiff's title and the allegation in the plaint that the title was denied before suit was not traversed in the written statement. Nor did the defendant raise the plea in his statement of the want or inadequacy of notice, but took it only in the grounds of appeal:

Held, that the defendant was not entitled to rely on the plea of want of notice in bar of plaintiff's claim.

Kathijakutti Umma v. *Kuthrussa*, 20 M. L. J. 415; 5 Ind. Cas. 924; 7 M. L. T. 173; (1910) M. W. N. 158, referred to.

At the first hearing of the suit, the defendant represented to Court that his summoned witnesses were absent and applied for the issue of warrants against them and also for adjournment. The Court adjourned the hearing but did not pass orders on the application for warrants. The defendant took no steps to secure the attendance of his witnesses at the adjourned hearing, when he again prayed for a further adjournment which was refused:

Held, that the adjournment was rightly refused.

Second appeal against the decree of the District Court of Tinnevelly, in A. S. No. 420 of 1910, preferred against the decree of the District Munsif of Tuticorin in O. S. No. 396 of 1909.

FACTS.—The following judgment of the District Munsif sets forth the facts of the case:—

This is a suit to establish plaintiff's title to the suit property;

(2). To declare that the sale to 1st defendant by 3rd defendant on behalf of 2nd defendant is not valid and binding on the plaintiff and to cancel the sale;

(3). To recover the suit property from the 1st defendant with past profits Rs. 13-8 together with future profits and costs of suit.

The plaintiff states that the property originally belonged to one Parasakthi Ammal, his mother's sister, that she conveyed the same to plaintiff by a registered Will on 25th September 1897 as she had no issue, that the plaintiff has been enjoying it ever since, that he let out the house to 1st defendant for rent at Re. 0-12-0 per mensem, that the 1st defendant has paid the rent till March 1908 and defaulted to pay subsequent rent on a frivolous ground that he is in possession of the house in virtue of a sale to him by the 3rd defendant, who executed it on behalf of his daughter, the 2nd defendant, that as she is living with her husband and as she is major, she had no necessity to sell the property through her father, the 3rd defendant and that the sale is not valid and binding upon the plaintiff.

In re ARMUGAM PILLAY.

2. First defendant pleads that the plaint property was not the property of Kuppammal, that she did not enjoy it in her right, that she had no money of her own to purchase it, that it was purchased in her name by her husband *benami*, that the possession was not given by the plaintiff to him (1st defendant), and that the plaint property was sold to this defendant and Pichiammal on 21st July 1908 for Rs. 200 by 3rd defendant and it is now in his possession.

3. *Issues.*

(1). Whether the plaint property was the property of Kuppammal or of her husband Subbu Pillai?

(2) Whether the 1st defendant was let into possession by the plaintiff as alleged by him? If so, what is the amount of rent that plaintiff would be entitled to?

(3) To what relief, if any, is plaintiff entitled ?

4. First defendant's Pleader says he has no instructions and 1st defendant is absent.

Plaintiff examined two witnesses and proved his claim. Exhibit B is the sale-deed to Kuppammal *alias* Parasakthi Ammal by her father. This shows that the plaint properties are her absolute property. She has bequeathed them in favour of the plaintiff by Exhibit A.

Issues 1 and 2 are found for the plaintiff.

5. Judgment for plaintiff as prayed for with costs and subsequent rent at the rate originally stipulated for.

The 1st defendant appealed to the District Court on the following grounds:—

1. The decree of the lower Court is contrary to law and against the weight of evidence.

2. The evidence adduced by the plaintiff in respect of his case is insufficient and cannot support the lower Court's decree.

3. The lower Court failed to give sufficient time to appellant and this disabled him from producing his evidence.

4. The notice upon which the plaintiff relies is not in accordance with the provisions of law nor is the notice in evidence,

5. The decree, so far as it directs that the plaintiff do recover the same from 1st defendant, cannot be supported.

The District Judge delivered the following judgment:—

The main objection to the lower Court's decision is that it should have adjourned on 1st defendant's application First Appeal No. 1063, dated 30th June 1910 and that it should have issued warrant for the witness, for whom it was asked for therein. In fact an adjournment was given to 8th July 1910, and that should have been sufficient for the execution of the processes asked for, warrant and two summonses, all against persons in Tuticorin itself. The lower Court, no doubt, did not pass orders specifically on the application for warrant but only on that for adjournment with which it complied. Whether the former was pressed is not clear There is, however, other reasons available in support of the lower Court's eventual decision. On 8th July 1910, when the suit was disposed of, 1st defendant's Pleader repeated his application for adjournment and, on its being refused, said that he had no instructions. First defendant was absent. I cannot see how he had any right to expect that the case would be postponed without such progress as was possible being made with it, or that such evidence as plaintiff or he could produce at once would not be taken. If he had taken part in the trial, so far as it could be proceeded with, and then asked for an adjournment, the persent plea might merit consideration. As the facts stand, the lower Court was justified in proceeding to trial and disposal, and this ground of appeal must fail.

3. On the merits, plaintiff's evidence transferred the burden of proof and alleged was unrebutted. The ground of appeal regarding insufficiency of notice represents nothing in 1st defendant's written statement and is unsustainable in view of the decision in *Kathiya Kutti Umma* v. *Kuthusa* (1). This portion of the appeal fails also.

4. The lower Court's decision is confirmed with costs.

First defendant appealed to the High Court.

Mr. *C. Madhavan Nair*. for the Appellant.

This second appal coming on for Orders as to admission under the provisions of order XLI, rule 11 of Act V of 1908, the Court delivered the following

JUDGMENT.—There are no grounds for interference in second appeal in this case. The first point argued is that the District

(1) 20 M. L. J. 415; 5 Ind. Cas. 924; 7 M. L. T. 173; (1910) M. W. N. 158.

Munsif ought to have granted a further adjournment of the suit on the 8th July 1910. It does not appear what steps the 1st defendant had taken prior to that date after the previous adjournment and what steps he wanted to take by obtaining the adjournment. In fact no sworn statement appears in the papers before me which would justify my holding that the Munsif acted wrongly in refusing the adjournment. The 1st defendant did not appear after the adjournment was refused. With reference to the question of notice; no plea was raised in the written statement, probably because the defendant considered it untenable inasmuch as he had, according to the allegation in the plaint, not traversed in the written statement, denied the plaintiff's title prior to the institution of the suit. Even now the appellant does not say what notice he got and how he says it was insufficient. The decision in *Kathiya Kutti Umma* v. *Kathussa* (1) seems also to apply in the circumstances of this case. I reject the second appeal.

Appeal rejected.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL NO. 137 OF 1910.

June 11, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Richardson.

MANINDRA CHANDRA NANDI—PLAINTIFF—APPELLANT

versus

ANNODA MOHAN ROY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Patni tenure—Creation of tenure—Two estates comprised in one tenure—Power given by kabulyats *to bring tenure to sale under Regulation VIII of* 1819, *legality of—Suit for declaration that tenure liable to sale under Regulation—Party—Collector not made party to suit—Suit improperly framed—No declaration should be made.*

A *patni* tenure comprised two estates bearing separate *touji* numbers. By the *kabulyat*, express power was given to the landlord in default of payment of any part of the rent due for any year to bring the tenure to sale under Regulation VIII of 1819. The landlord made two applications to the Collector to sell the tenure under the Regulation. Both were refused, and on the second occasion the Collector's action was upheld by the Board of Revenue. The landlord brought a suit for rent and interest and a declaration of his right to have the tenure sold under the Regulation. The Collector was not made a party to the suit:

Held, that the Collector ought to have been made a party and that the suit not being properly framed, no declaration should be made.

Appeal from the decree of the Sub-Judge of Rampur Boalia, dated December 20th, 1909.

Babus *Ram Charan Mitra*, Senior Government Pleader, *Jogesh Chandra Dey*, *Hemendra Nath Sen*, *Sarat Kumar Mitra*, for the Appellants.

JUDGMENT.—The plaintiff, Maharajah Manindra Chandra Nandi, is the proprietor of two estates bearing separate numbers (Nos. 136-1 and 137) on the revenue roll of the Rajshahye District. The tenure to which the suit relates comprises these estates and was created in the year 1251 (1844) as a *patni taluk*, the rent reserved being Rs. 27,001 per annum. The *kabulyat*, dated 26th *Ashar* 1251, executed by the original holder, is recited and its terms are embodied, in the *kabulyat* dated 16th *Sraban* 1279 (1872), executed in favour of the plaintiff's predecessor-in-interest by the father of defendants Nos. 1-3, Babu Mohini Mohan Roy, who had purchased the tenure in 1871. By these documents express power is given to the landlord in default of payment of any part of the rent due for any year to bring the tenure to sale under the provisions of Regulation VIII of 1819. It appears that the plaintiff made two applications to the Collector to sell the tenure under the Regulation, one in respect of the rent due for the year 1313 and the other in respect of the rent due for the following year. Both applications were refused and on the second occasion, the matter having been brought before the Board of Revenue, the Collector's action was upheld by an order of the Board dated the 17th September 1908.

The plaintiff brought the present suit, *firstly*, to recover the rent and cesses due for the years 1313, 1314 and 1315 with interest, the claim being laid at Rs. 1,25,174 odd and a further claim being made for interest during the pendency of the suit and up to the date of payment, and, *secondly*, to obtain a declaration of his right to have the tenure sold under Regulation VIII of 1819. The defendants Nos 1-4 were impleaded as being the heirs of Babu Mohini Mohan Roy. It has been found, however, that on a partition of the property left by the latter, the tenure in question was attached to the defendant

No. 1. The defendant No. 5 is Receiver to the estate of that defendant.

In the lower Court, the plaintiff obtained a decree against the defendant No. 1 for the sum claimed with interest after decree at the rate of six per centum per annum. Apparently, by inadvertence the learned Sub-Judge omitted to allow interest during suit. He also rejected the prayer for a declaration. This appeal preferred by the plaintiff is confined to these two matters. The defendants Nos. 1 and 5 were not represented before us and we have not had the advantage of hearing argument on their behalf.

As to interest during suit, it should have been allowed at the same rate as interest after suit. The decree of the Sub-Judge will be modified accordingly.

The question whether the declaration sought for should have been made is more difficult. The Sub-Judge refused to make the declaration not only on the grounds suggested by the order of the Board of Revenue to which we have referred but also on the further ground that the declaration is unnecessary for the purposes of the suit as a suit for arrears of rent and in the proper exercise of judicial discretion ought not to be made. In connection with the Board's order, the Pleader for the plaintiff (Babu Ram Charan Mitter) very properly drew our attention to note 31 on page 77 of the Board's Manual of the Revenue and the Patni Sale Laws (Edition 1906). The view, which the Board appear to have taken in such cases as the present, is that a tenure covering more than one revenue estate is not a *patni* tenure within the meaning of Regulation VIII of 1819 and that the *zemindar* or landlord has, therefore, no right to have recourse to that Regulation for the recovery of arrears of rent in respect of it. We do not find that this view is based upon any express prohibition in, or any particular provision of, the Regulation. The reasoning, so far as it can be gathered from the material before us, is of a general character, to the effect that it is of the essence of a *patni* tenure that it should be carved out of one estate, that the Regulation does not contemplate *patni* tenures embracing more than one estate, and that to admit the existence of such *patni* tenures would lead to complications and is contrary to public policy or the policy of the revenue laws. These propositions are not self evident and, as at present advised, we are not prepared to say that they correctly interpret the law. At the same time, we feel that the matter is one of some importance and that it is inconvenient that we should be called upon to arrive at a decision upon it in a proceeding in which the Revenue authorities have had no opportunity of being heard. The issue lies between the plaintiff and the Collector who refused to sell the tenure at the plaintiff's instance rather than between the plaintiff and his tenants, and so far as any revenue or fiscal question is involved, the Collector would not be bound by any decree which might be made in this suit to which he is not a party and of which he has had no notice. In other words, for the present purpose the suit has not been properly framed. It is within the discretion of the Court to refuse to make a declaratory decree and, in the circumstances, while we do not accept all his reasons, we agree on the whole with the Subordinate Judge that no declaration should be made. We come to that conclusion without expressing any final opinion on the question whether the plaintiff has or has not the right which he claims.

The result is that the appeal partly succeeds and partly fails. The plaintiff is entitled to costs in proportion to his success. The defendants not having appeared will have no costs.

Appeal partly allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2042 OF 1910.

April 26, 1912.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

MANDOTH VEETIL CHAPPAN—APPELLANT

versus

PUTHANPURAYIL RANU AND OTHERS—RESPONDENTS.

Malabar Tarwad—Possession, suit for, by a member—Subsistence of mortgages on property—Whether plaintiff should first sue to set aside mortgages—Right of junior members of a Hindu family—Redemption of mortgage, suit for—Valuation—Jurisdiction.

The proper valuation of a suit to redeem a mort-

gage is the amount of the mortgage or mortgages admitted by the plaintiff to be binding on him and not the mortgages set up by the defendant. The question of jurisdiction has to be decided on the averments in the plaint and not with reference to the pleas of the defendant.

Chandu v. *Kombi*, 9 M. 208, referred to.

A junior member of a Hindu family or of a Malabar Tarwad need not, in the first instance, sue to set aside all alienations made by the manager or Karnavan before suing to recover possession of the property alienated by him. He may sue to recover possession on his title and will be entitled to recover such possession if the defendant does not prove the validity and binding effect of the alienation on the plaintiff.

Where a junior member of a Tarwad sued to redeem a mortgage, ignoring the subsequent mortgages created on the property by the Karnavan as not binding on him:

Held, that the suit was maintainable and that the plaintiff was not bound to sue to set aside the later mortgages.

Chandu v. *Kombi*, 9 M. 208 at p. 212; *Unni* v. *Kunchi Amma*, 14 M. 26 at p. 28, referred to.

Second appeal against the decree of the District Court of North Malabar, in A. S. No. 301 of 1909, presented against the decree of the District Munsif of Quilandy, in O. S. No. 400 of 1900.

Mr. *C. V. Ananthakrishna Aiyer*, for the Appellant.

Mr. *K. R. Subramanya Sastri*, for the Respondents.

JUDGMENT.—The plaintiff, the trustee of a Devasom, sues to redeem a mortgage of Rs. 50 created by the plaintiff's Karnavan on the 21st January 1891. It is admitted, that, on the 21st February 1905, the same Karnavan mortgaged the lands included in the mortgage instrument aforesaid with certain other lands for Rs. 1,650. On the same day, he also mortgaged the equity of redemption for Rs. 1,500. It is conceded this mortgage for Rs. 1,650 was a consolidation of two previous mortgages, one for Rs. 900, dated 25th March 1890 and the other for Rs. 700 on the 13th February 1890 and the mortgage for Rs. 900 has been already declared to be binding on the property. The District Judge held that the mortgage of Rs. 50 is now no longer in force as it is merged in the mortgage for Rs. 1,650 and that the plaintiff is bound to sue to set aside the mortgages of the 21st February 1905 and as a suit to redeem on those mortgages or set them aside will not lie in the Munsif's Court, he dismissed the suit. The question in dispute is concluded by authority. The proper valuation of a suit to redeem a mortgage is the amount of the mortgage or mortgages admitted by the plaintiff to be binding on him, not the mortgages set up by the defendant. Otherwise, if the plaintiff files this suit in a Court of higher jurisdiction and succeeds in proving that the mortgages binding on him are less than Rs. 2,500, his plaint may be returned to him to be filed in the Munsif's Court. In a suit of this nature, the question of jurisdiction has to be decided upon the averment in the plaint, not with reference to the pleas of the defendant, see *Chandu* v. *Kombi*(1), which is directly in point. It was then argued that the plaintiff is bound to set aside the subsequent mortgages created by his Karnavan and the present suit treated as one to set them aside is not maintainable as three years from the date of the mortgages had expired before its institution and as the amount of the mortgages exceeds the jurisdiction of the Munsif's Court. It may be doubted whether the plaintiff is in the position of a junior member of a Tarwad seeking to set aside an alienation by his Karnavan. He is a trustee impeaching the conduct of his predecessor-in-office. But treating the case as that of a member of a Tarwad seeking to recover possession of properties mortgaged by his Karnavan, we do not think it is necessary for him to set aside the mortgages granted by the Karnavan. The same contention was put forward and disallowed in *Chandu* v. *Kombi*(1) by Kernan and Muthusami Ayyar, JJ., and by Shephard and Weir, JJ., in *Unni* v. *Kunchi Ammal* (2), following the judgment in an earlier case S. A. No. 270 of 1880 by Turner, C. J., and Kernan, J., [see the judgment extracted in *Unni* v. *Kunchi Amma* (2)]. The property of the Tarwad is vested in the members of the Tarwad. The Karnavan can alienate the property only when the interests of the Tarwad require such alienation. When he makes, therefore, an alienation which is not binding on the other members, it is unnecessary for the other members to set them aside. They may sue to recover possession on their title and they would be entitled to recover such possession if the defendant does not prove the validity and binding effect of the alienation

(1) 9 M. 208.
(2) 14 M. 26 at p. 28.

on the other members of the Tarwad. The case may be different where the plaintiffs themselves have executed the instrument under which the defendant claims. Certain cases were relied upon by the respondent's Pleader in which it was held that a minor was bound to set aside an alienation by his guardian. The case of a guardian and a minor is governed by a separate Article in the Limitation Act. Those cases may be distinguished on the ground that in such cases a guardian executes the instrument solely on behalf of a minor and if it is not binding on the minor, it ceases to have any legal effect, whereas an alienation by a Karnavan, though not binding on the other members of a family, may continue to be binding on the Karnavan. We, therefore, reverse the decree of the lower Appellate Court and direct the appeal to be restored to the file and disposed of in accordance with law. Costs will abide the result.

Appeal allowed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 146 OF 1905.
April 16, 1912.
Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.
Sri RAMAKRISHNA CHATRAIYA DEO, ZEMINDAR OF JALANTRA, AND ANOTHER—APPELLANTS
versus
Sri MERAJA SIR PUSHAPATI VIJAYARAMA GAJAPATHIRAZU MAHARAJ MANIYA SULTAN BAHADUR OF VIZIANAGARAM—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 99—Trusts Act (II of 1882), s. 90—Purchase by mortgagee of equity of redemption in Court sale—Fraud—Misconduct—Scope of section 90 of the Trusts Act.

Section 99 of the Transfer of Property Act does not lay down as a general principle that a purchase by the mortgagee of the mortgagor's equity of redemption is invariably and in all cases invalid even in the absence of fraud, misrepresentation or misconduct.

Sesha Ayyar v. *Krishna Ayyangar*, 24 M. 96; *Ikkotha* v. *Chakkiamma*, 27 M. 428; *Raja Kishendatt Ram* v. *Mumtaz Ali Khan*, 5 C. 198; 5 C. L. R. 213; 6 I. A. 145, *Khixrajmal* v. *Daim*, 32 C. 296 at p. 316; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23, referred to.

Section 90 of the Indian Trusts Act only applies to a case where the mortgagee or other qualified owner of any property has availed himself of his position and has thereby gained an advantage in derogation of the rights of other persons.

Appeal against the decree of the District Court of Ganjam, in O. S. No. 41 of 1903.

Messrs. *T. R. Ramachandra Aiyar*, *C. V. Ananthakrishna Iyar* and *T. V. Narayaniah*, for the 2nd Appellant.

Messrs. *T. Rangachariar* and *S. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—In this case, the plaintiff is the *zemindar* of Jalantra and the defendant is the Maharajah of Vizianagram. By an instrument Exhibit C, date dthe 20th June 1887, the plaintiff mortgaged his *zemindari* to the defendant with possession for the sum of Rs. 2,60,000. The present suit is brought by the plaintiff to redeem this mortgage. The defendant denies the plaintiff's right to redeem, because, on the 10th November in the same year, the plaintiff's equity of redemption was brought to sale in execution for a money decree (obtained as No. 27 of 1886 by a third party) and was purchased by the defendant. The plaintiff's reply to this is that the defendant was guilty of fraudulent misconduct in connection with the sale and that he, therefore, must be held to have purchased, and to hold the equity of redemption for the plaintiff's benefit. He relies on the principle enunciated, in section 90 of the Indian Trusts Act (II of 1882). The District Judge found that the defendant was not guilty of any fraud, misrepresentation or misconduct in connection with the sale and dismissed the plaintiff's suit.

Plaintiff appeals against the decree but we have no doubt that the suit was rightly dismissed. In 1885, the plaintiff executed a usufructuary mortgage (Exhibit D) of his estate for Rs. 1,35,000 in favour of certain persons who are referred to as "the *nalam* people." In the following year, he executed two other mortgages (Exhibits XII and XV) on the estate for Rs. 10,000 each in favour of other person, and he had various other debts also. In April 1887, the *zemindari* was put up for sale in execution of a decree obtained by Kamasam, but the money was paid and the sale stayed. Meantime another creditor Krishnama who held a money-decree against the plaintiff for some Rs. 13,000 in Original

Suit No. 27 of 1886 applied for execution of his decree. After some negotiations, evidenced by Exhibits A, G and B in May and June, it was arranged between the plaintiff and the defendant that the defendant should obtain a transfer of the three mortgages, Exhibits D, XII and XV that were outstanding on the estate and that the plaintiff should execute a usufructuary mortgage in favour of the defendant for Rs. 2,60,000. In pursuance of this agreement, Exhibit C was executed on 20th June. It recites the above mortgage debts and some other specific debts which are to be paid by the defendant out of the Rs. 2,60,000 and then adds "out of the balance, the remaining other debts due by me should be discharged as the said amount is sufficient for it; the vouchers, etc., thereof should be retained with your Highness for proof of record, and your Highness should cause to be given to me a list of the other defendants and decrees, etc., that may be so discharged. After discharging the debts as mentioned above, should there be any surplus, your Highness should obtain receipt from me and pay that money to me."

The Rs. 2,60,000 was applied by the defendant in the manner required by Exhibit C, but it was argued for the plaintiff that the defendant improperly charged the plaintiff with a sum of Rs. 20,000 and frittered away the rest of the balance in his hands in making importunities with the deliberate intention of having Krishnama's decree debt undischarged and thus bringing the estate to sale in satisfaction of it. The sum of Rs. 20,000 was a lump sum which had to be paid to the '*nalam* people' in order to induce them to transfer their mortgage (Exhibit D) to the defendant. The District Judge has shown clearly that it was greatly to the advantage of the plaintiff, even at the cost of this Rs. 20,000, to exchange the extremely onerous terms of Exhibit D for the very moderate terms in Exhibit C. Although the sum of Rs. 20,000 is not specifically named in Exhibit C, yet a reference to its terms and to the preceding agreement (Exhibit B) of the 5th June, shows that the parties intended that, the cost of getting transfer from the '*nalam* people' should be treated as chargeable to the plaintiff. That it should be so treated is obviously fair, and the plaintiff, on the 1st July when Exhibit C was being registered, signed the receipts acknowledging payments on account of the mortgage to the extent of Rs. 2,32,000 in which the sum of Rs. 20,000 is included. The receipt does not show details and the plaintiff says that he did not know the details until he received the account Exhibit E on the 19th July, but the District Judge gave good reasons for not believing his evidence on this point. The plaintiff, in fact, took no exception to the Rs. 20,000 until nearly a month afterwards in his letter (Exhibit L). We accept the conclusions of the District Judge that the payment of Rs. 20,000 to the '*nalam*' mortgagees was a reasonable one and that it was rightly and properly debited against the sum advanced under Exhibit C, and that this was done with knowledge and consent, implied if not express, of the plaintiff. As to the other payments made by the defendant out of the mortgage-money (Rs. 2,60,000), every one of them was made to, or at the request generally in writing, of the plaintiff himself. It will be observed that, in Exhibit C, though certain debts are specifically named, the discharge of Krishnama's decree debt is not so named nor is the debt described generally to discharge decree debts in preference to other debts. We, therefore, agree with the Judge that it is unreasonable to conclude that the defendant frittered away the balance under Exhibit C in order to prevent Krishnama's debt being discharged. We do not find that the defendant or his agent was guilty of any fraud or misconduct in the application of the money in defendant's hands under the mortgage, Exhibit C. The matter, however, that was most strongly urged before us on the plaintiff's behalf was that the defendant's agent, Jagannatha Rao (plaintiff's 1st witness), made deceitful representation to the plaintiff that he would advance him money to pay up Krishnamma's debt, but then suddenly left him in the lurch at the last moment and so prevented him from discharging the debt with the result that the equity of redemption was sold by the Court and was purchased by the defendant. It will be remembered that the sale was fixed for the 10th November 1887. The plaintiff relies on the telegram (Exhibit O) sent to him by Jaganatha Rao on the 26th October in which he offers

to get plaintiff a loan of Rs. 80,000 at 12 annas interest. Plaintiff admits that he took no notice of this offer, but went on with certain negotiations which were in progress with one Gopal Rao, to raise money to meet this and other debts. He even went so far as to have the agreement (Exhibit S) with Gopal Rao engrossed on a stamp paper and to send for the Registrar to have the document registered. When the Registrar came, however, he refused to register the document. It was apparently soon after this, that the letter, Exhibit J, on which the plaintiff mainly relies, was sent. The letter is not dated, but the person to whom it was sent, (plaintiff's 8th witness) who is a servant of the plaintiff, fixes the date as about the 5th of November. It was written by Kamesam (plaintiff's 2nd witness), an *Ameen*, who had managed the Jalantra *zemindari* for the Jalantra *zemindar* as well as for the '*nalam*' mortgagees and then for the defendant. It runs:—"Jagannatha Rao Pantulu sent a telegram just now that he would give Rs. 50,000 at Re. 0-14 0 interest; somehow or other cause Mr. Gopal Rao's transaction to be stopped and come at early dawn." It is contended for the plaintiff that when this letter was shown to him, he concluded that the defendant's agent was in earnest about lending money and so broke off his negotiations with Gopal Rao. We do not believe this. Kamesam, the sender of Exhibit G, says that he wrote it of his own motion and out of regard for his old master, the Jalantra *zemindar*, owing to the onerous terms required by Gopal Rao. There is nothing to show that this is untrue. It is also alleged that Jaganatha Rao came to plaintiff on 7th and remained until the 9th and there left, having promised plaintiff to go to Berhampore next day and stop the sale. We agree with the District Judge that the plaintiff has not established this case. Jaganatha Rao entirely denies that he made any such representations as alleged, and the evidence on the plaintiff's side to prove them is untrustworthy and inadequate, while the inferences from the documents and from the proved facts negative the contention. We have already seen that plaintiff took no notice whatever of Exhibit O in which Jaganatha Rao offered to get in a large loan at a reasonable rate of interest. He did not even reply to it. The reason seems to be that he distrusted him. He had already, on the 13th September (Exhibit 76), given the Collector notice that he intended to file a civil suit to set aside Exhibit C. In these circumstances, he would hardly care to bind his estate by a further mortgage to the defendant. So three days after he got this offer from the defendant's agent, we find the plaintiff going on with his negotiations with Gopal Rao and even sending for the Registrar to register the document. The terms required by Gopal Rao were, however, very onerous. Interest was to be charged at Rs. 2½ per cent. The mortgage money could not be paid off in less than five years, but the mortgagee could claim payment in full at any time on 3 months' notice. Moreover, "commission" of Rs. 10,000 was to be paid to Gopal Rao and also a village and a house were to be given to him. It is no wonder that the plaintiff, unwilling at the last to bind himself by such terms, refused to see the Registrar when he came for the registration of the document. Moreover, plaintiff himself says that up to the very day of the sale he had "strong hopes" that he would be able to get the money he required on reasonable terms from his own father-in-law, who was the *zemindar* of Parlakemedy and we find that the Collector, on the 3rd October, was inquiring into the value of the *zemindari* (Exhibit III H) with a view to purchase it for the Parlakemedy *zemindar*. In these circumstances, it is most unlikely that plaintiff could have been induced by the receipt of an undated scrap of paper from a subordinate like Kamesam, which plaintiff never even took the trouble to see, to break off his negotiations with Gopal Rao and rely exclusively on the oral promise of the defendant's agent to pay up the decree debt. Moreover, we, in fact, find that he did not do so. In Exhibit L, which is dated the 6th November, (*i.e.*, after the date appended to Exhibit 9), we find the plaintiff petitioning the Court to adjourn the sale, and stating that Jaganatha Rao (defendant's agent) intended to purchase the *zemindari* at the sale but that he (plaintiff) would raise the money by a mortgage to the Parlakemedy *zemindar* and would pay off the debt if the sale should be adjourned. This petition was dismissed

and, on the 1st November, that is, on the very day of the sale, we find him sending a telegram (Exhibit Y) again asking that the sale be postponed for two days, and his Vakil presents another petition Exhibit II protesting against the impending sale, and saying that plaintiff would raise the money somewhere if time should be given. In none of the papers, is there the slightest suggestion that the defendant or his agent has promised to pay the decree debt or advance the money for it to plaintiff, but had deceitfully withdrawn at the last moment. The fact seems to be, as found by the District Judge, that the plaintiff's omission to accept Gopal Rao's offer was not due to any false promise made by the defendant or his agent, but to the "strong hopes" which he had of getting the money from his own father-in-law, the Parlakemedy *zemindar* and to the feeling that, somehow or other, it would be all right and that he would be able to get another adjournment or make some temporary arrangement as he, in fact, tried to do by sending a pro-note to Gopal Rao on the night of the 9th November. Gopal Rao, in his evidence, states that he would have paid up Krishnama's debt even on the day of sale if plaintiff had executed the document proposed by him. There is no reason to hold that the defendant or his agent acted fraudulently or dishonestly or made false representations in connection with the sale. This finding on the facts is sufficient to show that the plaintiff's suit was rightly dismissed. The appellant's Vakil relies on section 99 of the Transfer of Property Act and contends that the fact that defendant was a mortgagee, even without fraud or misrepresentation or misconduct on his part, renders the sale to him invalid. We cannot accept the contention in the present case. It was not the defendant, but Krishnama, who attached and brought the property to sale. Section 99 has no application nor is there any such general principle as the appellant's Vakil suggests. *Sesha Ayyar* v. *Krishna Ayyangar*(1); *Ikkotha* v. *Chakkiamma* (2); *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (3); *Khiaraj Mal* v. *Daim* (4). Section 90 of the Indian Trusts Act (II of 1882) also has no application, for the simple reason that it applies only to cases where the mortgagee (or other qualified owner) of any property has availed himself of his position as mortgagee and has thereby gained an advantage in derogation of the rights of other persons. It is impossible to see how the defendant in this case can be said to have availed himself of his position as a mortgagee in derogation of the plaintiff's rights.

We concur with the findings of the District Judge on all the issues.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 24 M. 96.
(2) 27 M. 428.
(3) 5 C. 198, 5 C. L. R. 213; 6 I. A. 145.
(4) 32 C. 296 at p. 316, 2 A. L. J. 71; 1 C. L. J. 584; 32 I. A. 23, 7 Bom. L. R. 1; 9 C. W. N. 201.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 677 OF 1911.

June 18, 1912.

Present:—Mr. Justice Piggott.

DWARKA PERSHAD—PLAINTIFF—APPELLANT

versus

SHEOAMBAR KOERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Usufructuary—Mortgagor to redeem on the last day of Jeth *in a particular year—Notice—Mortgagee entitled to notice of redemption.*

A usufructuary mortgage contained a covenant that the mortgagor would redeem the mortgage on the last day of *Jeth* of the year 1317 *Fasli* corresponding with the 22nd of June 1910. On the 17th of June 1910, the mortgagor deposited in Court the full amount of the mortgage-money under section 83 of the Transfer of Property Act. The notice of deposit, however, could not be issued from the Court before 27th of June 1910:

Held, that the mortgagee was entitled to a notice of the deposit either on or before the 22nd of June 1910, and that, under the circumstances, he was entitled to maintain his possession and cultivate the land for two more harvests and was not liable to damages.

Second appeal from the decision of the District Judge of Jaunpur, dated 3rd April 1911.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Ahmed Kareem*, for the Respondents.

JUDGMENT.—This was a suit for redemption of a mortgage on a certain fixed-rate tenancy, the mortgagees having obtained possession under the terms of the mortgage. There is no question now before me as to the plaintiff's right to redeem or the amount to be paid for redemption.

The only question is whether the plaintiff is entitled to damages claimed by him on the ground that he was wrongfully kept out of possession by the mortgagees during the year 1318 *Fasli*, after he had made a valid tender of the entire amount due. The Court of first instance gave the plaintiff a decree for Rs. 14-12 as damages, calculating the same to be the gross rental of the land in suit for that year. The learned District Judge, on an appeal by the defendant, has dismissed the claim for profits, remarking that, under the circumstances of the case, it did not appear to him that there was anything in law to compel the defendants to pay damages. Coming to this Court in second appeal, the plaintiff contends that he is entitled to damages either from the date of deposit, or from such date as shall be found by the Court to be the date on which the mortgagor did all that could be done by him to enable the mortgagee to take the money deposited by him out of Court. The appellant relies upon the provisions of sections 83, 84 and 76 clause (*i*) of the Transfer of Property Act (IV of 1882). Those provisions are in his favour unless it can be shown that there existed between the parties a contract of notice of such a nature as to bring the case within the proviso to section 84 of the aforesaid Act. Now, the contract of mortgage in this case contains a very stringent provision which is nothing more or less than that the mortgagee will not be bound to accept payment unless such payment is made or tendered on one particular day in the year, namely, the last day in the month of *Jeth*. This is not an unusual covenant in mortgages of this sort, and it is a covenant as to notice and a very stringent one. It proceeds on the assumption that there will be no standing crops on the land on the last day of *Jeth* and that the mortgagee will not require formal notice of the mortgagor's intention to redeem provided payment is made or tendered on that particular day. Of course, if the mortgagee chooses to go out of his way to bring the land under cultivation during the month of *Jeth*, he takes the risk of his own covenant operating unfavourably to him, but as a general rule cultivation would not have commenced in that month. The effect of the covenant is really this, that if the mortgagor intimates his intention to redeem or makes a tender of the money to the mortgagee at any time before the last day of *Jeth* in any given year, the mortgagee is entitled to continue in possession, that is to say, he is entitled to notice until the last day of *Jeth* next following but if on that date he does not accept the tender and deliver up possession, he makes this refusal at his own risk and subjects himself to the provisions of those sections on which the appellant now relies in this case. On the terms of the covenant between the parties, there is only one possible case in which the mortgagees would be entitled to no notice at all, and that would be in the case of a payment made or tendered precisely on the last day of *Jeth*. In any other case, the effect of the contract between the parties is to entitle the mortgagees to notice from the date on which the payment was offered to them until the last day of *Jeth* next following. The length of notice would, therefore, vary according to the date on which the mortgagor tendered payment, or intimated to the mortgagees his intention of paying but the covenant is nevertheless essentially one as to notice. Now, in the present case it has been found by the lower Appellate Court that it is not proved that any communication took place between the parties privately or otherwise than through the agency of the Court, which would amount to a tender of the mortgage-debt by the plaintiff to the defendants or even an intimation by the plaintiff of his intention to pay the mortgage-debt on the last day of the month of *Jeth* next following. I have, therefore, only to consider what took place in Court. The last day of *Jeth* of the year 1317 *Fasli* fell on the 22nd of June 1910. On the 17th of June 1910, the plaintiff made in Court a tender of the full amount of the mortgage-debt as required by section 83 of the Transfer of Property Act. Before the mortgagees could possibly be in a position to take this money out of Court, it is obvious that they must be informed of its having been deposited. It is possible that, under normal circumstances, a written notice issued by the Court might have been served on the mortgagees on or before the 22nd of June 1910, and that all the requirements of the contract between the parties might have been duly satisfied. The

plaintiff, however, was unfortunate. The presiding officer of the Court concerned was absent on the 17th of June 1910 and the matter was only laid before him for orders on the 27th of June 1910, when writtten notice was ordered to be issued on the defendants-mortgagees. It is thus clear that the defendants did not receive and could not have received any intimation of the fact that the money due to them under the mortgage was lying in deposit to their credit, and might be taken out of Court by them at their pleasure, until the last day of *Jeth* of 1317 *Fasli* was gone by. The defence actually put forward by them against this claim for damages is that they received no intimation before the last day of *Jeth* 1317 *Fasli* of the plaintiff's intention to redeem and, therefore, brought the land under cultivation. I agree with the learned District Judge that this was, under the circumstances, a valid defence. The mortgagees had, under the terms of their covenant, a right to decline to accept payment, by taking the money deposited out of Court, until the last day of *Jeth* next following, the date on which they received intimation that the money was lying in deposit. They were, therefore, entitled to maintain their possession and cultivate the land for two more harvests, that is the *khanif* and *rabi* of 1318 *Fasli*. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 15 OF 1907.
April 25, 1912.
Present:—Sir Ralph Benson, Judge and
Mr. Justice Sundara Aiyar.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF GANJAM—APPELLANT
versus
KANNAPALLI VENCATARATNAMMAH AND ANOTHER—RESPONDENTS.

Deed, construction of—Grant of inam *village, "besides* poramboke"*—Meaning of "besides* poramboke"*—Right of grantee to channels and tanks in the village.*

Where an *inam* title-deed contained the following recital, "I acknowledge your title to a personal *inam* consisting of the right to the Government Revenne of land claimed to be * * * * * acres situated in the village of *L.*" and the words '*besides poramboke*' were inserted in the margin:

Held, (1) that the insertion of the words 'besides *poramboke*' need not necessarily be taken to be an acknowledgment by the Government of the *inamdar's* title to all kinds of *poramboke* and that the effect to be given to those words must depend on the evidence in each case and the circumstances attending the grant.

Papala Narayanasawmi v. *Pensalani Kunniappa*, (1912) 1 M. W. N. 496; 14 Ind. Cas. 261 and *Ambalavana Pandara* v. *Secretary of State*, 28 M. 539; 15 M. L. J. 251, referred to.

(2) that where the channels or tanks in the village grant had no connection with a Government source of irrigation and were not controlled by the Government to any appreciable extent, the effect of the said words was to invest the property in the channels and tanks in the *inamdar*.

Appeal against the decree of the District Court of Ganjam, dated 20th August 1906 in O. S. No. 47 of 1905.

This appeal coming on for hearing on 10th and 13th February 1911, the Court made the following

ORDER:—To enable us to decide this appeal satisfactorily, we consider it desireable to allow the parties to adduce further evidence on the following point (1) what, if anything, passed to the grantee under Exhibit XX under the words 'besides poramboke' and whether she obtained a right to the channels conveying water to the tanks irrigating the lands of the Lakkamdiddi village or to those tanks themselves.

The lower Court has not dealt with this point in its judgment, but appears to have assumed that the Government did not reserve the channels and tanks at the time of the *inam* settlement.

We request the District Judge to take the additional evidence that the parties may adduce and to submit the same together with his opinion on the effect of such evidence within one month after the re-opening of the District Court after the recess.

In pursuance of the above order, the District Judge of Ganjam submitted the following

FINDING:—In obedience to the High Court's order of 13th February 1911, I have taken the additional evidence adduced by the parties and I submit the same along with my following opinion on the effect of such evidence on the point (1) what, if anything, passed to the grantee under Exhibit 20 under

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir).

the words "besides poramboke" and whether she obtained a right to the channels conveying water to the tanks irrigating the lands of the Lakkamdiddi village or to those tanks themselves.

2. The additional evidence consists of the documents G. to N. on plaintiff's side and of the documents 21-(*a*), 22-(*h*) on defendant's side as also the oral evidence of one additional witness on defendant's side. The oral evidence of the witness is of very little use. He speaks to the payment of water-cess by him and his co-*inamdars* to the Government for water supplied to raise second crops on the excess area over the *mamool* area cultivated in the village of Gokayavalasa. He also speaks to the *inamdars* of the neighbouring village of Satyavaram being under a similar liability. The liability of these two villages for water-cess on excess area for second crop cultivation depends on the ownership of the water flowing through the Komarthy branch of the Polaki main channel and the ownership of the beds of the Komarthy branch channel and the Polaki main channel. The witness clearly admits in his evidence that the Government D. P. W. is in charge of the Polaki and Komarthy channels, that is, that the *inamdars* have no possession or control over those channels and the beds of those channels. Exhibits 22 series are accounts of water cess collected from the *inamdars* in those two villages. These accounts also might be set aside as of little value in coming to a conclusion on the question whether the *inamdars* of the plaint *inam* village of Lakkamdiddi are entitled to the beds of the plaint Yellamanchilli channel and its sub-channels so far as those beds lie within the limits of the *inam* village of Lakkamdiddi. The Yellamanchilli channel branches off from the Garebula Gedda hill-stream, whereas the Komarthi channel branches from the Government Polaki channel and irrigates Government villages also. This *jungle*-stream (Garebula Gedda) in its upper portion (above the surplus weir) is used only for the irrigation of *zemin* and *inam* lands.

3. I shall, therefore, consider the other additional evidence taken in the case and comment upon it in the light of the other facts of the case. The plaint village of Lakkamdiddi was one of the villages in the Chicacole *haveli*. Before 1766, the *haveli* belonged to the Mogul Emperor. The Emperor issued a *Firman* granting the management of the Circars to the East India Company. The East India Company leased the *haveli* lands in Chicacole in 1767 to one Sitaramraz, the brother of Vaziaramraz, the then *zemindar* of Vizianagram (see District Manual, page 212). This Sitaramaraz seems to have at once granted the plaint village of Lakkamdiddi within the Chicacole *haveli* as an Agraharam *inam* to a Brahmin, named, Kannepalli Ramavadhanulu for subsistence. The village consists of no *vrittis* because it was Yekabhoga Agrahar or an Agrahar that was in sole possession of a single individual up to the 8th February 1861, on which date Kannepalli Venkata Narasoo (the holder of the *inam*) died leaving a childless young widow by name Kannepalli Venkataratnamma (see recitals in Exhibit 16).

4. In 1802, the District of Ganjam consisted of four *havelis* (including the Chicacole *haveli*) and 21 *zemindaris*. The *haveli* lands were resumed by the Government from the temporary lessees and sold in lots in 1803 and 1804 to the highest bidders *on permanent settlement*. Twenty proprietary estates were formed by the sale of the Chicacole *haveli* lands in 1803. One of them is Jarjangi and another is Urlam. The plaint Agraharam village of Lakkamdiddi is within the proprietary estate of Jarjangi (or Jarjangi Gangaram). The proprietors of these twenty estates were entitled to get only Kattubadi or a fixed low rent from the *inamdars* of the *inam* villages included in their proprietary estates, though they were, of course, full proprietors of the ordinary *zeroyati* lands in their estates. The Government also seems to have reserved to themselves the "reversionary right in the *inam* tenures included in these proprietary estates when the Government granted *sanads* to the proprietors for their respective estates" (see page 149 of Exhibit N). The Kattubadi rent paid by the *inamdar* to the proprietor is also called Shrotriem when paid by Brahmin *inamdars* for their Agraharam *inams*. The words Agraharam and Shrotriem *inam* seem to be used in the same sense. In the *inam* Settlement papers (Exhibit N page 330), Shrotriem is stated to be "a general term for all favourably assessed

villages held by Brahmins"; see also Wilson's Glossary, 1855 Edition, page 11). Again at page 154 of Exhibit N, Agraharams are treated under "whole village *inam*" and are said to mean villages "granted to Brahmins". There can be no doubt that Lakkamdiddi was an Ekbhog Agraharam "whole village *inam*" enjoyed by Brahmin *inamdars* and has been paying a favourable Kattubadi or Jodi of Rs. 212-8 to the Jarjangi Estate proprietors from 1803 up to date, the *inam* having been created about 1½ centuries ago. (There seems to have been an account called the *gudikat* account prepared in *Fasli* 1226 of the *inam* lands included in the proprietary estates). Besides the major whole village *inams* (or sometimes, carved out of such *inams*), there are minor *inams* which relate to grants of defined extents of lands as contrasted with grants of entire villages. (See the distinction between whole village *inams* and minor *inams* in para. 29 page 155 of Exhibit N).

5. The rights of Government over the lands of these *inam* villages seem not to have been ever defined unambiguously. A reversionary right to resume the *inams* on failure of direct lineal heirs seems to have been always asserted by Government. In *Gunnaiyan* v. *Kamakchi Ayyar* (1), Sir V. Bhashyam Iyengar, J., says at page 345: "According to the theory of the common law of the land,.....succession".....(to *inams* grants) "is, or at any rate *is supposed to be*, limited to the undivided brothers and to the direct lineal heirs, including a daughter's son, of the last incumbent, as also his widow and failing them, to the direct lineal heirs of the original grantee. And under that law, it is, or *it is supposed to be*, competent for Government to resume personal *inams*, when the reversion falls in.....by reason of the extinction of direct lineal heirs of the body of the original grantee"....The question as to whether the Crown has such prerogative reversionary right in the case of hereditary personal *inams* has never been subjected to the test of a judicial decision, for the simple reason that claims in respect of personal *inams*, which have not been enfranchised, are exempt from the cognizance of Civil Courts and can be adjudicated upon only by the Governor in Council or other Executive Authority.....The Government, of course, was not bound to exercise its right of resumption and it was open to it to exercise it only partially and surrender its reversionary rights. The declared policy of Government, when the *Inam* Commissioner was appointed in 1859 and rules framed for his guidance, was to waive its right of resumption and enfranchise personal *inams* and convert them into ordinary heritable property and forego its reversionary right in consideration of the holder of the *inam* agreeing to pay a quit rent, the rates of which varied with reference to the value and prospect of the reversionary claim of the Government in each case."

6. In 1854, Jarjangi was the 6th of the 28 proprietary estates then existing within the Ganjam District. The Government wished to give up their reversionary interests in the whole village *inams* and similar *inams* (excluding service *inams*) situated within the limits of the *zemindaris* and of the proprietary estates in the Ganjam District after fixing a permanent quit-rent based on the value of the cultivated lands in the *inam* village, Porambokes as such yielding no income and having no market value. The Deputy Collector, Sudarsana Row, as *Inam* Commissioner, was directed to fix such values, that is, to find out the net income of the villages. He prepared the register Exhibit 16 for the plaint *inam* village of Lakkamdiddi. The total area of the village was taken from the old *gudikat* account of *Fasli* 1226 as 266⅔ *graces* or 533 acres (2 *graces* making one acre). The 533 acres were classified as follows:—

	Acres.
Poramboke consisting of tanks, village sites, paths, channels, burial grounds, pasture lands, etc.	116
Personal and service *inams* (which were not settled then) ...	34
Waste ...	8
Remaining cultivated and cultivable lands ...	375
(249 acres cultivated wet, 13 acres cultivated *tope*, and 113 acres cultivated dry).	

7. The whole village was an Ekbhog *inam* (as already said) till the middle of the 19th century (though a few minor personal and service *inams* aggregating 34 acres had been created). Then, 1/10th of the village area seems to have passed to one Ravi Janaki Ramayya by a Court auction sale. The 375

(1) 26 M. 339.

acres was afterwards enjoyed by Kannepalli Venkatarathnamma and by this Ravi Janakiramayya in the proportion of 9/10th and 1/10th accordingly, that is, about 340 acres by Venkataratnamma and 35 acres by Janaki Ramayya.

8. The *Inam* Deputy Collector recomended that in the "particulars to be entered in the title deeds" (or deeds) to be issued for the village, 340 acres should be entered in the name of Kannepalli Venkatarathnamma and 35 acres in the name of Janaki Ramayya (see Exhibit No. 16). Venkataratnamma was to pay Rs. 297 as quit-rent at the highest rate of $\frac{1}{2}$ to $\frac{3}{4}$ because Government's reversionary rights would fall in as soon as she died, while Ravi Janaki Ramayya was charged a quit-rent of only 9 Rupees (at $\frac{1}{8}$th rate as Government's reversionary expectancy was very remote).

9. Two separate title deeds were issued accordingly to K. Venkataratnamma and Janaki Ramayya in 1867. Neither of these is forthcoming now. Venkataratnamma lost her title-deed of '67 and Ravi Janaki Ramayya is dead and his grandson, who was summoned to produce his title-deed of '67, could not or would not produce it. The Settlement proceedings began in 1859. The order confirming the *Inam* Deputy Collector's recommendations was passed in February 1865 and the title deeds were issued in February 1867. The form of grants then obtaining in respect of whole village *inam* title deeds appears from Exhibits K, K 7, K-10, K-11, L 1, 2/(*a*) and 2/1 (*b*). The form in the 1st page first sets out the grantee's present title (which is acknowledged in para. 1 of the 1st page by the Governor in Council) and is then followed by the Government's proposals (in paras. 3 and 4) to give up their reversionary rights in consideration of a quit rent. Then on the 2nd page, the conversion into free-hold in favour of the grantee is entered as the grantee had agreed to pay the quit-rent demanded. It is the entry on the 2nd page that extinguishes the Government's reversionary claims. The form in page 1 paras. 1 to 3 is as follows:—

1. On behalf of the Governor in Council of Madras, I acknowledge your title *to the Shrotriem* village of—claimed to be of—acres of dry land and—acres of wet land *besides poramboke.*

2. This *inam* is subject to a *Jodi* or quit-rent of—and is hereditary but it is not otherwise transferable; and in the event of failure of lineal heirs, it will lapse to the estate.

3. On your agreeing to pay an annual quit-rent of—inclusive of the *Jodi* already charged on the land as above said, your *inam* tenure will be converted into a permanent free-hold.

10. I take it that Kannepalli Venkataratnamma got her title deed in February 1867 in this form for 9/10ths of the area of the Shrotriem whole village *inam* of Lakkamdiddi (340 acres of dry and wet lands "Besides Poramboke") and Ravi Janaki got a similar title deed for 35 acres "Besides Poramboke". It has to be observed that in the case of minor or subsidiary *inams*, the title deeds issued about that time do not contain the manuscript additional words "*Besides Poramboke*". (See Exhibits K8, K9, K12, K13 which relate to small defined extents of 1 acre, 6 acres, 2 acres and 7 1/100 of an acre which had been granted as *inam*).

11. As I said before, the major *inam* title-deeds issued between 1863 and 1867 were in the form of Exhibit K1, K7, etc. Exhibit 21 (*a*) and Exhibit 21 (*b*) filed on defendant's side also contain the additional words "Besides Poramboke" as they are also grants of the whole Shrotriem Villages of Gokayavalasa and Satyavaram and not minor grants of small areas within a whole village. In December 1867, the Madras Government evidently wanted to introduce a bill in respect of the form of title-deeds for the various descriptions of *Inams* (see pages 86 to 94 of Exhibit N showing the old forms). The *Inam* Commissioner then suggested (in January 1868) that in para. 1 in the form of title deeds, the words "claimed to be of" should be substituted by the words "claimed to consist of the right of receiving the rent or tax payable to Government on." In July 1868, the Advocate-General thought that the Government of Madras had no right to issue deeds in its own name and suggested (among other changes) that in para. 1, the words "acting on behalf of the Secretary of State" should be introduced after the words "the Governor in Council of Madras" and that all title-deeds should be re-issued with the necessary alteration (See pages 82 to 302 of Exhibit N which deal with these

matters). At last, Act VIII of 1869 was passed giving effect to the views of the *Inam* Commissioner in his letter of January 1868; and all title deeds subsequently issued omitted the use of words which might enable all kinds of *inamdars* to claim proprietary rights in the soil which they "would not *otherwise* possess" and it made clear that only the rights of Government were intended to be granted and that no proprietary rights in the soil (*which did not* already *exist* in any particular *inamdar*) were intended to be *newly* given.

12. Kannapalli Venkatarathnamma evidently wanted about 1898 a renewal of her lost title deed of 1867 to 9/10th, of the area of the Lakkimdiddi Major *inam* village. Exhibit 20 was issued to her accordingly on 20th June 1898. This title deed was issued in a form which varies from the old form of 1864 to 1867 in the following particulars. (*a*) The words "acting on behalf of the Secretary of State" have been inserted in para. 1 as per the opinion of Mr. John Pruce Norton (Advocate-General in 1868). (*b*) In the same para 1, instead of the bare words "right to land claimed to be 108.38 acres of dry, 218 53 acres of wet and 13 acres of garden besides Pormaboke and situated in the Jarjangi proprietary Shrotriem portion of the village of Lakkamdiddi," the words "right to the Government Revenue on land &c." have been substituted. In other respects, the title deed follows the old form *including the insertion of the manuscript* words "besides Porambokes" after the mention of the area of dry, wet and garden lands.

13. I think that there can be no reasonable doubt that the words "besides Poramboke" were intended to have the same meaning and implication in the renewed title-deed of 1898 as they had in the old title-deed of 1867. What there was the meaning of the words in the old form of title-deeds relating to major *inams* (See Exhibits K-1, K-7, K-10, K-11, 21-(*a*) and 21-(*b*) which all contain the words "besides Poramboke"), read specially in the light of the fact that these manuscript words were not inserted in minor *inam* title-deeds like Exhibits K-8, K-9, K-12, and K-13? One very significant entry appears in Exhibit K-2 (the Lukulam Register prepared in 1862). The *Inam* Commissioner first mentions the Gudikat Extent of the lands in Lukulam for purposes of valuation. He then deducts the extent of Poramboke in favor of the *inamdar*. [Poramboke consisting of (*a*) *the bed of the river Vamsadhara*, (*b*) path, (*c*) pasture land, (*d*) burial grounds, (*e*) channels, (*f*) sandy deserts, (*g*) sandy heaps in the bed of the river, (*h*) tanks and (*i*) village sites]. Then, he makes this important note: "The Agraharamdars have nothing to do *with the bed* of the river, that is, he denies their title to the items which I have marked (*a*) and (*f*) out of the Poramboke items but it does not say that the Agraharamdars have no right to the other Poramboke areas items (*b*) to (*f*), (*h*) and (*i*) which include the "channels" (*e*) and "tanks" (*h*).

14 My predecessor, Mr. Ayling, (now Mr. Justice Ayling), in his judgment in the suit has taken it as clear "that the Government did not reserve the channels and tanks" in the village (there are 6 tanks supplied by the channels) "at the time of the *inam* Settlement." In the Urlam Case which seems to me to be a weaker case for the plaintiff than the present case [see the judgment reported in *Kundukuri* v. *Secretary of State*(2)]. His Lordship, Mr. Justice Miller, (with whom Munro, J., concurred) remarks as follows:—"We have not been shown anything in the evidence to indicate that any channels or works in the *haveli* lands were so reserved" by Government at the time of the Permanent Settlement of 1803 and 1804 with the proprietors purchasers "nor does it seem probable that the Government would *at that time* have deemed it necessary to reserve a channel." * * "On the whole, the evidence seems to me to support the contention that the beds of the channels were not reserved by the Government at the Permanent Settlement but passed with the lands to the respective purchasers in so far as they lay within the limits of the land purchased by each to *the same extent and in the same way as the tank beds, village sides* and other Poramboke lands." In the present case, it cannot be contended that the Government have any rights in the house sites in the village and it seems to me that they have none in the channel beds and tanks also. If the Jarjangi proprietor purchased the whole Estate of Jarjangi including

(2) (1910) 1 M. W. N. 595; 8 M. L. T. 389; 20 M. L. J. 823; 8 Ind. Cas. 67; 34 M. 295.

the channel beds and tank beds, etc., the Government lost all right in the channel beds even if the *inamdars* were not the owners under their original grant of 1767 which was confirmed in 1867. The Government must have intended by the insertion of the words "Besides Poramboke" in the *major inam title deeds* issued between 1863 and 1867 to acknowledge the title of the *inamdars* to the Poramboke lands along with the cultivated dry, wet and garden lands. The change of the form of the title-deed, by which change, the title only to the Government Revenue payable on the cultivated lands (instead of the title to the lands themselves) was acknowledged, retained the words "Besides Poramboke" (just after mentioning the area of the cultivated lands). This made the whole sentence in the new form to read rather awkwardly (if not ungramatically) but the intention of the Government to acknowledge the *inamdar's* title (in the case where the original *inam* grant was of a whole village) to the Poramboke lands in the village seems to me reasonably clear. The insertion of the words cannot mean that only the *Goverment right to revenue from Poramboke land is* given to the *inamdar*, because Poramboke lands (like channel beds, etc.,) are not assessed to revenue. Why the words "besides Poramboke" were not inserted in the printed forms of the title-deeds themselves and why they are added in every title-deed in manuscript both in the old and new forms is not indicated by the evidence. I am invited by the learned Government Vakil (Mr. W. L. Venkataramiah) to interpret the words "besides Poramboke" as meaning excluding Poramboke or "the Government reserving to itself the Poramboke". I can only remark that such an interpretation is, to say the least, entirely far-fetched. In Webster's Dictionary, two of the meanings of "besides" are given as "over and above" and "in addition to" and that is the meaning in ordinary parlance and not the meaning of exclusion or reservation. The *Inam* Commissioner, in preparing the register for whole *inam* villages, excluded service *inams*, minor personal *inams* and Poramboke from the area of a whole *inam* village in order to ascertain the income derivable from the village. Then, when title-deeds were issued to the whole village *inamdars*, the service *inams* area and the minor personal *inams* area were alone deducted from the grant (because they belonged to other than the whole village *inamdars*, and those lands had to be settled with those minor *inamdars* separately) but the Poramboke area was recognised in the major *inamdar's* title-deeds as belonging to them by the addition of the words "Besides Poramboke," that is, that the Poramboke area was to be included in the area, the title to which in the *inamdars* was acknowledged by Government.

15. In the result, my opinion is that by the words "Besides Poramboke", the Government acknowledged the title of the *inamdars* of the whole *inam* village to the channel beds and tanks in dispute.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, Advocate-General, for the Appellant.

Mr. *P. Narayanamurty*, for the Respondent.

This appeal coming on for hearing after the return of the finding of the lower Court the Court delivered the following

JUDGMENT.—The District Judge (Mr. Sadasiva Aiyar) has submitted the fresh evidence adduced both by the plaintiff and the Government and has expressed his opinion that by the words 'besides Poramboke' in the *inam* title deed Exhibit XX, given to the *inamdar* proprietor of the village, the Government acknowledged the title of the *inamdar* to the channel beds and tanks in dispute. The claim of the Government to water cess cannot be maintained unless the water irrigating the village flows directly or indirectly from any river, stream, channel, tank or work belonging to or constructed by Government. According to the former District Judge's finding, the Garebula Gedda, which irrigates the lands in the village takes its rise in the Parlakimedi *zemindari* and does not pass through any Government lands before it irrigates the plaint village, and the Government has not exercised any control over the Gedda. But it was contended, at the former hearing of the appeal, that although there is no evidence that the channel or stream and the tanks irrigating the village belong to Government, it must be presumed that the ownership thereof is vested in it by virtue of section 2, of Act III of 1905 (Madras Land Encroachments Act) which enacts (we quote only the necessary portion of the section) that "a bed of the sea and all harbours and creeks below high water mark and of rivers, streams, *nalas*, lakes and tanks and all canals and water-

courses and all standing and flowing water and all lands wherever situated, save in so far as the same are the property of any *zemindar*, *poligar*, *mittadar*, *jaghirdar*, *shrotriemdar*, or *inamdar* or any person claiming through or holding under any of them, are and are hereby declared to be the property of Government, except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land-owners and to all customary rights legally subsisting." It is contended for the plaintiff, the *inamdar*, that the section does not really alter the law as previously understood and the channels passing through the whole *inam* village cannot be presumed to be the property of the Government. We consider it desirable to call for a finding on the question whether, by the grant of the *inam* to the *inamdar*, the title to the channel irrigating the village belonged to the *inamdar*.

The original *inam* title deed which was granted by the Government in 1867 has not been produced. It is stated to have been destroyed. A fresh title deed which was granted in 1898 has been produced and is marked as Exhibit XX. An extract from the *inam* register, Exhibit XVI, has also been produced. It appears from it that the *inam* was originally granted in 1767 to one Kanna Pillai Ramavadhanulu as personal hereditary *inam* by Sitaramraz. Sitaramraz was the brother of Viziaramraz, the then *zemindar* of Vizianagaram. He was a renter under the East India Company which had obtained a *firman* from the Moghal Emperor granting the management of the Sircars to the Company. The village in question was included in the Chicacole *haveli* in 1802. The Government sold its *haveli* lands in 1803-04 to the highest bidder on Permanent Settlement and 20 proprietary estates were formed by the sale of the Chicacole *haveli*. The village in question is situated in one of the *zemindaries* so formed named Jarjangi. The *inam* village was excluded from the Permanent Settlement of the Jargengi estate. The proprietor of the estate was entitled only to get the Kattupadi fixed on the village, the right of resumption of the *inam* being reserved by the Government. The Government subsequently recognised the *inam* granted by Sitaramraz and settled the *inam* with the *inamdars* and granted a *patta* to them. The *inam* register, Exhibit XVI, does not show that the Government intended to exclude any portion of the *inam* which had been originally granted in 1767. Exhibit XVI shows the mode in which the quit-rent payable for the village was fixed; the Poramboke, consisting of channels, tanks, village sites, *pattis*, burial ground, hills as well as *jungle* and pasture lands together amounting to 116 acres, was excluded from the total acreage of the village. The assessment was fixed on the cultivated dry and wet lands. Exhibit XX, the *inam patta* of 1898, shows that the Government acknowledged the title of the *inamdar* to the whole village. It states:—"I acknowledge your title to a personal *inam* consisting of the right to the Government revenue of land claimed to be 108·38 acres of dry, 21·53 of wet and 13 acres of garden land situated in the Jarjengi Proprietary Shrotriam portion of the village of Lakkimdiddi of Chicacole, District of Ganjam." The words "Besides Poramboke" are inserted in the margin, the extent of this Poramboke being as appears from Exhibit XVI, 116 acres. The District Judge assumes that the original title deeds must have also acknowledged the *inamdar's* title to the Shrotriam village said to consist of a certain extent of dry and wet land besides Poramboke. This assumption is based on the form of grants issued in respect of whole village *inams* as appearing from the title deeds granted by the Government for other villages produced on behalf of the plaintiff. It is unnecessary to consider whether this assumption was safely made. It is contended on behalf of the Government that the object of the *inam* title deed was only to recognise the *inamdar's* title to the Government Revenue or Melvaram of the village and, in cases where the *inam* was enfranchised, to give up the Government's right of resumption; that as no Melvaram was levied or payable on Porambokes there could have been no intention to recognise the *inamdar's* title to any Poramboke by the grant of the title deed. We do not decide in this case that the mere insertion in the margin of the title-deed of the words "Besides Poramboke" must necessarily be taken to be an acknowledgment by the Government of the *inamdar's* title to all kinds of Poramboke. It was held, in *Papala Narayansawmi* v. *Pensala Kanniappa* (3), by this Court that such is

(3) (1912) 1 M. W. N. 496; 14 Ind. Cas. 261.

not the necessary effect of the insertion of those words. The question in that case related to the bed of a stream. The *inam* there was granted by the British Government in 1802 in lieu of certain lands held as emoluments of the office of Nattuvar which had been resumed by the Government. No boundaries were stated in the documents relating to the grants and no mention was made of the river or river-bed. The Court held that notwithstanding the insertion of words "Besides Poramboke" in the margin of the title-deed, the documents in the case showed that it was not intended to acknowledge the *inamdar's* title to the bed of the stream. In *Ambalavana Pandara* v. *Secretary of State* (4), it was held that a grant of a village "with all wells, tanks and waters within the boundaries" did not pass to the grantee any artificial water-course then existing which irrigated the village granted and other lands. There was no mention in the grant of the channel although the existence and importance of the channel as separate entity were present to the mind of the grantor and although tanks and wells were separately mentioned. It was held that the omission of channel was intentional and that from that circumstance it was clear that it could not have been the intention of Government to recognise the *inamdar's* title to the channel or its bed. The effect to be given to the insertion of the words "Besides Poramboke" must depend on the evidence available in each case and the circumstances attending the grant. In this case, it is extremely unlikely that when the whole of the village was granted in 1767 by Sitaramraz, it was not intended to convey to the grantee all the wastes and Porambokes in the village. The British Government accepted that grant and recognised the *inamdar's* title under it. The channel was not one which passed through any Government property before it reached the village of Lakkimidi It is apparently not a large stream connected with any system of irrigation maintained by Government and, as found by the former District Judge, the channel was not controlled by the Government to any appreciable extent. There was no intention on the part of Government at any time to derogate from the grant made in 1767. Both of the learned District Judges who dealt with the case proceeded on the footing that the channel and other Poramboke in the village belonged to the *inamdar*. On the whole, we see no reason to dissent from that conclusion. It has, therefore, not been proved that the water irrigating the village belongs to Government. In the result we dismiss the appeal with costs. The memorandum of objections has not been argued and is also dismissed with costs.

Appeal dismissed.

(4) 28 M. 539; 15 M. L. J. 251.

CALCUTTA HIGH COURT.
CIVIL RULE No. 226 OF 1912.
May 20, 1912.
Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.
Maharaja Sir BIJOY CHAND MAHATAP —PLAINTIFF—PETITIONER
versus
RAKHAL CHATTORAJ AND OTHERS— DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 2, sub-s. (2), O. IX, r. 8—Decree where defendant only appears—Appeal.

A decree under rule 8 of Order IX of the Civil Procedure Code of 1908 is not an order of dismissal for default within the meaning of sub-section (2) of section 2 of the Code, and is, therefore, appealable.

Rule against the order of the Sub-Judge of Burdwan, dated September 14th, 1911.

Babu *Shoroshi Charan Mitra*, for the Petitioner.

JUDGMENT.—The question of law raised in this Rule is, whether a decree under rule 8 of Order IX of the Code of 1908, is an order of dismissal for default within the meaning of sub-section 2 of section 2 of the Code. It appears that the petitioner was the plaintiff in a suit for rent. When the suit came on for trial, an application was made on his behalf for adjournment. That application was refused, whereupon his Pleader stated that he had no materials in support of the claim. The Court did not dismiss the suit, as the defendants had admitted a part of the claim: and a decree was made in terms of rule 8 of Order IX of the Code. That decree is to the effect that the portion of the claim admitted by the defendant be decreed and that the remainder

In re DORAISAWMY THEVAN.

of the claim be dismissed. In our opinion, this decree is not an order of dismissal for default within the meaning of sub-section 2 of section 2. Consequently; an appeal against the decree was competent. Such an appeal was preferred, but the Subordinate Judge erroneously declined to entertain it on the ground that the decree was really an order of dismissal for default and was consequently non-appealable.

The result is that this Rule is made absolute, the order of the Subordinate Judge set aside, and the case remitted to him in order that the appeal may be heard on the merits. As the Rule has not been opposed, there will be no order for costs.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1626 OF 1911.

April 30, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re DORAISAWMY THEVAN AND OTHERS—APPELLANTS.

Hindu Widows' Re-marriage Act (XV of 1856)—Hindu Law—Widow re-marrying, whether entitled to retain husband's estate—Custom.

A Hindu Widow's right to retain property inherited from her husband ceases on her re-marriages, and the reversioners are entitled to immediate possession of the properties on her re-marriage.

Murugayi v. *Viramakali*, 1 M. 226; *Rasul Jehan Begum* v. *Ram Surun Singh*, 22 C. 589; *Vithu* v. *Govinda*, 22 B. 321; *Panchappa* v. *Sanganbasawa*, 24 B. 89, followed.

Gajadhar v. *Musammat Kaunsilla*, 31 A. 161; 1 Ind. Cas. 761; 6 A. L. J. 107 and *Mula* v. *Partab*, 32 A. 489; 6 Ind. Cas. 114; 7 A. L. J. 417, not followed.

Quære:—Whether, if a custom were proved according to which a re-marrying widow is entitled to retain property inherited from her husband notwithstanding her re-marriage, such a custom could not be given effect to?

Second appeal against the decree of the District Court of Madura, in A. S. No. 435 of 1910, presented against the decree of the Principal District Munsif of Madura, in O. S. No. 200 of 1908.

Mr. *T. Arumainatham Pillay*, for the Appellants.

This second appeal coming on for orders as to admission under Order XLI, rule 11 of Act V of 1908, the Court delivered the following

JUDGMENT.—Both Courts concur in finding that there was no justifying necessity for the alienation made by the widow. The District Judge also finds that the defendant's father, the alienee, did not make proper inquiries before advancing the money to satisfy himself that funds were required by the widow for any necessary purpose. The alienation, therefore, cannot be held to be binding on the reversioner.

The next question argued is, whether the plaintiffs have a present right to recover the property. The widow is still alive, but she re-married after the alienation. It is contended that her widow's interest did not cease on her re-marrying, re-marriage of widows being permitted according to the custom of the caste. It was not alleged or proved that, according to the custom pleaded, widows who remarry would be entitled to retain the estate inherited from their husbands notwithstanding their re-marriage. I see no reason not to follow the decision of this Court in *Murugayi* v. *Viramakali* (1) that, according to the provisions in the Widow's Re-marriage Act, a widow's right to property inherited from her husband ceases on her re-marriage. This is the view taken also by the Calcutta and the Bombay High Courts. [See *Rasul Jehan Begum* v. *Ram Surun Singh* (2); *Vithu* v. *Govinda* (3); *Panchappa* v. *Sanganbasawa* (4)], though the Allahabad High Court has taken a different view in *Gajadhar* v. *Musammat Kaunsilla* (5) and *Mula* v. *Partab* (6). The Widow Re-marriage Act does not proceed on the assumption that the re-marriage of the widow would be invalid except for the provisions of the Act making it valid. I express no opinion on the question, whether if a custom were proved according to which a re-marrying widow is entitled to retain property inherited from her husband notwithstanding her re-marriage, such a custom could not be given effect to, in spite of the provisions of the Widow's Re-marriage Act. I reject the second appeal.

Appeal rejected.

(1) 1 M. 226.
(2) 22 C. 589.
(3) 22 B. 321.
(4) 24 B. 89.
(5) 31 A. 161; 1 Ind. Cas. 761; 6 A. L. J. 107.
(6) 32 A. 489; 6 Ind. Cas. 116; 7 A. L. J. 417.

TRINAYANI DASEE *v.* SRICHANDAN BHUIYAH.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 558 OF 1909.
July 1, 1912.
Present:—Mr. Justice Chitty and
Mr. Justice Teunon.
TRINAYANI DASEE—PLAINTIFF—APPELLANT
versus
SRICHANDAN BHUIYAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Husband and wife—Maintenance—Criminal Procedure Code (Act V of 1898), s. 488—Order by Magistrate for maintenance of wife—Whether bars Civil suit for further order—Jurisdiction of Civil Court to entertain suit for additional maintenance.

Although there is an order by a Magistrate directing a husband to pay his wife's maintenance at a certain monthly rate, the Civil Court has power to make a further order in the matter in a suit by the wife.

The Civil Court may pass a separate order for additional maintenance if it thinks that the amount awarded by the Magistrate is not sufficient.

Appeal from the decree of the Sub-Judge of Cuttack, dated August 16th 1909.

Babus *Bipin Bihary Ghose* (Senior), *Mohini Nath Bose* and *Jadu Nath Mandal*, for the Appellant.

Babu *Satish Chandra Bose* for Babu *Probash Chandra Mitter*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff, Bhuinyani Trinayani Dasee, in a suit which was brought by her against her husband for maintenance.

The only point which was argued before us was whether this suit was, in any way, barred by the fact, which is undisputed, that the lady had obtained an order from the Magistrate, under section 488 of the Code of Criminal Procedure for the payment to her of maintenance of Rs. 50 a month. That sum is the highest which a Magistrate can award under that section and, in this Civil suit, the lady asked for Rs. 250 a month with arrears, for the provision of a proper residence and, further, that the amount allowed might be made a charge upon her husband's properties. The last order is one which, of course, the Magistrate had no jurisdiction to pass.

We adjourned the appeal for a fortnight to enable the parties to come to terms. They have not, however, been able to do so, and we must, therefore, pass orders in the case.

We were referred to a number of decisions which, generally speaking, were to the effect that a Civil Court cannot interfere with the orders of a Criminal Court in the matter of maintenance. These cases, however, have no bearing on the question which is before the Court in the present case which is whether, although an order has been made by the Magistrate, the Civil Court has power to make a further order in the matter of maintenance. We are not aware of any provision of law which excludes the jurisdiction of the Civil Court in such a case, and we, therefore, cannot agree with the learned Subordinate Judge that this suit is barred by the order which was passed by the Magistrate. It is true that the plaintiff cannot have that order set aside, but there seems to be no reason why she should not have a separate order for additional maintenance, if the Civil Court thinks that Rs. 50 a month is not sufficient, or an order from the Civil Court for a sum which would include and give credit for the 50 rupees allowed by the Magistrate.

We accordingly set aside the order of the Subordinate Judge and remand the case to his Court for him to inquire and determine what would be the proper amount to allow this lady as maintenance either in addition to or, more properly, inclusive of the sum allowed by the Magistrate. The Subordinate Judge will be at liberty to pass an order making the amount allowed a charge on the properties of the husband. The appellant will have her costs of this hearing. We fix the hearing fee at five gold *mohurs*.

If the plaintiff-appellant had been compelled to pay the Court-fee on this appeal, she would have been entitled to a refund of the amount but, as she filed the appeal *in forma pauperis*, no fee has in fact been paid, and, therefore, no order is necessary for a refund.

Let the record be sent down at once.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 42 OF 1911.

April 12, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

JAIPARKASH NARAIN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BASANTA KUMARI DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, rr. 5, 6—Attachment before judgment—Finding of essential elements necessary—Opportunity of furnishing security to be given before attachment before judgment.

A Court has no power to make an order under Order XXXVIII, rule 6 of the Civil Procedure Code, directing an attachment before judgment, without finding the essential elements mentioned in rule 5 of the Order, and without affording the defendant an opportunity of furnishing security.

Shoshee Shekhoreswar Roy v. *Haro Gobind Bose*, 13 C. L. R. 356; *Bishambar Sahai* v. *Sukhdevi*, 16 A. 186 and *Ahmed Ali* v. *Gladstone*, 7 W. R. 508, relied upon.

Appeal from the order of the First Sub-Judge of Bhagalpore, dated January 26th, 1911.

Babus *Baldeo Narain Singh* and *Jyotish Chandra Sarkar*, for the Appellants.

Babu *Brojo Lal Chakravarti*, for the Respondents.

JUDGMENT.—This appeal is directed against an order of attachment before judgment, under rule 6 of Order XXXVIII of the Code of 1908. The order is assailed on behalf of the defendants-appellants on the ground that the learned Judge has not, as required by the statute, determined upon the materials on the record that they were about to dispose of the whole or any part of their property. In our opinion, this contention is well founded, and the order in question cannot be supported.

The plaintiffs-respondents, in an action to enforce a mortgage security, applied, on the 22nd December 1910, for an order of attachment before judgment on the allegation that the mortgaged property would not be sufficient to satisfy the mortgage-debt and that unless an order for attachment before judgment was granted, the defendants would dispose of the whole of their property. The affidavit in support of this application was of the vaguest character. The deponent stated that he had been informed and believed that the allegations in the application were true; but the requisite details were not given [*Gobinda Mohun Das* v. *Kunja Behari Das*(1)] and there was no indication of the source of information. A petition of objection was filed in answer by the defendants. They denied the truth of the allegation about the insufficiency of the mortgaged security and of the statement that they were about to dispose of their properties. The Subordinate Judge thereupon recorded an order in the following terms: "The defendants object to the attachment before judgment, but the objection is groundless; I see there is no harm in keeping the properties under attachment. The objection is disallowed and the attachment is allowed to be issued". On behalf of the appellants, it has been argued that the order is bad as the Subordinate Judge has not found the essential elements mentioned in rule 5 of Order XXXVIII, which must be established before an order of this description can be made. In support of this proposition, reliance has been placed upon the cases of *Ramnarain* v. *Ezekiel* (2) and *Shoshee Shekhoreswar Roy* v. *Haro Gobind Bose* (3) In the latter case, Sir Richard Garth, C. J., pointed out, with reference to the corresponding section of the Code of 1882, that the power given to the Courts to effect an attachment before judgment, should be exercised sparingly and with the utmost caution. The Court should be fully satisfied before it proceeds under that section that the defendant is really disposing of his properties with intent to obstruct or delay the execution of any decree that may be passed against him. This view is also supported by the decision in *Bishambar Sahai* v. *Sukhdevi* (4), in which it was pointed out that although the Court should act cautiously, it was not necessary to establish by actual sale of the property that the mortgaged property would be insufficient to satisfy the mortgage-debt. The Subordinate Judge appears to have lost sight of this principle and seems to have assumed that no harm is done to the defendants if their property is kept in attachment and that an order in favour of the plaintiffs may be made as a matter of course. This view

(1) 10 C. L. J. 414; 14 C. W. N. 153; 4 Ind. Cas. 380.
(2) 2 Hyde 183.
(3) 13 C. L. R. 356.
(4) 16 A. 186.

clearly cannot be sustained. An attachment practically takes away the power of alienation, and such a restriction on the exercise of the undoubted rights of ownership, ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff. The Subordinate Judge has further overlooked the fact that before the order is made against a defendant, he ought to have been afforded an opportunity to furnish security, *Ahmed Ali Muhammad* v. *Gladstone* (5). The order in question is, therefore, inappropriate from every point of view.

The result is that this appeal is allowed, the order of the 26th January 1911, discharged and the case remitted to the Subordinate Judge in order that he may decide the questions raised on materials to be placed before him by the parties. The learned Vakil for the appellants has given an understanding on behalf of his clients that they will not deal with the property in any way between this date and the date of the final decision of the Subordinate Judge upon this matter. We make no order as to costs.

Appeal allowed.

(5) 7 W. R. 508.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 623 AND 669 OF 1907.

April 11, 1912

Present:—Sir Ralph Benson, Judge, and Mr. Justice Wallis.

IN No. 623

VELAYADAIN CHETTY AND ANOTHER—APPELLANTS

IN No. 669

NILABAGAM CHETTY—APPELLANT

versus

'ALANGARAN CHETTY AND OTHERS—RESPONDENTS (IN BOTH).

Mortgage—Redemption—Purchase of part of equity of redemption by plaintiff and another part by defendant—Right of plaintiff to redeem the whole mortgage—Consolidation—Mortgages to be united in one person—Transfer of Property Act (IV of 1882), ss. 60, 61, 95.

The rule is that a mortgage is one and indivisible, and the exception only arises when the mortgagee, or, if there are more mortgagees than one, all such mortgagees have acquired in whole or in part the share of a mortgagor.

Plaintiff sued for redemption of a mortgage as the purchaser of a part of the equity of redemption. First defendant, who was one of the several mortgagees, was the purchaser of the other part:

Held, that the plaintiff was both bound and entitled to redeem the whole mortgage and not only the part purchased by him.

Huthasanan Nambudri v. *Parameswaran Nambudri*, 22 M. 209, referred to.

Kallan Khan v. *Mardan Khan*, 28 A. 155; A. W. N. (1905) 225; *Mamu* v. *Kuttu*, 6 M. 61 and *Thillai Chetti* v. *Raman atha Aiyyan*, 20 M. 295, distinguished.

Both under section 61 of the Transfer of Property Act and the law prior to its enactment, it was necessary, for the consolidation of mortgages that the two mortgages to be consolidated should have become united in title or come into the same hand.

Pledge v. *White*, (1896) A. C. 187, 65 L. J. Ch. 449; 74 L. T. 323; 44 W. R. 589, *Riley* v. *Hall*, 79 L. T. 244, referred to.

Second appeal against the decree of the Subordinate Judge of Madura West, in A. S. Nos. 112 and 124 of 1905, presented against the decree of the District Munsif of Sivaganga, in O. S. No. 201 of 1900.

In No. 629.

Messrs. *K. Srinivasa Aiyangar* and *N. Rajagopala Chariar*, for the Appellants.

Messrs. *S. Subramania Aiyar* and *S. Srinivasa Aiyangar*, for the Respondents.

In No. 669.

Messrs. *K. Srinivasa Aiyangar* and *N. Rajagopala Chariar*, for the Appellants.

Messrs. *S. Srinivasa Aiyangar* and *P. R. Narayanasawmi Aiyar*, for the Respondents.

JUDGMENT.—This is a suit to redeem a mortgage effected by the late *zemindar* of Vaiupur in favour of defendant No. 3 and of the fathers of defendants Nos 1, 2 and 4. Portions of items Nos. 1 and 2 of the mortgage properties were sold in execution of a decree obtained against the *zemindar* in 1866 and 1867 and now belong to the 10th defendant. In a suit of 1884 the plaintiff obtained a decree against the *zemindar's* elder son and in execution acquired the elder son's share of the mortgaged properties in so far as it had not been already alienated. The plaintiff's case is that the estate was impartible and that by his purchase he acquired the whole equity of redemption subject to the prior alienations. In 1897, the *zemindar's* younger son, claiming that the estate was partible, sold his share to a purchaser who transferred it to the first defendant who claims to be entitled to a one-third share in addition to his rights as a representative of one

of the original mortgagees. Both the lower Courts, however, have held that it was unnecessary to decide the question of impartibility in this suit. Both the lower Courts gave the plaintiff a decree. Second appeals have been preferred by the 1st and 10th defendants and two questions have been argued before us.

In the first place, it is argued on the part of the 1st defendant that the plaintiff, not being the owner of the whole of the equity of redemption and part of it having become vested in the 1st defendant himself, who is also one of the mortgagees, the plaintiff is not entitled to redeem such part. This contention is opposed to section 60 of the Transfer of Property Act as well as to authority. Section 60 provides that "Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, *or, if there are more mortgagees* than one, *all such mortgagees*, has or have acquired, in whole or in part, the share of a mortgagor." Here there are more mortgagees than one but only one of them has acquired in part the share of a mortgagor. It is, therefore, perfectly clear that the exception does not apply, that the plaintiff is bound to offer to redeem the whole mortgage. It seems equally clear that he is entitled to insist on doing so (see section 95 of the Transfer of Property Act). The general rule being, as explained in *Huthasanan Nambudri* v. *Parameswaram Nambudri* (1), that a mortgage is one and indivisible and the exception only arises when the mortgagee, or, if there are more mortgages than one all such mortgagees have acquired, in whole or in part the share of a mortgagor. The rule is explained in Ghose on Mortgages, 4th Edition, page 247. The appellant relied on *Kallam Khan* v. *Mardan Khan* (2), but that was a case in which a single mortgagee had acquired a part of the mortgaged property and was, consequently, within the exception. It was there held, in cases coming within the exception, that the indivisible character of the mortgage was broken up and a mortgagor could not claim to redeem the shares of other co-mortgagors in which he was not interested but the judgment expressly distinguishes that case from one in which only one of several mortgagees had purchased a part of the mortgaged properties and the indivisible character of the mortgage had not been destroyed. *Mamu* v. *Kutlu* (3) was a case in which a single mortgagee had purchased a portion of the mortgaged property and so came within the exception and *Thillai Chetti* v. *Ramanatha Ayyan* (4) wastr eated as coming within the same principle.

The next objection is, that by a prior mortgage in 1863, the *zemindar* mortgaged certain items included in the plaint mortgage together with other properties and that the first defendant having become solely entitled to such prior mortgage, the plaintiff is not entitled to redeem the plaint mortgage without redeeming that mortgage to the extent of the amount thereof apportioned in the items included in the plaint mortgages.

What the first defendant claims, therefore, is to consolidate the two mortgages, that is to say, to treat them as one and insist that one shall not be redeemed without the other. But even before the right to consolidate had been restricted by legislation, as by section 61 of the Transfer of Property Act, it was always necessary that the two mortgages to be consolidated should have become united in title or come into the same hand, to use the language of Lord Davey in *Pledge* v. *White* (5), and this cannot be said to be the case where, as here, the 1st defendant is only a part owner of the plaint mortgage.

The point has been expressely decided in a later case *Riley* v. *Hall* (6). In the result, the appeals fail and must be dismissed with costs.

Appeals dismissed.

(1) 22 M. 209.
(2) 28 A. 155; A. W. N. (1905) 225.
(3) 6 M. 61.
(4) 20 M. 295.
(5) (1896) A. C. 187; 65 L. J. Ch. 449; 74 L. T. 323; 44 W. R. 589.
(6) 79 L. T. 244.

NAULI *v.* KHERI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 237 OF 1911.

June 11, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

Musammat NAULI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KHERI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Jats—Inheritance—Custom—Exclusion of daughters and daughter's sons.

There is no custom among *Jats* of Sardhana *Tahsil*, Meerut District, excluding daughters and daughter's sons from inheritance.

Second appeal from the decision of the District Judge of Meerut, dated 11th February 1911.

Mr. *Howard*, for the Appellants.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *G. L. Agarwala*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of property and mesne profits. The plaintiffs are the reversioners of the last male owner and have brought their suit on the death of the last remaining widow against the daughters, and one daughter's son. Under Hindu Law, the daughters are entitled to succeed. The parties are *Jats* resident in the Sardhana *Tahsil* of the Meerut District. The plaintiffs, accordingly in para. 6 of the plaint, pleaded that according to a custom prevalent in the *caste* and *brotherhood* of their family, daughters and daughter's sons were excluded from inheritance and the defendants, therefore, had no title.

The main defence was a denial of the custom and a claim based on the ordinary Hindu Law.

The Court of first instance held that the evidence produced by the plaintiffs did not establish an immemorial invariable custom and dismissed the suit.

The lower Appellate Court held that the evidence sufficiently established the custom and decreed the suit. The defendants come here in second appeal and it is urged that accepting the evidence, it is insufficient in law to establish a custom in derogation of the ordinary rule of Hindu Law to which the parties are subject. To decide the point, we have had to examine the evidence and have been taken through all the details of it which bear upon the point.

There can be no doubt that the burden was upon the plaintiffs to prove a custom which overrides the ordinary Hindu Law of inheritance.

They developed their case in the course of the evidence in the following manner. They tried to prove (1) that their class of *Jats* originally came from the Punjab; (2) that *Jats* in the Punjab follow the custom whereby daughters and their sons are excluded from inheritance; (3) that the custom prevailed in the two villages in which they own property and in the surrounding villages

In the course of this appeal, we are asked to accept the lower Court's finding that the plaintiffs are Punjabi *Jats* and our attention has been called to the reports of various Settlement Officers in several districts of the Punjab in which the custom is said to exist in those districts among *Jats*. It is then argued that the presumption is that the *Jats* who emigrated to these provinces retained their old customs and, therefore, there is a presumption in favour of the existence of the custom now put forward.

The evidence, on which the lower Appellate Court held that the *Jats* to which the plaintiffs belong, came from the Punjab, consists of the bald statement of one plaintiff and a few of their witnesses that their forefathers emigrated from the Punjab. As to when the emigration took place and from which part of the Punjab, there is no knowledge whatever displayed by the witnesses. One does, indeed, give a name of a village, but cannot say even in what district of the Punjab it is situate.

As evidence of the origin of the plaintiff's caste and family, this is worthless and we find it difficult to understand how the lower Court could, on such bald and unconvincing statements, hold that the fact was proved.

But, granting that their forefathers came from the Punjab in the remote past, there is no evidence at all to show how many hundreds of years ago this occurred. None of the evidence on record goes back later than 40 years. As the witnesses can give us no help in the matter, the presumption is that the emigration took place so long ago that all knowledge of it has vanished.

In these circumstances, there can be no presumption that the plaintiff's caste-fellows have not followed the same rule of law which prevails in these Provinces and which is an ordinary rule of Hindu Law. As the lower Court's judgment shows, there are many *Jats* in these Provinces who follow the rule of Hindu Law and only recently another Bench of this Court, in *Lachhmi* v. *Sangram* (1), in a similar case from this same part of the Province, has held that the custom now put forward by the plaintiffs does not exist among *Jats*

We are, therefore, unable to approach the actual evidence in the case with a persumption in favour of the existence of the custom. As we have already said, it is one contrary to the rule of Hindu Law and, the parties being Hindus, must be, therefore, proved by clear and cogent evidence.

To establish the custom, the plaintiffs have produced entries made at the two Settlements of the district of Meerut which followed each other closely and that soon after the Mutiny of 1857.

The entries are to be found in the *wajib-ul-arz* of seven villages of the district, two being these in which the family owns property.

In addition to these documents, they have called witnesses who testify to instances in which the custom has been observed.

In regard to the entries in the *wajib-ul-arz*, these lay down that daughters and their sons shall not inherit where a *Jat* dies leaving collaterals alive. But it seems to us that these very documents contain within themselves intrinsic evidence to show that they are not relating actual existing customs as to the law of inheritance but rules which the persons who dictated them wished to be established.

They lay down the rule that a *Jat* cannot gift his property to his daughters or their sons as long as he has any collateral relatives alive. They place no restriction on his power to gift to a stranger.

Again, in one set of these documents, it is laid down as a rule of inheritance that where a man has two or more families by two or more wives, his estate will be divided up into a corresponding number of portions and the sons of each wife will divide their portion among themselves. But in the other set of *wajib-ul-araiz*, the rule laid down is that his descendants will take *per capita*. These two sets of documents were drawn up at no great distance of time from each other and such customs do not alter so rapidly. Under these circumstances, considerable doubt arises as to whether actual existing customs were recorded or whether the records contain merely those rules which the persons, who dictated them, desired to promulgate.

And our suspicions are greatly strengthened when we come to the oral evidence as to the instances of exclusion.

The plaintiff's chief witnesses were Niada (plaintiff), Rup Ram Kure, Lachmi Dat and Sis Ram; a few others were also examined. The evidence of these witnesses go to show some 18 to 20 instances having occurred within the last 30 or 40 years of the exclusion of daughters and their sons. At the same time, we note that they speak in some cases merely by hearsay and their cross-examination shows that in many cases, they have a woeful ignorance of the family and estate. The best witnesess to prove such instances would surely have been the persons who excluded the daughters and daughter's sons, or their immediate descendants.

But, putting this aside, these very witnesses have had to admit at least six instances within the same period of daughters and their sons having inherited, even in spite of the opposition of collaterals in a few cases.

The defendants have called witnesses who similarly testify to instances the other way. Several of these are not real instances.

Stress is laid on the fact that in at least two cases, the daughters have sold the property to the collateral heirs of their fathers. This surely weighs against the plaintiff's case.

Some instances on both sides have occurred within the last 12 years and the persons in possession are liable to attack in the law Courts.

None of the instances are very old. We must note that the plaintiffs did not limit the custom to their own family. They distinctly pleaded a caste custom among *Jats*.

It comes then to this that about 18 instances of exclusion within 30 or 40 years have been proved and about six cases where the daughters have inherited, custom has

(1) 14 Ind. Cas. 322.

been defined as a rule of conduct uniformly governing a community from time immemorial. The Hindu Law of inheritance is itself based on immemorial custom, and the parties are Hindus. They put forward what they designate an immemorial custom divergent from the rule of Hindu Law. The utmost that their evidence proves is that there is a strong feeling in their caste that the daughter should not be allowed to inherit and that during the last 30 or 40 years, there have been 18 cases in which the daughters have been excluded and that there have been at least 6 instances in which they have asserted their right successfully. In our opinion, this evidence is insufficient to establish a general custom, binding on the whole community this rule of inheritance. There is no evidence to show that it has been uniformly followed over a considerable period of time so as to be binding on the community as a custom.

In this view, we must allow the appeal. We set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 148 OF 1911.
April 30, 1912.
Present:—Mr. Justice Wallis and
Mr. Justice Sankaran Nair.
VEERABADRA TEVAN—APPELLANT
versus
VEERAPPA TEVAN AND OTHERS—
RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Suit for redemption of mortgage—Plea of purchase of mortgaged property by defendant—Onus *of proving absolute conveyance—Limitation.*

In a suit for redemption of a mortgage, where the defendant pleads that he purchased not the mortgage interest but the property absolutely from the mortgagee and claims the benefit of Article 134 of the Limitation Act, the *onus* is on the defendant to prove an absolute purchase affirmatively and not on the plaintiff to prove that the mortgagee did not purport to transfer more than his mortgage interest.

Second appeal against the decree of the Subordinate Judge of Negapatam, in A. S. No. 889 of 1909, presented against the decree of the District Munsif of Tirutaraipundi, in O. S. No. 180 of 1908.

FACTS —The facts of the case are sufficiently clear from the following judgment of the lower Appellate Court:—

"Suit to redeem a mortgage with possession. The mortgagors were two brothers, Kolandaivelu Odayar and Srinivasa Odayar. One Singaravelu Odayar was the mortgagee. First plaintiff is the son of Kolandaivelu Odayar. First defendant is the brother's son of the mortgagee. Both the mortgagors and the mortgagee had since died. The mortgage was effected for Rs. 150, on 12th June 1874 fixing five years' time for redemption. On the death of the mortgagee, his brother, Rangasami Odayar, assigned it in favour of one Vithialingathudayar, the 2nd defendant's father. Defendants Nos. 3 to 5 were impleaded as they are in possession of the plaint properties. In the course of the suit, 1st plaintiff having transferred his interest in the plaint properties to the 2nd plaintiff, his name was removed, and the 2nd plaintiff's name was substituted in his stead. First and 3rd defendants disclaimed any interest in the plaint property. The 2nd defendant did not contest the suit. Fourth defendant for himself and, as guardian of the 5th defendant, contested the same, and setting up absolute title to the plaint property by right of purchase of the same by himself and the father of the 5th defendant on 5th March 1902 under the sale deed, Exhibit II, from one Appusami Odayar, since deceased, who was the purchaser of the same, among others, from 2nd defendant under a sale deed, Exhibit I, dated 5th April 1893, ignored any knowledge of the plaint mortgage either on his part or on the part of Appusami Udayar, and pleaded limitation with reference to Article 134 of the Limitation Act.

The District Munsif found that the plaint mortgage was genuine, that Appusami Odayar had purchased under Exhibit I only the mortgagee's interest therein, and not the absolute estate also, with knowledge of the existence of the plaint mortgage, that the suit was not barred by limitation, and that Article 134 did not apply to the case, and gave a decree for redemption in 2nd plaintiff's favour. Defendants Nos. 4 and 5 have appealed against the said decision.

* * * * * * * *

VEERABADRA TEVAN *v.* VEERAPPA TEVAN.

"The only point then which was argued on appeal is, whether Article 134 of the Limitation Act applies to this case and bars the claim. Article 134 runs thus :—"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration—12 years, the date of the transfer". The words '*bona fide*,' or rather 'in good faith', which appeared in Article 134 of Act IX of 1871, were advisedly omitted in Article 134 of Act XV of 1877, to exclude the possible inference that absence of notice of the real owner's claim was necessary to enable a purchaser to avail himself of the Article. *Yesuramji Kalnath* v. *Balkrishna Lakshman* (1). The Article is intended to provide for a case, where the defendant's vendor purports to transfer full ownership when, in fact, he has only a mortgage right to transfer, *Rego* v. *Abu Beari* (2) and it is not applicable to the case of a purchaser from a mortgagee of his interest as such mortgagee. *Kamta Prasad* v. *Bakar Ali* (3); *Chandan Kuar* v. *Jhuran Singh* (4); *Inji Rai* v. *Wali Muhammad* (5). In order to give the purchaser the benefit of Article 134, the purchase must have been made of that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title, *Pandu* v. *Vithu* (6); but, if a purchaser from a mortgagee had actual knowledge that his vendor was in possession of the properties only as mortgagee, then Article 134 won't apply. So, the essential requisites of the applicability of Article 134 are, (1) the purchaser should have purchased in the belief that the mortgagee had a right to convey, and was conveying, an absolute interest, and not merely the interest of a mortgagee ; (2) the purchaser should have had no actual knowledge that his vendor was in possession only as a mortgagee; (3) the vendor must have made a representation to the purchaser that he was conveying only an absolute title; and (4) absence of *bona fide* does not prevent the purchaser from claiming benefit of this Article.

(1) 15 B. 583.
(2) 21 M. 151.
(3) A. W. N. (1881) 122.
(4) A. W. N. (1881) 75.
(5) A. W. N. (1881) 169.
(6) 19 B. 140.

"Such being the principles of law applicable to this case, I shall now proceed to consider, whether the facts of this case would warrant the applicablity of Article 134 to the same.

[Here the learned Subordinate Judge discussed the evidence and continued:—]

"In order to have the benefit of Article 134, the purchaser must show that he is the purchaser of an absolute title; and the production of Exhibit I by defendants Nos. 4, 5 and the recitals thereof afford cogent proof of the purchase of such an absolute title in the plaint properties by Appusami Odayar The *onus* is, therefore, shifted on to the 2nd plaintiff to show that Appusami had purchased the plaint properties with the actual knowledge of the vendor's title only as mortgagee from the said vendor's representation of his real title as mortgagee and a belief on the part of the vendee, Appusami, that what he was purchasing was not an absolute title, to prevent the application of Article 134. *Pandu* v. *Vithu* (6). Such a vendee does not buy the property as an absolute property, and does not differ from an assignee of the mortgagee's right. The mortgagor's suit against such a purchaser would be governed by Article 148.

[After further discussion of the evidence, the Subordinate Judge concluded thus:—]

"For all these reasons, I have no hesitation in holding that the 2nd plaintiff has not proved actual knowledge of the plaint mortgage on the date of Exhibit I and that Article 134 does not apply. I find, accordingly, that Article 134 bars the suit."

Plaintiff appealed to the High Court.

Mr. *C. S. Vencatachariar*, for the Appellant.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Respondents.

JUDGMENT.—We think the Subordinate Judge has erred in throwing on the plaintiff-mortgagor, the burden of proving that his mortgagee did not purport to transfer more than his mortgage interest so as to bring the case within Article 134 of the Indian Limitation Act. The deed of transfer, Exhibit I, recites that the title-deeds were handed over, and if so, the fact that the transferor had only a mortgage interest must have appeared. As against this, there is only the evidence of a Pleader who speaks to facts sixteen years old. He says he does not remember whether any

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title-deeds were handed over or not. It is for the defence to prove a purchase affirmatively to bring the case under Article 134, and we think the facts relied on by the Subordinate Judge do not make out such a case. We reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1014 OF 1911.

May 22, 1912.

Present:—Mr. Justice Banerji.

CHANDAR SEKHAR TEWARI—DEFENDANT—APPELLANT

versus

BALAKDHAR DUBEY—PLAINTIFF—RESPONDENT.

Mortgage—Priority—Minor—Proper guardians appointed—Negligence of guardian, effect of, on decree.

In 1892, *A.* obtained a mortgage decree on a mortgage of 1879. *B.*, a subsequent mortgagee of 1898, sued on his mortgage and impleaded *A.* as a defendant. *A.* did not set up his decree of 1892 as a defence but set up another mortgage of 1890, which the Court found did not exist.

Held, that it was not subsequently open to *A.* to assert that he had priority over *A.* as regards the mortgage decree of 1892.

Sri Gopal v. *Prithi Singh*, 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889, followed.

Where a minor was represented in a suit by a duly constituted guardian and by a person who could legally act as such, he is as much bound by the decree passed in the suit as he would have been if he were of full age.

If the guardian neglected to support the case of the minor but there is nothing to show that he did so deliberately, that circumstance alone would not entitle the minor to avoid the operation of the decree.

Daulat Singh v. *Raghubir Singh*, A. W. N. (1894) 141: and *Sham Lal* v. *Ghasita*, 23 A. 459; A. W. N. (1901) 147, followed.

Second appeal from the decision of the Additional Judge of Gorakhpur, dated the 31st July 1911.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Sarat Chandra Chaudhri*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for possession of a 3 pie, $1\frac{1}{2}$ *suls zemindari* share and for mesne profits. I must observe at the outset that the judgment of the lower Appellate Court is most unsatisfactory and does not comply with the requirements of Order XLI, rule 31 of the Code of Civil Procedure. It does not set forth the points at issue, nor does it give full reasons for the decision on those issues. All that it says is that a competent Court has already decided that the defendant's mortgage is not prior but subsequent, and as that decision has not been set aside, it operates as *res judicata*. The learned Judge does not refer to the judgment which he says has the effect of *res judicata*, and it is difficult to see which judgment he had in view. The facts of the case are somewhat complicated. It appears that under a registered bond dated the 21st of May 1879, a $5\frac{1}{3}$ pie share was mortgaged to the ancestor of the defendant. A suit for sale was brought on the basis of that mortgage, and a decree was obtained on the 30th of May 1892. On the 20th of October 1898, the same mortgagors executed a mortgage in favour of the plaintiff in respect of $10\frac{2}{3}$ pies which included the $5\frac{1}{3}$ pies mortgaged to the defendant's ancestor. The plaintiff brought a suit upon his mortgage and joined as parties to it, among others, the present defendant who was at the time a minor and his brother Kalka Prasad. Kalka Prasad had been appointed by the District Judge guardian of the minor and he apparently was appointed by the Court guardian of the minor for the suit. In that suit, Kalka Prasad, on behalf of himself and the minor, set up two mortgages of 1890 as having priority over the plaintiff's mortgage. But apparently he did not put forward the decree of the 30th of May 1892 under which the right of the defendants, as prior mortgagees under the mortgage of 1879 had been recognized and ordered to be enforced. The Court, however, held that the mortgages of 1890 were not proved and passed a decree on the 25th of January 1904 for sale of the property comprised in the plaintiff's mortgage. The decree provided that certain other mortgages held by *Musammat* Kabutra and others should first be redeemed by the plaintiff, but it made no such provision in favour of the defendant so that the decree, so far as the defendant was concerned, was a decree for sale free from any incumbrance which might have existed in favour of the defendant. If the learned Judge of the lower Appellate Court had this decree in view, he was wrong in saying that a competent Court had declar-

ed that the defendant's mortgage was subsequent to that of the plaintiff. The Court made no such declaration. The effect, however, of the decree was, as I have pointed out above, that the defendants could not take the benefit of the decree which they had obtained in 1892 on the basis of their mortgage of 1879. In execution of the decree obtained by the defendants, they caused $3\frac{1}{3}$ pies to be sold by auction and purchased it on the 27th of March 1905. Subsequently, on the 26th of October 1908, the plaintiff in execution of his decree caused $5\frac{1}{3}$ pies to be sold and bought it himself, but did not obtain possession of the $3\frac{1}{3}$ pies purchased by the defendants. He, therefore, brought the suit out of which this appeal has arisen for possession of that share. The defendant contended that he had priority over the plaintiff by reason of his having purchased the property under the prior mortgage of 1879 and the decree passed on the basis of that mortgage. He urged that his brother Kalka Prasad was a man of vicious habits, and that the decree, obtained by the plaintiff in the suit in which Kalka Prasad was the defendant's guardian, was fraudulently obtained as against the defendant. He further contended that the property purchased by him was not a part of the property purchased by the plaintiff, that is to say, that the property sold under the decrees held by the respective parties was not the same property. The Court of first instance decided all these points against the defendant and decreed the claim This decree has been affirmed by the lower Appellate Court. The defendant has preferred this second appeal. In my judgment, the decrees of the lower Courts are right. So far as the question of the identity of the property is concerned, it is clear that parts of the same property were sold in execution of the two decrees obtained respectively by the plaintiff and the defendant. The plaintiff was the mortgagee of $10\frac{2}{3}$ pies, half of which, namely, $5\frac{1}{3}$ pies, was subject to the mortgage in favour of *Musammat* Kabutra and others which the plaintiff was ordered to redeem. That mortgage was not redeemed so that the plaintiff brought to sale the remaining $5\frac{1}{3}$ pies. It is a part of this $5\frac{1}{3}$ pies which was purchased by the defendant. He does not pretend that he purchased any portion of the property which was held in mortgage by *Musammat* Kabutra and others. This point was found against the defendant by the learned Munsif, and no objection was taken in appeal to the lower Appellate Court on that point. The next point is that the priority, which existed in the defendant's favour under the decree of 1892, not having been put forward in the suit brought by the plaintiff upon his mortgage of October 1898, it is not now open to the defendant to assert that he has priority over the plaintiff. This is settled by the principle of the ruling of their Lordships of the Privy Council in *Sri Gopal* v. *Pirthi Singh* (1). The decree passed in the plaintiff's favour against the defendant is binding upon him, and although it may have been a wrong decree inasmuch as it did not safeguard the defendant's rights under his prior mortgage and prior decree, yet the defendant is precluded from claiming priority over the plaintiff whom the decree gave the right to sell the property mortgaged to him free from any incumbrance which might have existed in the defendant's favour. The defendant, however, contends that the decree is not binding upon him inasmuch as it was fraudulently obtained. This plea was taken in the memorandum of appeal to the lower Appellate Court but was not considered by the learned Judge. I have, however, looked into the matter and find that there is nothing on the record to show that there was any fraud on the part of Kalka Prasad, the defendant's guardian. As I have stated above, Kalka Prasad was the certificated guardian of the defendant. He is his own brother, and, as the Court of first instance finds, lives jointly with him so that the defendant was properly represented in the previous litigation by a duly constituted and legal guardian. If the guardian neglected to support the case of the defendant, and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the defendant to avoid the operation of the decree. As he was represented in the suit by a duly constituted guardian and by a person who could legally act as such, he was as much bound by the decree passed in that suit as he would have been if he were of full age; see *Daulat Singh* v. *Raghubir Singh* (2) and *Sham Lal* v. *Ghasita* (3). The decree being a decree binding upon the defendant, the

(1) 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889.

(2) A. W. N. (1894) 141.

(3) 23 A. 459; A. W. N. (1901) 147.

plaintiff, by reason of his having purchased in execution of that decree, is entitled to the property purchased by him, and the decrees of the Courts below are right. I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 64 OF 1911.

April 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

KALYANAM BASAVAYA—APPELLANT

versus

ALAKAM MALLAPPA—RESPONDENT.

Possession, suit for—Dispossession of plaintiff by defendant—Non-acquisition of prescriptive title by defendant—Right of prior possessor to possession.

In a suit for possession, where it appears that plaintiff, who was in possession, had been dispossessed by defendant, and at the date of suit defendant had not acquired a title by prescription, and neither party is found to have a good title, plaintiff, as the prior possessor, has a right to recover possession from the defendant, who cannot show a better title.

Narayana Row v. *Dharmachar*, 26 M. 514; 13 M.L.J. 146, *Bhagwan Singh* v. *Secretary of State*, 10 Bom. L. R. 571; *Sri Gopal* v. *Ayesha Begam*, 29 A. 52; 3 A. L. J. 775, A. W. N. (1903) 264; *Perry* v. *Clissold*, (1907) A. C. 73, 76 L. J. P. C. 19; 95 L. T. 870; 23 T. L. R. 232, referred to.

Nisa Ghand Gaita v. *Kanchiram Bagani*, 26 C. 579; 3 C. W. N. 568, dissented from.

Second appeal against the decree of the District Judge of Cuddapah, in A. S. No. 130 of 1909, presented against that of the District Munsif of Madanapalli, in O S. No. 220 of 1908.

FACTS.—The facts of the case are sufficiently clear from the following judgment of the District Judge on appeal:—

"Plaintiff is the purchaser of the suit land and he sues to establish his right thereto and recover possession thereof. He purchased it from his sister, who was kept by one Elliah, since deceased, and who had a son by him. The land is alleged to be the property of this illegitimate son, and she sold it as his guardian on his behalf. The first question which arises is whether this illegitimate son could succeed to his father, whose property it undoubtedly was. It is admitted that the woman was a widow at the time she came to live with Elliah. The Munsif has held that her son being born of an adulterous concubinage is not an heir in Hindu Law. The question arises as to whether the cohabitation with a widow amounts to adultery. It has been argued that, since Hindu Law cannot tolerate the idea of a second husband, a woman, although she becomes a widow, is still supposed to have a husband. Cohabitation with another person would, therefore, under the circumstances, amount to adultery. On the other hand, it is contended that a widow is as good as an unmarried woman, and in her case there can be no such thing as adultery. I am inclined to think that the former view is correct, and to agree with the Munsif in holding that the son of such a union is no heir. However, this point does not arise. The deceased Elliah, at the time of his death, had an undivided brother, Veeriah, and also a mother living. The natural heir of Elliah was his brother Veeriah, and after his death, the mother. The mother is said to have died only 10 years before the suit. Admittedly, Elliah's mistress was in possession and enjoyment of the land after the mother's death. This will not give her any prescriptive right. Plaintiff claims the land as his own, whereas defendant maintains that he has been cultivating it as a tenant. The Munsif has taken quite a different view of the case. He held that the plaintiff's sister has acquired an adverse title by possession and enjoyment. How he makes this out I cannot understand, for the evidence of the plaintiff's witnesses shows that the produce of the land was all along being paid to the mother during her life-time. If it is anybody's property, it is Veeriah's and his heir's, if any. The plaintiff cannot, by virtue of his sale deed from a person who had no right to the property, acquire any title thereto. I reverse the decision of the Munsif, and dismiss the plaintiff's suit with costs of both Courts."

The plaintiff preferred a second appeal to the High Court on the following, among other, grounds:—

"II. The District Judge failed to see that previous possession is in itself a heritable and alienable interest, which would give a right to possession from a dispossession without title.

III. Plaintiff's vendor admittedly having been in possession since the death of Elliah's mother, and the title set up by the defendants in denial of Elliah's title having been found against, the District Judge should have held that the plaintiff was entitled to recover having regard to rulings like *Narayana Row* v. *Dharmachar* (1); *Sri Gopal* v. *Ayesha Begam* (2); *Krishnacharya* v. *Lingawa* (3).

IV. The lower Appellate Court should have held that a tenant like defendant could not by claiming title in himself, impose upon the landlord the burden of proving his title in order to get back possession.

Mr. *P. S. Subrahmanya Aiyar*, for the Appellant.

Mr. *S. Gopalaswmi Aiyangar*, for the Respondent.

JUDGMENT.—On the findings of facts arrived at by the District Judge, we are of opinion that he ought not to have reversed the District Munsif's decree. The District Judge finds that the ownership of the property is in Veeriah and his heirs, Veeriah being the brother of Ellaya. He also finds that Elliah's mistress was admittedly in possession 10 years before the suit, that is, about 1898. He is also of opinion that, during the life-time of Elliah's mother, his mistress was paying over the rental of the property to the mother of Elliah, so that possession was not then in the defendant. The District Munsif found that defendant must have dispossessed the plaintiff in 1905. The District Judge does not say when the dispossession commenced. But, on his finding, it must have been at the time when the plaintiff's transferor was in possession, her possession in 1898 being admitted. The defendant, therefore, had not, at any rate, acquired a title by prescription when the suit was instituted. The state of facts, therefore, is this, that plaintiff and his transferor had possession prior to the defendant, who has not acquired a title by prescription. On these facts, the law as laid down by this Court is that plaintiff, as the prior possessor, has the right to recover possession against the defendant, who cannot show better title. See *Narayana Row* v. *Dharmachar* (1), *Bhagwan Singh* v. *Secretary of State* (4), *Sri Gopal* v. *Ayesha Begam* (2), *Perry* v. *Clissold* (5) and Pollock on Torts, 8th Ed., pp. 369 and 370. The decision of the Calcutta High Court in *Nisa Ghand Gaita* v. *Kanchiram Bagani* (6) has not been accepted as good law by this Court, and it is not in accordance with several previous decisions of the Calcutta High Court itself.

The District Judge's decree is reversed and that of the District Munsif restored with costs both here and in the lower Appellate Court.

Appeal allowed.

(1) 26 M. 514; 13 M. L. J. 146.
(2) 29 A. 52; 3 A. L. J. 775; A. W. N. (1906) 264.
(3) 20 B. 270.
(4) 10 Bom. L. R. 571.
(5) (1907) A. C. 73; 76 L. J. P. C. 19; 95 L. T. 890; 23 T. L. R. 232.
(6) 26 C. 579; 3 C. W. N. 568.

CALCUTTA HIGH COURT.

CIVIL RULE No. 661 OF 1912.

May 3, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.

JITAL SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

Raja KAMALESWARI PROSAD—DEFENDANT—OPPOSITE PARTY.

Jurisdiction—Civil Court—Stay of proceedings—Execution proceedings—Decree of Revenue Court—Suit for declaration that decree bad—Temporary injunction, if may be issued—No prayer for permanent injunction—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Injunction.

Although a decree may have been passed by a Revenue Court, when it is under execution in a Civil Court, proceedings may be stayed by the Civil Court if a suit has been brought for a declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction to restrain the decree-holder from executing the decree.

Ram Lochan Singh v. *Beni Prosad Kumari*, 1 Ind. Cas. 933; 9 C. L. J. 125, 13 C. W. N. 791, 36 C. 252, followed.

Onkar Singh v. *Bhup Singh*, 16 A. 496, dissented from.

But if the suit is brought simply for the declaration and there is no prayer for a perpetual injunction, then a temporary injunction under Order XXXIX, rule 2 of the Civil Procedure Code cannot be issued.

Rule against the order of the District Judge of Bhagalpur, dated December 18th, 1911, reversing that of the Sub-Judge of Monghyr, dated November 18th, 1911.

JITAL SINGH *v.* KAMALESWARI PROSAD.

Babus *Gonesh Dutt Singh*, for the Petitioner.

Babu *Satish Chandra Ghose*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court of appeal below has discharged an order of the primary Court granting a temporary injunction. It appears that the landlord, opposite party, obtained an order under sub section (5) of section 70 of the Bengal Tenancy Act and proceeded to execute it by an application to the Civil Court. The petitioner thereupon commenced a suit in the Court of the Subordinate Judge for a declaration that the order of the Revenue Authorities had been passed without jurisdiction and was illegal and inoperative. During the pendency of this suit, an application was made, under rule 2 of Order XXXIX of the Code of 1908, for a temporary injunction to restrain the landlord from executing the order in question. The Court of first instance granted this application. Upon appeal, the District Judge has discharged the order on the ground that a Civil Court is not competent to stay execution of an order made by the Revenue Authorities. In support of this view, the District Judge has referred to the case of *Onkar Singh* v. *Bhup Singh* (1). It does not appear, however, to have been brought to his notice that this decision of the Allahabad High Court has not been accepted as well founded by this Court, in the case of *Ram Lochan Singh* v. *Beni Prosad Kumri* (2). This latter decision is an authority for the proposition that although a decree may have been passed by a Revenue Court, when it is under execution in a Civil Court, proceedings may be stayed by the Civil Court if a suit has been brought for a declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction to restrain the decree-holder from executing the decree. In the case before us, the ground assigned by the learned Judge for his order is, therefore, not well founded. But it is clear that his order is right on the merits. An examination of the plaint shows that the suit is solely for declaration; there is no prayer for any consequential relief; the plaintiffs do not ask for a perpetual injunction to restrain the decree-holder from executing the decree on the ground that the decree was made by the Collector without jurisdiction. An order for temporary injunction, such as the plaintiffs seek, can, under Order XXXIX, rule 2 of the Code of 1908, be sought only in aid of the prospective order for a perpetual injunction. If the plaintiffs do not ask for a perpetual injunction, if, therefore, in the event of their success, they cannot obtain a decree for perpetual injunction, it is clearly not competent to them to ask for a temporary injunction during the pendency of the suit. In granting a temporary injunction, the Court acts in aid of the legal right, so that the property may be preserved in *status quo*. *Saunders* v. *Smith* (3), *Hilton* v. *Granville* (4), *Harman* v. *Jones* (5). Here, however, the plaintiffs do not seek a permanent injunction in the suit, and even if they are successful, the defendant will be free to execute the decree. They cannot on principle enjoin the defendant temporarily, when, upon the disposal of the suit and dissolution of the temporary injunction, the defendant will be at liberty to proceed with execution. Under these circumstances, we are of opinion that the District Judge rightly refused the application for injunction. But we do not express any opinion upon the questions whether the proviso to section 42 of the Specific Relief Act, or sub-section (5) of section 70 of the Bengal Tenancy Act, is a bar to the suit as framed.

The result is that this Rule is discharged with costs. We assess the hearing-fee at two gold *mohurs*.

Rule discharged.

(1) 16 A. 496.

(2) 36 C. 252; 1 Ind. Cas. 933; 9 C. L. J. 125; 13 C. W. N. 791.

(3) (1838) 3 My. and Cr. 711; 7 L. J. (N. S.) Ch. 227; 2 Jur. 491 at p. 536; 45 R. R. 367.

(4) (1841) Cr. and Ph. 283 at p. 292; 54 R. R. 207 at p. 203; 4 Beav. 133; 10 L. J. Ch. 398.

(5) (1841) Cr. and Ph. 299.

SARAT KUMARI DEBI *v.* BHOLA NATH BANERJI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 396 OF 1910.

May 3, 1912.

Present:—Mr. Stuart, A. J. C.

Musammat SARAT KUMARI DEBI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Babu BHOLA NATH BANERJI—DEFENDANT—RESPONDENT.

Hindu Law—Mitakshara *school*—Dayabhaga *school*—*Manager, liability of, in a joint family to account*—*Member of an undivided joint family, right of, to sue for his share of profits.*

Although a member of a joint family has a right to ask for a statement of account from the manager, yet he is not entitled to sue the manager for any money relief on account of his share.

Obhoy Chunder Roy Chowdhry v. *Pearee Mohun Gooho*, 13 W. R. 75 (F. B.), referred to.

On this point, there is no difference between the *Mitakshara* and *Dayabhaga* schools of law.

Appeal against an order of the Additional District Judge, Lucknow, dated 20th June 1910, upholding that of the Additional Munsif, Lucknow, dated 15th December 1909.

JUDGMENT.—Tara Nath Banerji, husband of Sarat Kumari Devi, and father of Lalit Mohan Banerji, was a Bengali governed by the *Dayabhaga* law who was employed in the Hardoi District. He had a brother, Bhola Nath Banerji, who is still employed in Lucknow. On the 27th January 1905, Tara Nath Banerji died. His widow, Sarat Kumari Devi, and his son, Lalit Mohan Banerji, the latter of whom is a minor, instituted a suit against Bhola Nath Banerji in the Court of the Additional Munsif, Lucknow, in which they alleged that Tara Nath Banerji and Bhola Nath Banerji were originally members of a Hindu joint family governed by the *Dayhbhaga* law, and that after the death of Tara Nath Banerji, they, the plaintiffs, had separated, although certain property in Bengal belonging to the said joint family had remained joint. They claimed an account from Bhola Nath Banerji who, they alleged, managed this said property in Bengal, and further claimed the payment of such sums as might be found due to them on the account, and the costs of this suit. The learned Additional Munsif dismissed the suit in a judgment, dated 15th December 1909, holding that the defendant Bhola Nath Banerji was not the manager of the property. Against this decision, the plaintiffs appealed to the Court of the Additional District Judge, Lucknow. On the 16th of April 1910, Mr. C. E. Guiterman, then Additional Judge, passed an order of remand on this appeal. In this order, he discussed two points. The first was whether the appellants, as a widow and minor son of Tara Nath Banerji, were entitled to sue the manager of the family for accounts. He commenced with the assumptions that there was a joint family, that that joint family possessed certain property, that Bhola Nath Banerji was manager of the property, and that the plaintiffs-appellants were members of the joint family. These assumptions are not borne out by the plaintiffs' pleadings. The plaintiffs were not very clear in their plaint as to their exact status. They apparently took the position that, although they had separated in food and income from the joint family in question, they had left their share in certain joint family property unpartitioned, and in the management of the head of the joint family. I do not understand them to mean that they remained members of the joint family. Thus, when the learned Additional District Judge applied, in the course of the plaintiffs-appellants' case, the findings in the case of *Obhoy Chunder Roy Chowdhry* v. *Pearee Mohun Gooho* (1), he made an assumption which the appellants had not made, namely, that they were still members of the joint family. I do not consider that they had taken the plea that they were members of the joint family, and in the circumstances, they could hardly have relied upon the decision in question, which laid down the law as to the right of a member of a joint Hindu family governed by the *Dayabhaga* law to sue the manager for an account. The learned Additional Judge came to the conclusions, however, that they were so entitled, although he did not decide the question so as to examine the grounds, on which the learned Munsif had dismissed the suit, and found that the respondent, Bhola Nath Banerji, was manager of the joint Hindu family in question. He then referred to the learned Additional Munsif the following issue:—

"After taking of accounts, what sum, if any, is due from the defendants to the plaintiff in respect of the parties here in suit?"

The learned Additional Munsif decided on that issue that Rs. 6-12 were due to the appel

(1) 13 W. R. 75 (F.B.).

lants from the respondent under this head and remitted the finding to the Court of the Additional District Judge. When the case came on again for hearing, Mr. C. E. Guiterman had vacated the office and his place had been taken by Mr. T. K. Johnston. The latter officer proceeded with the hearing of the appeal. He came to the conclusion, that Mr. Guiterman had not definitely decided whether it was within his power to pass a money-decree and finally decided that he was not bound in any circumstances by Mr. Guiterman's finding on the order of remand. He then proceeded to examine the facts and law and to decide the various points raised *seriatim*. On the first point, he decided that the appellants and the respondent were still members of a joint Hindu family governed by the *Dayabhaga* law. He next decided that the appellants were entitled to demand an account, but that they were not entitled to any money relief upon the basis of such account except by recourse to a suit for partition. It is impossible for them to sue in this Province for partition of the immoveable property which belonged to the joint family, as that property is situated in Bengal. He further decided that the account given by the respondent showed that in any circumstances, nothing was due from him as he had expended the joint family income upon objects on which he was entitled to expend them as manager of the family. He accordingly dismissed the appeal and upheld the decree. The appellants have come before this Court in second appeal. The first ground of appeal is that Mr. Johnston had no authority to re-open the points decided by Mr. Guiterman. This is an academic point. I do not find that Mr. Johnston as a matter of fact reopened points that were decided by Mr. Guiterman. Mr. Guiterman had decided on the assumption that the plaintiffs and the respondent were members of a joint Hindu family governed by the *Dayabhaga* law, that the provisions of the case of *Obhoy Chunder Roy Chowdhry* v. *Obhoy Mohun Gooho* (1) governed the case. Mr. Johnston did not dissent from that finding. He found that the appellants and the respondent were members of a joint Hindu family governed by the *Dayabhaga* law and that the provisions of the ruling in question governed the case. He distinctly states that the appellants have a right to sue the respondent for an account. Mr. Guiterman found that the respondent managed the property of the joint family. Mr. Johnston is not sure with regard to the views that Mr. Guiterman might have had with respect to the law, as indicated by the manner in which he framed the additional issue. Whatever views Mr. Guiterman may have had with regard to the law, these views could not be operative, until the issue was decided, and as the issue was decided later, Mr. Guiterman had no operative views on the point. Mr. Guiterman was at perfect liberty to discuss the question as to whether any money relief was due to the appellants. The second ground of appeal refers to a remark in Mr. Johnston's judgment, which would appear to show that he considered that the fact of separation by a member of a Hindu joint family could not be effected except by an instrument in writing. The third ground contests the finding that the parties are members of a joint Hindu family, and that the property in Bengal is held jointly. The fourth ground contests, amongst other points, the manner in which the burden of proof has been laid in the case. The above grounds of appeal have thus much importance. If Mr. Johnston applied the principles of law correctly, his finding as to the fact that the family was joint would be final. If he did not apply the principles of law correctly, the question can be re-opened in second appeal. I am not certain from reading his judgment that he did misinterpret the law on the subject, but it is not worth while to discuss the question as to whether he did or did not take the correct view. I have examined the evidence on the record and I am satisfied that there is nothing to prove that the appellants ever separated from the joint family. They admit themselves in the plaint that the family was originally joint. The burden of proof was distinctly upon them to prove the fact of separation. After an examination of the evidence, I am satisfied that they have failed to discharge this. I accordingly find that the appellants are still members of a Hindu joint family governed by the *Dayabhaga* law, of which the respondent is manager. With regard to the remainder of the fourth ground of appeal, which is to the effect that such a suit as this is maintainable without adding a claim for partition, I have only this much to say. I consider that according

to the doctrine laid down in the case of *Obhoy Chundar Roy Chowdhry* v. *Obhoy Mohun Gooho* (1), a member of such a family has a right to ask for a statement of account from the manager. I do not consider that the appellants had a right to ask the Additional Munsif of Lucknow to grant anything more. It has been argued before me by the learned Advocate for the appellant that the position of a manager of a Hindu joint family under the *Dayabhaga* law is essentially different from the position of a manager of a Hindu joint family under the *Mitakshara* law. I agree that there is a difference between the status of the manager of the former and the manager of the latter family, but I cannot admit the proposition that there is anything in the *Dayabhaga* law or in any recognized authoritative pronouncement of the Courts on the subject that would permit a member of a Hindu joint family governed by the *Dayabhaga* law to sue the manager of the family for a money relief to be given on the valuation of the benefits accruing to him under his share. The remedy is by a suit for partition. This much, I think, is clear from the ruling reported in *Obhoy Chunder Roy Chowdhury* v. *Pearee Mohun Gooho* (1), to which I have already referred. It is true that Mr. Justice Mitter said in his note of reference quoted in this ruling, "He (the managing member of such a joint family) is entitled to obtain credit from his co-parceners for all sums of money *bona fide* spent by him for the benefit of the joint family, but he is certainly liable to make good to them their shares of all sums which he has actually misappropriated, or which he spent for purposes other than those in which the joint family was interested." But there is nothing in this dictum to show that the relief open to the joint member would be otherwise than by a suit for partition, and I think that Mr. Justice Mitter meant that the remedy would be by a suit for partition, for he goes on to say in a later portion of his note of reference: "Suppose, for instance, that one of the members of a joint family, with a view to separate himself from the others, asks the manager what portion of the family income has been actually saved by him during the period of his managership? If the manager chooses to say that nothing has been saved, but at the same time refuses to give any account of the receipts and disbursements, which were entirely under his control, how is the member who is desirous of separating to know what funds were actually available for partition?" The finding of Sir Richard Couch on the point of law was as follows:—"Where there is a joint interest in the property, and one party receives all the profits, he is bound to account to the other parties who have an interest in it for the profits of their respective shares, after making such deductions as he may have a right to make." Mr. Justice Phear expounded the law as similar to that prevailing in English Courts of Equity with regard to discovery. He said: "The principle that I understand the English Courts of Equity to act upon in these matters is simply this, that a person, who has the control of and management of another's property upon the footing of anything which amounts to a confidence or trust reposed in him by this other, shall not be allowed to abuse that confidence, and to make a profit out of his management without the owner's consent; and inasmuch as the question whether or not a profit had been made, or what had been done, lies, under these circumstances, solely within the knowledge of the manager himself, a Court of Equity will make him disclose what he has done; in other words, will make him to account for his administration of the property. It is the necessity for discovery, as the English Lawyers term it, in order to protect the actual owner's right and interest, which founds the jurisdiction of the English Courts of equity in cases of this sort." In the case of *Bala Krishna* v. *Mathusami Ayar* (2), it is clearly laid down that the above decision was under the *Dayabhaga* law. I have been unable to find any clear statement as to the difference between the *Mitakshara* and the *Dayabhaga* law in this respect. But in the recent "Treatise on Hindu Law" by Mr. Golapchandra Sarkar, 4th Edition, page 467, I find it laid down that with regard to this matter there is no difference between the two schools. The words are:—"As regards management of joint families by the managing member, there is absolutely no difference between

(2) 32 M. 271; 5 M. L. T. 145; 19 M. L. J. 70; 3 Ind. Cas. 878.

the two schools. The distinction between the two schools with respect to the nature of the title of co-heirs, and its incidents of alienation and survivorship does not, in any way, effect any difference on the present question. For community of interest, which is a distinctive feature of jointness and upon which the question depends, is common to both schools" and he has said above: "Partition is the only remedy to which the other members are entitled for protecting their interests if the management be deemed negligent and prejudicial to the same." The view which I take upon the point raised is this that the right to sue for accounts carries a member of such a family no further than giving him the materials for a suit for partition. But as the point has been raised, I consider it advisable to add a finding as to the manner in which the respondent in this case has expended the income of the joint family property. Upon the facts, I see no reason to suppose that he has either misappropriated any portion of this income or expended it on unjustifiable objects. The case, therefore, stands that the appellants have asked for an account and that they have obtained a sufficient account already. This much is clear from the record. They are entitled to no other relief in this Court and it is impossible to pass any sort of decree in their favour. I might have been disposed to award them some portion of their costs, as the respondent at first did not show much desire to meet their demand for information, but in view of the frivolous nature of the suit and of the fact that the time of three Courts has been taken up with an absolute triviality, I do not consider that they are entitled to any indulgence. The subject-matter is practically nothing and the appellants must have known all along that it was practically nothing. I do not find that the respondent has in any way failed in his duty towards the appellants, and in the circumstances, the fact that they have brought him into Court over such a trifle, is sufficient to justify an exercise of discretion both in making them pay their own costs and also the costs of the respondents. I accordingly dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 3212 OF 1912.

June 7, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.

PRIYA NATH PAL—PLAINTIFF—PETITIONER

versus

RAJANI KANTA PAL—DEFENDANT—OPPOSITE PARTY.

Fixtures—English law of fixtures, whether applicable in this country—Purchase of land by plaintiff in execution of decree against defendant No. 2—Growing of crops by defendant No. 2 after plaintiff's purchase—Removal of crops by defendant No. 1—Plaintiff's title to crops—Suit for value of crops, whether sustainable.

The English law of fixtures cannot be applied in this country as based on equitable grounds.

Mofiz Sheikh v. *Rasik Lal Ghosh*, 6 Ind. Cas. 796, 37 C. 815; 14 C. W. N. 952; 12 C. L. J. 246, followed.

The plaintiff, in execution of a decree for rent against the 2nd defendant, purchased a holding on May 19. 1911. He obtained delivery of possession through Court on August 19. Crops had then been grown by the second defendant and they remained on the land till December 25, when they were cut and taken away by the first defendant. The plaintiff brought this suit on the ground that as the crops were grown after his purchase by the second defendant on land, the title whereto had vested in him, the crops became his property:

Held, that the suit was not sustainable.

Lep Singh v. *Nimar Khasia*, 21 C. 244, referred to.

Rule against the decree of the Small Cause Court Judge of Midnapore, dated March 30th, 1912.

Babu *Sarat Chandra Ray Chowdhry* and *Satya Charan Sinha*, for the Petitioner.

Babu *Bipin Bihari Ghosh* (Junior) and *Romesh Chandra Sen*, for the Opposite Party.

JUDGMENT.—This Rule is directed against a decree by which the suit of the petitioner for value of crops grown on his land by the second defendant has been dismissed. The petitioner alleges that in execution of a decree for rent against the second defendant, he purchased the holding on the 19th May 1911, that he obtained delivery of possession through Court on the 19th August, and that the crops grown thereon by the second defendant were unlawfully cut and taken away by the first defendant on the 25th December. His contention is that as the crops were grown after his purchase by the second defendant on land, the title whereto had vested in him, the crops became his property, and he is, consequently, entitled to the value thereof. The learned Small Cause Court Judge has negatived this claim and

dismissed the suit; in our opinion the view taken by him is correct and his decree must be affirmed.

It was pointed out by this Court, in the case of *Mofiz Sheikh* v *Rasik Lal Ghosh* (1), that the English law of fixtures cannot be applied in this country as based on equitable grounds. No doubt, under the mediæval English law, as laid down in Bracton, whatever is planted, sown or built in belongs to the soil, if root has struck; or, as Britton and Fleta put it, if trees are planted or seeds sown in the land of another, the owner of the soil becomes owner also of the tree, the plant or the seed as soon as it has taken root. But that has never been the law in this country. On behalf of the petitioner, however, reliance was placed upon the text of Narada quoted in the case of *Mofiz Shiekh* v. *Rasik Lal Ghosh* (1), where it is stated that if a man had been residing on the ground of a stranger without paying rent and against that man's wish, he shall by no means take with him, on leaving it, the thatch and timber. It will be observed, at the outset, that this does not specifically apply to growing crops. It must further be remembered that, in the case before us, the second defendant must have continued in occupation of the land with the acquiescence of the plaintiff after his purchase. As already stated, the sale took place on the 19th May; possession was delivered to the plaintiff on the 19th August; the crops were then grown by the second defendant and remained on the land till the 25th December. During this period extending over many weeks, the second defendant must have been in actual occupation of the land, although, in the eye of law, possession might have been with the plaintiff. Neither authority nor principle can be invoked in support of the proposition that merely because the plaintiff became the owner of the land on the 19th May, and the crops were grown thereon by the second defendant after that date, the crops, as soon as they were grown, became the property of the plaintiff. The view we take is supported by the case of *Lep Singh* v. *Nimar Khasia* (2), where, in a suit for recovery of damages for value of the fruit crops taken away by the defendant from a garden alleged to be in the possession of the plaintiff, it was held that the fact that the plaintiff was in possession was sufficient to support his title to the damages claimed. In other words, if in the present case, the second defendant had brought a suit against the plaintiff, assuming that the latter had by force removed the crops, his claim would have been successful. Consequently, a suit by the plaintiff against the second defendant for the value of the crops grown by the latter cannot be sustained. The plaintiff may possibly be entitled to mesne profits against the second defendant if she continues in occupation of the land after her title had been extinguished by the execution sale. But there was no claim for mesne profits made in the Court below and nothing in this judgment will affect the title of the plaintiff to recover mesne profits from any person who may be found hereafter to have kept him out of possession of the land.

The result is that this Rule is discharged with costs. We assess the hearing fee at four gold *mohurs*.

Rule discharged.

(1) 37 C. 815; 14 C. W. N. 952; 12 C. L. J. 246; 6 Ind. Cas. 796.

(2) 21 C. 214.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 322 OF 1910.

March 14, 1912.

Present:—Mr. Justice Harington and Mr. Justice Mookerjee.

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

versus

BHUBANESWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—One of several tenants registered in landlord's books—Suit for rent against him—Disclaimer by him—Forfeiture—Suit for ejectment against all tenants, not maintainable—Act of disclaimer not within scope of authority—Partial forfeiture.

Defendant No. 1 alone was registered as tenant in respect of a holding in the books of the landlord, the plaintiff, though defendants Nos. 2 and 3 also were jointly interested in the tenancy. The plaintiff sued defendant No. 1 for rent. The defendant No. 1 denied the title of the plaintiff and the suit was dismissed. The plaintiff then sued to eject all the defendants on the ground that the tenancy was forfeited by disclaimer,

COLLECTOR OF MALDAH *v.* NIRODE KAMINI DEBYA.

Held, that when defendant No. 1 repudiated the tenancy, he acted beyond the scope of his authority; that, therefore, his disclaimer could not operate as a forfeiture of the tenancy, in so far as the second and third defendants were concerned, that there could not be a forfeiture of a tenancy in part, and that the claim for possession was not maintainable.

Appeal from the decree of the Sub-Judge of Noakhali, dated November 18th, 1909, modifying that of the Second Munsif of Feni, dated March 8th, 1909.

Babus *Dwarka Nath Chakravarti* and *Gobinda Chandra Dey Roy*, for the Appellant.

Babu *Khitish Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for ejectment, and, in the alternative, for assessment of rent under section 157 of the Bengal Tenancy Act.

It appears that the first defendant alone is registered as tenant in respect of the disputed land in books of the landlord, though the second and the third defendants also are jointly interested in the tenancy. The plaintiff sued the first defendant for recovery of arrears of rent. That defendant denied the title of the plaintiff and the result was that the action for rent was dismissed. The plaintiff now sues to eject all the defendants on the ground that the tenancy has been forfeited by disclaimer. He also prays that if the tenancy has not been forfeited, fair and equitable rent may be assessed.

The Court of first instance declared the title of the plaintiff but dismissed the claim both for possession and assessment of rent. Upon appeal by the plaintiff, the Subordinate Judge has declared that the title of the first defendant as tenant has been forfeited; but he has held that the plaintiff is not entitled to a decree for possession as the second and third defendants are not liable to be ejected.

In the present appeal, it has been argued on behalf of the plaintiff that the tenancy has been forfeited and that he is entitled to eject all the three defendants. It has been contended in substance that as the first defendant was allowed by the co-sharers to represent them in the books of the landlord, the disclaimer by him operates as a forfeiture of the tenancy in respect of all the persons interested therein. In our opinion, this argument is obviously fallacious.

It may be conceded that as the first defendant represented the tenancy in the books of the landlord, he was entitled to bind his co-sharers for the purposes of the tenancy; but when he repudiated the tenancy, he must be taken to have acted beyond the scope of his authority. Consequently, his disclaimer cannot operate as a forfeiture of the tenancy in so far as the second and third defendants are concerned. It is further clear that there cannot be a forfeiture of the tenancy in part. The position, therefore, is that the tenancy still subsists and the suit for ejectment must fail. But there is no reason why the plaintiff should not realise rent from all the defendants on the footing that the tenancy still continues.

The result is that the decree of the Subordinate Judge is discharged, and in lieu thereof it is declared that the claim for ejectment must be dismissed. The case is remanded to the Court of first instance in order that the plaint may be amended and the rent payable in respect of the tenancy determined. The defendants are entitled to their costs of this appeal as also of the appeal before the Subordinate Judge. The costs in the Court of first instance will abide the result.

Case remanded.

CALCUTTA HIGH COURT.
CIVIL RULE No. 951 OF 1912.
June 24, 1912.
Present:—Mr. Justice Stephen and Mr. Justice Richardson.
COLLECTOR OF MALDAH—PETITIONER
versus
NIRODE KAMINI DEBYA—
OPPOSITE PARTY.

Court-fee—Probate and Letters of Administration—Fee to be paid—Exemption—Gross value of estate above and net value below one thousand rupees—Whether fee payable on net value—Court Fees Act (VII of 1870), ss. 6, 19 (viii), 19 I, 19 K, Schedule I, No. 11, Schedule III, Form.

Section 19 (viii) and No. 11 of Schedule I of the Court Fees Act, exempt from liability to fees Probate or Letters of Administration where the amount or value of the property, in respect of which the grant is made, does not exceed one thousand rupees. This exemption, however, applies only in cases where the gross value of the property does not exceed one thousand rupees.

The fee mentioned in No. 11 of Schedule I is to be paid on the valuation mentioned in Schedule III, and is to be paid on the net value of the property.

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Where the gross value is above and the net value is below one thousand rupees, a fee of two per cent. is payable on the net value.

Rule against the order of the Munsif of Maldah, dated June 17th, 1911, as also the order dated November 14th, 1911, on an application for review of his previous order.

Mr. *Kenrick*, Advocate-General, and Babu *Ram Charan Mitra*, Senior Government Pleader, for the Petitioner.

Babu *Krishna Kamal Mitra*, for the Opposite Party.

JUDGMENT.—In this case, Nirode Kamini Debya, the opposite party in the present proceedings, applied for Letters of Administration of the property of her deceased husband to the Munsif of Maldah who was the Delegate for the purpose of granting such Letters under the Probate and Administration Act. It is admitted that the gross value of the estate was Rs. 1,985, and that the liabilities amounted to Rs. 1,009, giving a net value of Rs. 976. The Delegate held that as the net value did not exceed Rs. 1,000, no Court-fee was payable. On a review, he refused to set this order aside, and a Rule has been granted to show cause why it should not be set aside.

A preliminary objection has been taken that we have no jurisdiction to interfere either under section 115 of the Code or under section 15 of the Charter. After hearing arguments on the point, we hold that we have jurisdiction to interfere under the latter enactment.

The contention of the petitioner is that Court-fees are payable on the net value of the estate in respect of which Probate or Letters of Administration are asked for, and that no deduction is to be made if that value is below one thousand rupees. The opposite party contends that the decision of the Munsif is correct.

The question is purely one of the construction of the Court Fees Act of 1870. Section 6 of that Act is the provision by which, except in the case of High Courts, the fees specified in the Act are made payable. By section 19K, however, that section does not apply to grants of Probates and Letters of Administration, but fees are made payable on them by section 19I, which is as follows:—"No order, entitling the petitioner to the grant of Probate or Letters of Administration, shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third Schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first Schedule has been paid on such valuation." Now, without labouring the point, it is safe to say that the valuation arrived at by following the form set out in the third Schedule is a valuation of the net value of the property and that the fee mentioned in No. 11 of the first Schedule is a fee calculated on gross value, being two per cent. on "the amount or value of the property in respect of which the grant or Probate is made," which is unmistakeably a description of gross and not net value. But the fee mentioned in No. 11 is to be paid on the valuation mentioned in Schedule III, and we have no hesitation in reading this as providing that two per cent. is to be paid on the net value of the property. Then the question arises what is to happen in such a case as the present, where the gross value is above, and the net value is below one thousand rupees. The Act contains two provisions in favour of properties below this limit. These are section 19 (viii) and No. 11 of the first Schedule, which are couched in similar terms, and exempt from liability to fees Probate or Letters where the amount or value of the property in respect of which the grant is made does not exceed one thousand rupees. But we have already said that these terms in No. 11 indicate gross value. Therefore, the exemption provided by these enactments applies only in cases where the gross value of the property does not exceed one thousand rupees.

It follows that the Munsif in this case was wrong in holding that a fee was not payable, as it was payable, though on the net value.

We may add that section 19B has no application to the present case, as it merely enables the Chief Controlling Revenue authority of the Province, in this case the Board of Revenue, to give relief in certain cases, which is an act of the Executive authority with which the Munsif was not concerned. It is to be observed that section 19B was added to the Act as it originally stood by Act XIII of 1875, and sections 19I and 19K and Schedule III by Act XI of 1899.

As the original order of the Munsif is

wrong, this Rule must be made absolute and the order is set aside.

It is not, however, necessary, that we should make any further order in the case. We make no order as to costs.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2095 OF 1910.

April 19, 1912.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

JUTURI NAGIAH—APPELLANT

versus

ARIPARALA VENCATRAMA SASTRULU AND OTHERS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 15—Specific performance of contract of sale—Agreement by manager of joint family—Other members not parties—Enforcibility of the contract.

Section 15 of the Specific Relief Act applies where a member of an undivided Hindu family agrees to sell part of the joint property in which he has only a share.

Where the managing member of a Hindu family agrees to sell the family property and the other coparceners are not parties to the agreement, and it is found that the agreement is not binding on the latter, specific performance of the contract cannot be enforced.

Kosuri Ramaraju v. *Ivalury Ramalingam*, 26 M. 74; 12 M. L. J. 400; *Srinivasa Reddi* v. *Sivarama Reddi*, 32 M. 320; 4 Ind. Cas. 506; *Ponaka Subbarani Reddy* v. *Vadamadi Sesha Chellam Chetty*, 33 M. 359; 7 M. L. T. 137; 20 M. L. J. 328; 5 Ind. Cas. 79, explained and distinguished.

Govinda Naicken v. *Apathsahaya Iyer*, (1912) 1 M.W. N. 87; 11 M. L. T. 87; 22 M.L.J. 257: 13 Ind. Cas. 471, referred to.

Barrett v. *Ring*, 2 Sm. & Giff. 43, distinguished.

Second appeal against the decree of the District Court of Guntur, in A. S. No. 13 of 1908, presented against that of the District Munsif of Tenali, in O. S. No. 238 of 1906.

Messrs. *E. Venkatarama Sarma* and *P. Nagabushanam*, for the Appellant.

Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—This is an appeal from the decision of the lower Courts refusing specific performance of a contract of sale entered into by the 1st defendant, who is the managing member of the family and against defendants Nos. 2 to 4, his major sons, and defendants Nos. 5 to 8, his minor sons, who appear by their guardian, the 1st defendant. The lower Courts have both found that this contract is not binding on defendants Nos. 2 to 8 and the question which we have to decide is, whether specific performance should in these circumstances be granted or not.

We have been referred to a decision in *Kosuri Ramaraju* v. *Ivalury Ramalingam* (1), in which it was decided, without specific reference to the provisions of the Specific Relief Act, that the proper course in such cases as this would be to give a decree for specific performance of the whole of the contract against the 1st defendant leaving it to be settled in future litigation what passed under the conveyance.

Another case to which we have been referred is *Srinivasa Reddi* v. *Sivarama Reddi* (2), in which, similarly, a decree was granted directing the first defendant to sell the whole land without determining whether such a sale would bind the 2nd defendant. In that case, the provisions of section 15 of the Specific Relief Act were referred to and it was observed that, "section 15 of the Specific Relief Act would be applicable only if the 1st defendant had no interest in any portion of the property agreed to be conveyed as in illustration (*a*) or is unable to convey such portion as in illustration (*b*) to that section."

In *Ponaka Subbarani Reddy* v. *Vadamadi Sesha Chellam Chetty* (3), the Court considered it unnecessary to express any opinion as to the correctness of the observation that we have just cited and refused in that case to grant a decree for specific performance of the whole contract distinguishing the previous case on the ground that the contract before them was one entered into on behalf of the minors as well, but gave the plaintiff the benefit of the latter provision of section 15 of the Specific Relief Act.

In *Govinda Naicken* v. *Apathsahaya Iyer* (4), these cases were again considered and *Srinivasa Reddi* v. *Sivarama Reddi* (2) was distinguished from the case before the Court and was explained as proceeding on

(1) 26 M. 74: 12 M. L. J. 400.

(2) 32 M. 320; 4 Ind. Cas. 506.

(3) 33 M. 359; 7 M. L. T. 137: 20 M.L. J. 328; 5 Ind. Cas. 79.

(4) (1912) 1 M. W. N. 87; 11 M. L. T. 87: 22 M.L. J. 257; 13 Ind. Cas. 471.

the ground that an undivided father has an interest in every portion of the undivided property, and that, therefore, section 15 of the Specific Relief Act does not apply. To us, however, it appears that the consideration that an undivided father has an interest in every part of the undivided property in no way takes the case out of the operation of the section which runs thus: "Where a party to a contract is unable to perform the whole of his part of it and the part which must be left unperformed forms a considerable portion of the whole, he is not entitled to obtain a decree for specific performance." We think the words of the section apply where a member of an undivided family agrees to sell part of the joint property in which he has only a share and the present case is a particularly plain one, because, according to the plaintiff's own evidence, the 1st defendant agreed to get the other members of the family to execute the sale-deed.

Further, the contract has been decided in the present suit not to be binding on the other members of the family and a decree for specific performance against the first defendant only would be merely encouraging useless litigation. We may add that *Barrett* v. *King* (5) is no authority on the persent point as the facts were entirely different.

The plaintiff does not claim the benefit of the latter part of section 15 of the Specific Relief Act, and we dismiss the appeal with costs.

Appeal dismissed.

(5) 2 Sm. & Giff. 43.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1386 AND 1400 OF 1910.

April 18, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

RAMDAHIN ROY—DEFENDANT—APPELLANT

versus

DHANWANTRI KOER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence—Admissibility—Decree for rent obtained by co-sharer landlord—When admissible in another suit for rent by another co-sharer—Tenancy under one contract—Proportionate share of entire rent payable to each co-sharer—Co-sharer made pro forma *defendant in first suit.*

When a tenant holds on one contract of tenancy under the entire body of landlords, each co-sharer landlord claiming to collect rent proportionately to his share of the entire rent, a decree in a suit for rent against the tenant obtained by one co-sharer landlord, in which the other co-sharers were made *pro forma* defendants, is relevant to prove the entire rent and is thus admissible in evidence in proof of the rate of rent in a suit for rent by another co-sharer against the tenant.

Abdul Ali v. *Raj Chandra Das*, 10 C. W. N. 1084 and *Tepu Khan* v. *Rajani Mohun Das*, 25 C. 522, 2 C. C. W. 501, distinguished.

Appeal from the decree of the District Judge of Shahabad, dated December 14th, 1909, modifying that of the Munsif of Arrah, dated June 8th, 1909.

Babu *Raghunath Singh*, for the Appellant.

Babu *Chandra Sekhar Pershad Singh*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendant in a suit for rent. The question of law which requires consideration is whether the decree in a previous suit for rent by a co sharer of the plaintiff against the defendant, is admissible in evidence in proof of the rate of rent. The District Judge, in support of the view that the decree is admissible in evidence, has pointed out that the plaintiff was made a *pro forma* defendant in the previous suit for rent and has relied upon the decision of the Judicial Committee in the case of *Ram Ranjan* v. *Ram Narain* (1). Against this view, it has been argued for the appellant, on the authority of the decisions in the cases of *Abdul Ali* v. *Rai Chandra Das* (2) and *Tepu Khan* v. *Rajani Mohun Das* (3), that the decree is not admissible in evidence, because it was obtained by a co-sharer landlord. In our opinion, there is no foundation for this contention. The case of *Abdul Ali* v. *Rai Chandra Das* (2), where it was stated that a decree by a co-sharer landlord is not admissible in evidence as to the rate of rent in a suit brought by another co-sharer, does not lay down any inflexible rule of law, and is clearly distinguishable; in that case, the subject-matter of the two suits was different and the plaintiff in the later suit was not a party to the previous suit. Similarly, in the case of *Tepu Khan* v. *Rajani Mohun Das* (3), it was

(1) 22 C. 533; 22 I. A. 60.
(2) 10 C. W. N. 1084.
(3) 25 C. 522, 2 C. W. N. 501.

pointed out that the decree was not admissible because the title to the one-third share in dispute in one of the suits was different from the title to the share in controversy in the other litigation. In our opinion, the true test to be applied in a case of this description is, whether or not the decree obtained in the previous suit is relevant for the determination of the question raised in the subsequent suit. To take a concrete illustration: suppose the allegation is that the defendant holds on one contract of tenancy under a body of landlords, each of whom collects rent proportionately to his share; it is clear that the decree obtained by one co-sharer landlord is relevent to prove the terms of the entire contract of tenancy, and, therefore, to prove the rate of rent at which another co-sharer is entitled to collect rent. On the other hand, assume the allegation to be that the tenant holds on distinct contracts of tenancy under different landlords; a decree obtained by one co-sharer would not be relevent to prove the terms on which the tenant holds under a co-sharer. This is the true import of the observation of Sir James Maclean, C. J. in *Tepu Khan* v. *Rajani Mohan Das* (3) that the title to the share in dispute in the later suit was not identical with the title of the share in controversy in the earlier litigation. Tested from this point of view, the contention of the appellant in the case before us must be overruled. The tenant holds on one contract of tenancy under the entire body of landlords; each co-sharer claims to collect rent proportionately to his share of an entire sum: this explains how the present plaintiff was joined as a *pro forma* defendant in the former suit by his co-sharer; the decree obtained therein is clearly relevant to prove the entire rent and thus admissible to establish the allegation of the plaintiff.

The result is that the decree of the District Judge must be affirmed and this appeal dismissed with costs.

It is conceded that this judgment will govern the other appeal (S. A. No. 1400 of 1910), which is also dismissed with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 339 OF 1910.

June 20, 1912.

Present:—Mr. Justice Chamier aud Mr. Justice Piggott.

THE COLLECTOR OF FARRUKHABAD —DEFENDANT—APPELLANT

versus

GAJRAJ SINGH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 32—Entry of family relationship in Panda's book—Admissibility of secondary evidence—Rejection in appeal

Entries in Panda's register or note-books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication.

Kalka Prasad v. *Mathura Prasad*, 30 A. 510; 13 C. W. N. 1; 18 M. L. J. 424, 4 M. L. T. 380; 10 Bom. L. R. 1088; 8 C. L. J. 447; 5 A. L. J. 701; 11 O. C. 362; 35 I. A. 166; 1 Ind. Cas. 175, referred to.

Secondary evidence of a document should not be rejected on appeal merely on the contention, that the loss of the original has not been satisfactorily proved.

Harripria Debi v. *Rukmini Debi*, 19 C. 438; 19 I. A. 79, followed.

First appeal from the decision of the Subordinate Judge of Farukhabad, dated the 16th of May 1910.

The Hon'ble Dr. *Sunder Lal*, for the Appellant.

Mr. *J. N. Choudhri* (with him Dr. *Tej Bahadur Sapru*), for the Respondents.

JUDGMENT.

PIGGOTT, J.—We are dealing in this case with the affairs of a family of Panwar Thakurs who, according to a tradition embodied in the Settlement Records, trace back their descent to one Rao Sheopal Singh, who came into the Farrukhabad district from the Deccan something over six hundred years ago. His family acquired considerable landed property in Farrukhabad and across the Oudh border in Hardoi. It broke up into several branches, but the evidence shows that the village of Wazirpur in the Farrukhabad district was looked upon as the head quarters of the family. The branch with which we are immediately concerned had its head-quarters at Allahganj in the same district, and the group of villages owned by them was known as "*taluqa* Allahganj". There are other indications in the evidence besides the use of this name that the status of the family at one time approximated more or less to that of an Oudh *talukdari* estate. At the time of the Mutiny, the owners of "*taluqa* Allahganj" were three

brothers, Lekha Singh, Hemanchal Singh and Dammar Singh. The first named was the eldest, and he had one son, named Gopal Singh, the other two died childless. The family was deeply involved in the Mutiny and was severely dealt with by the Government in 1859. When this day of reckoning came, it is clear that the three brothers, whatever may have been the actual state of things before 1857, found it convenient to represent themselves as entirely separate in estate, and as each owning one-third share of the villages forming the *taluqa*. This position was accepted by Government, and was to the advantage of the family because Government had nothing against Hemanchal Singh personally. He was accordingly left in undisturbed possession of one-third of the family estate; Dammar Singh's property was confiscated, but it appears that either the whole or a considerable portion of it was shortly afterwards restored to his widow, *Musammat* Dular Kuar. Lekha Singh had been deeply concerned in the doings of the mutinous sepoys; he was transported for life and all his property confiscated. It is clear that no reservation was made in favour of Gopal Singh and that the whole of Lekha Singh's one-third share in the estate was lost to the family; Gopal Singh had in fact been arrested along with his father, and it would seem that he only escaped transportation on the ground of his youth. Hemanchal Singh was left as the virtual head of the family; being childless himself, it would seem that he felt himself bound to do something for his elder brother's family. He probably felt that any disposition of his property in favour of Gopal Singh might lead to trouble but Gopal Singh had two minor sons, Kunwar Bahadur Singh and Lal Bahadur Singh. The former of these, the elder brother, was virtually adopted by Hemanchal Singh who finally placed matters beyond dispute by executing, on November 10th, 1875, a formal transfer of his entire property by way of gift (*vide* paper No. 69 at page 44 R.) in favour of the said Kunwar Bahadur, then still a minor. The next point to be noticed in the history of the family relates to the years 1878-9. *Musammat* Dular Kuar, widow of Dammar Singh must have got into difficulties, and on January 20th, 1879, we find her one-third share in the two villages, Allahganj and Islamganj, put up to auction sale and purchased (nominally at any rate) by Gopal Singh. (*Vide* papers No. 155 at 64R and No. 74 at 34A. of the printed books). In the year 1888, Kunwar Bahadur Singh died without male issue, leaving a young widow, (aged about 22 years, according to a paper No. 152 at 67R) *Musammat* Phul Kuar, who is the real defendant in the present suit. A dispute immediately broke out between this lady and her late husband's brother, Lal Bahadur Singh. The latter seems to have taken possession of as much of his late brother's property as he could get hold of, and Phul Kunwar brought a Civil Suit (No. 76 of 1889 see p. 67R) for recovery of the same. The suit ended in a compromise decree dated March 28th, 1891, see papers Nos. 71 and 72 at pp. 48 and 49A. which gave Phul Kunwar possession of the entire property in dispute for her life-time as a Hindu widow, with a proviso that Lal Bahadur Singh should succeed to the same after her death. With this proviso, we are not concerned, as Lal Bahadur Singh himself died childless in the year 1898, leaving him surviving a widow *Musammat* Tilok Kunwar. The details of this litigation require, however, to be attentively examined with reference to the disposition of the family property in the two villages of Allahganj and Islamganj. We have to see what Phul Kuar claimed in these two villages as having formed part of her late husband's estate, and what by implication she left to Lal Bahadur Singh as admittedly his property. The conclusions we arrived at, after examining the documentary evidence, were finally accepted by both parties before us as clear beyond dispute; it is, therefore, sufficient simply to state them.

In village Allahganj, Phul Kuar claimed five sixths of the entire village; and this five-sixths must have been made up as follows:—

One-third share originally Hemanchal Singh's which passed from him to Kunwar Bahadur;

One third share originally Lekha Singh's, which is proved to have been bought back by Hemanchal Singh after the confiscation, and so passed from him to Kunwar Bahadur;

One sixth share, representing one-half of Dammar Singh's original one-third

share, purchased at auction by Gopal Singh in 1879, and treated at his death as having been equally divided between his two sons, Kunwar Bahadur Singh and Lal Bahadur Singh.

In village Islamganj, Phul Kuar claimed one-half of the entire village, that is to say, Hemanchal Singh's one-third share plus one sixth share, which again represents one-half of Dammar Singh's original one-third share. In this village, Lakha Singh's one-third share had not been re-purchased after the confiscation and was thus finally lost to the family. The important point to notice is that Phul Kuar leaves to Lal Bahadur Singh one-sixth share in each of these two villages and does not claim the same as forming part of the estate of her late husband.

Whatever Lal Bahadur Singh owned passed on his death to his widow Tilok Kuar, and it is with the death of this lady on January the 9th 1906, that the dispute begins out of which the present suit arises. The estate of Phul Kuar had in the meantime been taken under the management of the Court of Wards, and when Tilok Kuar died, leaving no heir behind her who had any clear or undisputed title to the succession, the Collector of Farrukhabad took charge of her entire property pending further inquiry. There is nothing on the record before us to show that there was any formal magisterial inquiry into the question of the right of succession to this small estate; apparently the matter was left to be dealt with by the Revenue Courts in connection with the applications for mutation of names in the village papers of Allahganj and Islamganj. The order of the Assistant Collector who dealt with this question of mutation has not been translated or printed, but it is on the file in the vernacular and we have been through it. It appears that at least three distinct sets of claimants alleging themselves to be the reversioners to the estate of Lal Bahadur Singh under the Hindu Law came forward with conflicting claims; on the other side, we know that *Musammat* Phul Kuar also claimed the property. It would be interesting if we could know the precise nature of the title asserted by her, but this is not clear from the mutation order. Obviously, *Musammat* Phul Kuar as widow of Kunwar Bahadur would have no title in law to succeed to the estate of a deceased brother of her late husband; the only way in which she could make out a title in law to the immoveable property in dispute would be by showing that it never really belonged to Lal Bahadur Singh at all but was always a portion of the estate of Kunwar Bahadur Singh, though assigned to his younger brother, and afterwards to that younger brother's widow by way of maintenance. Seeing that the Collector had originally assumed charge of the property left by *Musammat* Tilok Kuar as property for which no legal heir was apparently forthcoming, and which might, therefore, lapse to Government by way of escheat, it would seem that there ought to have been some sort of inquiry there and then into the validity of *Musammat* Phul Kuar's title before this property was practically made over to her. It seems unfortunate that we have no record before us of any such inquiry; and if, as a matter of fact, the handing over of the property to Phul Kuar took place as a consequence of the order passed in the mutation proceeding, the result is certainly peculiar. What the Assistant Collector in effect says in that order is, that none of the alleged reversioners have succeeded in satisfying him as to the validity of the title claimed by them, and that in any case *Musammat* Phul Kuar is actually in effective possession of the disputed property through the manager of the Court of Wards. It may be that there is some hiatus in the evidence before us which a more careful inquiry into the records of the Farrukhabad Collectorate might have supplied; but as the evidence stands, it would certainly appear that the Assistant Collector's order in mutation is based upon a misapprehension arising out of a failure on his part to distinguish between the Collector's possession over Phul Kuar's estate as manager of the Court of Wards and his possession over Tilok Kuar's estate as property liable to escheat to Government for which no claimant with a clear title was forthcoming. As a matter of fact, this particular point seems to me to be still involved in some obscurity which was not completely cleared up by the arguments before us. The original defendant in this case was the Secretary of State for India in Council. The name of the Collector of Farukhabad as manager of the estate of *Musammat* Phul Kuar under the superintendence of the Court of Wards was added as a

defendant by an order passed more than three months after the institution of the suit. Separate defences were entered by the Collector of Farrukhabad on behalf of the Secretary of State for India in Council and by the same officer as manager of the Court of Wards. The judgment of the lower Court implies that the landed property in Allahganj and Islamganj is held by the Collector "in the name of the Government" as if the possession over this property were still that of the Secretary of State for India in Council. Yet the appeal before us has been filed by the Collector of Farukhabad as manager of the Court of Wards only; so that we must take it that the Secretary of State for India in Council acquiesces in the decree of the Court below, though I cannot say that it is at all clear to me whether he does so on the ground that he has actually recognised *Musammat* Phul Kuar as owner of the property in suit, and made over the same to her, or whether he is simply not prepared to offer further resistance to the plaintiff's claim. The point was alluded to before us in the course of arguments, and the parties were apparently satisfied that we ought to deal with the case on the assumption that *Musammat* Phul Kuar, through the manager of the Court of Wards, is actually in possession of the entire property in dispute. I accordingly propose to do so but I cannot say that on the record as it stands the point seems to me as clear as it ought to have been made.

In any case, the institution of a formal suit by some person or persons claiming as reversioners under the Hindu Law was almost certain, and it was rendered inevitable by a circumstance which may as well be noticed at once, as it requires to be borne in mind in estimating the value of all the evidence produced. The property actually in dispute in the present case is comparatively small. It consists of a one-sixth share in each of the two villages of Allahganj and Islamganj, of a grove in village Islamganj, of the dwelling house in village Allahganj occupied by Lal Bahadur Singh and after him by his widow, and of a considerable quantity of moveable property, a complete list of which was prepared under the Collector's orders at the time when he took charge of *Musammat* Tilok Kuar's estate. It is obvious, however, that any person who can prove himself to be the nearest reversioner under Hindu Law to the estate of Lal Bahadur Singh will at the same time be proving himself the nearest reversioner to the much larger estate of Kunwar Bahadur Singh at present held by *Musammat* Phul Kuar. I do not suggest that a decision in favour of the plaintiff in the present suit would necessarily operate as *res judicata* against all possible claimants, but it is obvious that any person whose title as reversioner is affirmed in this suit will have a claim to immediate possession of Kunwar Bahadur Singh's estate upon the death of *Musammat* Phul Kuar which the Collector of Farrukhabad, in whose hands the estate will then be left, will probably feel himself compelled to admit.

Now, amongst the three sets of claimants, who came forward during the mutation proceedings, were three persons who made common cause, namely Gangu Singh, Jwala Singh and Gajraj Singh. The two last named are father and son, and Jwala Singh is the son of one Ram Baksh Singh, who was the own brother of Gangu Singh. It need scarcely be remarked that, under these circumstances, if these three claimants had made out a good case, the estate would go to Gangu Singh to the exclusion of the other two. It would seem, however, that either by reason of their possession of necessary funds or for some other cause, it is Jwala Singh and his son Gajraj Singh who have interested themselves in fighting this claim. Gajraj Singh has obtained from Gangu Singh a deed of gift in his favour of whatever property Gangu Singh may have inherited upon the death of *Musammat* Tilok Kuar as reversioner of her late husband; he has also gone to another branch of Gangu Singh's family and has obtained a similar deed of gift from Madho Singh, a first cousin of Gangu Singh's. In the present suit, therefore, instituted on the 18th of May 1908, Gajraj Singh comes into Court as plaintiff on the basis of these two deeds of gift, that is to say, he sets up and undertakes to prove the title of his two donors, Gangu Singh and Madho Singh, as the nearest reversioners to the estate of Lal Bahadur Singh. The fact that Gangu Singh died in the month of June 1907 has no bearing on the plaintiff's case inasmuch as Gangu Singh admittedly survived *Musammat* Tilok Kuar. From the point of

view of the two donors, the position is simple enough; they were making to Gajraj Singh a gift of property of comparatively small value, not in their possession and not to be obtained by them without troublesome and expensive litigation, on the understanding that Gajraj Singh was to institute and finance a suit which, if successful, would prove his donors to have a good claim to a very much larger estate, in the event of either of them surviving *Musammat* Phul Kuar, a lady who must now be some 45 years of age.

We shall have to turn presently to the pedigree upon which the plaintiff based his claim and the proving of which is undoubtedly the one substantial issue in the case; but it is necessary to dispose in the first instance of *Musammat* Phul Kuar's defence, in so far as that defence is based upon the allegation that the property in dispute was really not Lal Bahadur Singh's but that of her own husband Kunwar Bahadur Singh. The facts which I have stated in an earlier portion of this judgment are in themselves sufficient to show that there is but a slender basis for this claim. In any case, the dwelling house and the moveable property found in *Musammat* Tilok Kuar's possession would presumably belong to her and have come to her from her late husband. There is nothing to show that the grove in the village Islamganj does not appertain to the one-sixth share in the proprietary rights of that village held by Lal Bahadur Singh; and if by any chance, it does not so appertain, there is simply nothing in the evidence to show that it ever belonged to Kunwar Bahadur Singh and not to its ostensible and recorded owner. We have only to consider, therefore, *Musammat* Phul Kuar's case regarding the one sixth share in the *zemindari* rights in the villages Allahganj and Islamganj. It has been pointed out that these form part of the one-third share in each village purchased by Gopal Singh in his own name in January 1879. The case for the defendant is that Gopal Singh could have at that time no property of his own with which he could effect the purchase, and a certain amount of oral evidence has been tendered on behalf of the appellant to show that the money with which the purchase was effected came from the estate of Kunwar Bahadur Singh. It is unnecessary to discuss this evidence, because it is in itself of little value as against the documentary evidence on the other side; and, as a matter of fact, it might be true without being sufficient to make out *Musammat* Phul Kuar's case. I have pointed out that this lady herself, when suing Lal Bahadur Singh in 1889, did not claim the property now in dispute as part of her late husband's estate. Moreover, Kunwar Bahadur Singh himself in an application dated March the 25th, 1880, (No. 155 at page 64 R), applied that his own name and that of his brother Lal Bahadur Singh should be entered as owners in equal shares of the one-third share in the villages Islamganj and Allahganj which had formerly belonged to *Musammat* Dular Kuar and had been purchased at auction by Gopal Singh. Possession remained thereafter with Lal Bahadur Singh and with his widow after his death. One can understand *Musammat* Phul Kuar's claim as having some sort of basis in equity, with reference to the previous history of the family and to those parts of the evidence which suggest that the Allahganj estate was regarded at one time as an Oudh *talukdari* estate descending by the rule of primogeniture, subject only to a reasonable provision being made for younger branches of the family. This state of things, however, undoubtedly came to an end in 1859 if not before; and there is really nothing in the evidence to justify a finding that Lal Bahadur Singh held the immoveable property now in dispute as a mere grant in lieu of maintenance, or otherwise than as full owner.

This matter having been disposed of, it only remains to be considered whether the plaintiffs have made out their case by proving the pedigree set up by them. The evidence shows that it is so far incomplete that the various lines have not been carried further down than was sufficient to show that no person nearer in degree to the alleged common ancestor than Gangu Singh and Madho Singh, the plaintiff's donors, had survived *Musammat* Tilok Kuar. Otherwise, it purports to be a complete pedigree, and if proved by adequate evidence, it is sufficient to establish the plaintiff's case. The evidence tendered in support of it is both oral and documentary, and the documentary evidence was the subject of much argument before us. It must be remembered that Madho Singh and Gangu Singh were never

landed proprietors. They come from a village called Behta in the Farrukhabad district, which, undoubtedly, appertains to the estate known as Taluqa Allahganj, and is shown in the schednle appended to *Musammat* Phul Kuar's plaint in Suit No. 76 of 1889 as the property of the owners of the said *taluqa*. The plaintiff's case is that, some generations back, at a time when the Allahganj estate was a real *taluqa* and the right to it descended by primogeniture, a younger branch of the family settled in village Behta, obtaining no share in the *zemindari* but only grove lands and what the witnesses on the point call "*sir* lands", by which they presumably mean tenant holdings at favourable rates. It was impossible, therefore, for the plaintiff to find documentary evidence in support of his claim in ancient village records containing the names of landed proprietors belonging to the family with which he seeks to connect himself. In default of this he has sought for documentary evidence in the books kept by certain Brahmins known as *pandas* at Soran on the Ganges and at the sacred city of Muttra. These *pandas* are priests who receive pilgrims visiting sacred places for purposes of devotion and assist them in the performance of ceremonies appropriate to the occasion. Their livelihood depends on the fees paid them by the pilgrims who thus employ their services, and there is no doubt that they are exceedingly jealous of their traditional or prescriptive rights to receive and minister to all pilgrims belonging to any family which has once definitely enrolled itself in their lists of *jaimans* or clients. For this purpose, they maintain certain books or registers one of which has been produced before us by the plaintiff's witness, Ganga Nath, a *panda* of Soran, whose evidence will be found printed at pages 10 to 14 of the respondents' book. His evidence needs to be compared carefully with the printed translation of the extracts from his *bahi* or register which will be found as document No. 230 at pages 61-62 R. As a matter of fact, we have had to subject the entire book to a good deal of examination. It begins with a sort of index giving the names of villages where the *panda's* clients live, together with numbers for facility of reference. A good deal of trouble seems to be taken to keep the entries relating to particular villages together or, at any rate, to facilitate reference when entries relating to the same village have got into different parts of the book. There seems, moreover, to be a certain amount of system employed in grouping villages together so as to connect with one another entries relating to different branches of one and the same family residing in different villages The entries themselves consist very largely of pedigrees or fragments of pedigrees sometimes purporting to be made by, or at the dictation of, a particular member of the family concerned on the occasion of a visit paid to the Ganges at Soran in a specified year and month, sometimes merely jotted down underneath some other entry, without any specific record either of the occasion or of the particular person on whose authority the entry is made. Of course, the book is not, and does not profess to be, a systematic record of family pedigrees. The pages are not consecutively numbered. It is admitted that the binding is unstitched and fresh pages inserted whenever the "*panda*" finds it convenient to do so. Blank spaces, and even blank pages, occur from time to time in the body of the book. It is admitted that if a page gets very much worn or tattered, the "*panda*" will copy out what he can decipher of the entries upon it on to a fresh page and will insert the same in its place. It must also be borne in mind that the "*panda*" does not hold himself responsible for the identification of pilgrims who appear before him and represent themselves as being members of such and such a family. On these and similar grounds a strong attack was made on behalf of the defendant-appellant, not merely upon the value of this Soran book as a piece of evidence, but upon its admissiblity under any of the provisions of section 32 of the Indian Evidence Act. The argument, indeed, went so far as to ask us to hold that in no case ought entries in these *pandas'* register or note-books to be treated as admissible in evidence upon a question of pedigree. I am satisfied that this contention goes much too far. Indeed, the more we examined the book produced before us, the more certain it appeared that this book contained a large number of entries, obviously genuine and of considerable antiquity, which might afford evidence of real value on the question of the pedigree of the persons named therein. The book needs to be received with caution and subjected to a severe scrutiny in order to

guard against the possiblity of fabrication; but to say that no entry contained in it can be admissible in evidence, or even that none of the entries relied upon in the present case is admissible, is to go a great deal too far. Each entry must be carefully examined and dealt with on its own merits. Where it purports to be made by, or at the dictation of, a member of the family concerned, and the Court is of opinion that fair presumption exists in favour of its having been so made, it would clearly be admissible, as a statement by a person who had special means of knowledge, under the provisions of section 32 clause (5) of the Indian Evidence Act. Even as regards particular entries which do not purport to be made by any named person, I should not be prepared to lay down any universal rule of exclusion. Such an entry might be treated as admissible under the clause above referred to, if the Court were of opinion that there was a fair presumption that it represented a statement made by some person who had special means of knowledge, even though that person could not with certainty be named. I think also that such entries might be admissible under clause (6) of section 32 aforesaid. They are not family pedigrees as that expression was explained by their Lordships of the Privy Council in the case of *Kalka Prasad* v. *Mathura Prasad* (1), but they would seem to be statements as to the existence of relationship such as are referred to in the last part of the said clause as "made upon any tomb-stone, family portrait or other thing on which such statements are usually made". Taking into account all the evidence which has been laid before us regarding the manner in which these *pandas*' books are kept up, I do not see why even such entries, as I am now considering, should be treated as less admissible than (for instance) a note of the parentage of the subject of some old family portrait endorsed on the portrait itself. The principle laid down by clause (6) of section 32 of the Indian Evidence Act has been adopted from the English Law of Evidence; it seems to me that it has been laid down in sufficiently wide terms in order that there may be no doubt as to its application to analogous cases arising out of the widely different conditions of Indian life.

I now proceed to consider in detail the entries in the Soran book on which reliance is placed. The printed record gives a very imperfect, and in some ways almost a misleading, idea as to their actual appearance and significance. They undoubtedly occur amongst a series of entries relating to Thakur landholder of the Panwar clan coming from villages connected with Wazirpur. At the end of a page dealing with village Mahilia, comes a note which is not to be found in the translation of the Exhibit on pages 61 and 62R but which is referred to as entry No. 7, in the record of Ganga Nath's evidence as printed on page 13 R. It runs thus:—

"The Panwar clan, an entry by Thakur Shahzada, son of Deo Rao, and grandson of Bhagwant Singh."

This is separated by an entire blank page from the entries which follow; this blank page looks newer than those which precede and follow it, so that it is possible that its insertion is a mere accident during some process of re-binding; but if it be a mere accident, it is an unfortunate one for the plaintiff. What he is trying to prove is the common descent of himself and his donors on the one hand and of the family of Lekha Singh on the other, from an ancestor named Bhagwant Rai or Bhagwant Singh. He has here an entry purported to be made by a grandson of a Panwar Thakur named Bhagwant Singh, and corrobrating three important steps in the pedigree deposed to by his witnesses. This entry stands isolated, with no mark of time, no note of the name of the village from which "Thakur Shahzada" came, at the end of a page dealing with a different village, and separated by a blank page from the other relevant entries presently to be considered A curious point in connection with it is that it does not appear to have been put forward by the plaintiffs when he examined Ganga Nath in chief nor has the plaintiff thought it worth printing amongst the Exhibits on which he relies. It seems to have been dragged out of Ganga Nath under cross-examination and pressed upon the Court by the defendants as a palpable forgery. We know, as I shall have to point out presently, that Jwala Singh, father of the plaintiff, visited Soran and

(1) 30 A. 510; 13 C. W. N. 1; 18 M. L. J. 424; 4 M. L. T. 380; 10 Bom. L. R. 1088; 8 C. L. J. 447; 5 A.L.J. 701; 11 O.C. 362; 35 I.A. 166; 1 Ind. Cas. 175.

Muttra early in 1906 to see what evidence could be got together from the *panda's* books about the pedigree of his family and the suggestion is that he must have then procured the fraudulent insertion of a false entry about the parentage of Shahzada Singh on a blank space accidentally left at the end of the Mahilia entries. Such a theory would require to be carried to its logical conclusion; it implies that Jwala Singh arranged the perpetration of a forgery at once so futile and so palpable that he thougt it better not to invite the attention of the Court to it when the case came up for trial. On the whole, I think there is only one thing to be done with this entry, to disregard it altogether. It is so far suspicious that we ought not to rely upon it; yet there are difficulties in the way of dealing with it as an undoubted and demonstrable forgery.

Now we take up the examination of the book after the blank page. The heading of the next page is "Village Kasara" but this is immediately qualified by the opening words of the entry itself which are noted as belonging to "Village Wazirpur". Then follows a note that Thakur Dulo Rai, son of Bhagwant Singh, and grandson of Gharamdeo, etc., (his pedigree being carried back several generations), a Rajput of the Panwar clan, resident of Wazirpur in pargana Mehrabad, came to the Ganges in the month of *Aghan* 1802 *Sambat* corresponding with 1745 A. D. A formal pedigree repeating much of the information originally given but naming some collateral branches, follows; and at the end Dulo Rai is noted as having a son named Kunjal Singh, who has a son named Sahib Rai.

Immediately below this comes an entry dated in the month of *Magh* 1871 *Sambat* = 1814 A.D., expressly purporting to be made by Thakur Hira Singh, son of Thakur Kunjal Singh and grandson of Dulo Rai, the pedigree being traced upwards to Gharamdeo, resident of Allahganj, formerly resident of Wazirpur. Here again the pedigree is formally repeated, with the added information that Hira Singh had a brother named Sahib Rai, that Hira Singh's son was Bhure Singh, who had a brother called Bhikham Singh, who had two sons, Dal Singh and Bhawani Singh.

These entires are obviously genuine, and it is beyond question that they give accurately the pedigree of the defendant's side of the family down to Bhure Singh, who was the father of Lekha Singh, the man sentenced to transportation in 1859 A. D. I do not think any Court which had carefully examined this Soran book would hesitate to accept these entries not only as admissible, but as really valuable evidence of the facts therein stated. The note regarding the transfer of the family residence from Wazirpur to Allahganj is peculiarly significant in view of the tradition on this point preserved in the settlement records and in the oral evidence. It must be remembered that the defendant has never explicitly denied her family's side of the pedigree set forth in the plaint; it is the pedigree of the elder branch of the *Talukdars* of Allahganj, and would be well known in the Panwar clan by oral tradition. I have no doubt that it is fully established by the oral evidence alone.

Immediately under these entries about the Allahganj people, the paper has got torn, and we had to fit in the broken piece and to decipher with some difficulty. The entry next following relates to some Thakurs of village Kulhri, also appertaining to Wazirpur, and this brings us to the bottom of the page as it originally stood. We then turn the page, *i.e.*, reverse it and read on the opposite side. The first entry then runs:

"Village Behta, *pargana* Maherabad Rajputs of the Panwar clan of the family of Becha."

(This is obviously intended to mean Becha Singh, whom Dulo Rai has previously named as his great-great-grandfather).

"Thakur Shahzade Singh and Daya Ram, brothers; Dunde Singh, Makan Singh, Ratan Singh and Fateh Singh, sons of Shahzade Singh, Chheda Singh, son of Makhan Singh, Bhawani Singh and Hindu Singh, sons of Dunde Singh. Budh Singh and Kunwar Singh, sons of Fateh Singh. Below is a note that the signature (or signatures) of the person (or persons) responsible for this entry will be found in "the old book".

Under this again is some writing in Urdu which shows that Jwala Singh inspected this book (presumably early in 1903) and found it worth while to leave his signature on this page to show that he had done so. The reference to the "old book" may be to a book of signatures which Ganga Nath tells us was kept up; but this youth (he is only 19 years of age) has not been able to help

the plaintiff to trace the reference. We do not know, therefore, on whose information the pedigree of the Behta people was noted down, and we have to deal also with the defendant's argument that the entry is a forgery arranged by Jwala Singh. All reasonable presumptions seem to me against the theory of forgery. The entry looks genuine, and the very objection as to its not being more explicit is in favour of its genuineness. Moreover, from the plaintiff's point of view, it proves too little to have been worth forging. The plaintiff has to trace his family and that of his donors back to Bhagwant Rai, this entry begins with Shahzade Singh and Daya Ram, the alleged grandsons of Bhagwant Rai. It carries us down along one line of descent to Bhawani Singh, father of Madho Singh, who had not at that time made common cause with Jwala Singh or executed any deed of gift in favour of the plaintiff. But the most striking point of all remains. This enty gives Dunde Singh's sons as Bhawani Singh and Hindu Singh, while the plaintiff's case is that Dunde Singh had another son named Tilak Singh, and from this Tilak Singh are descended the plaintiff himself and his other donor, Gangu Singh. The latter's deed of gift in favour of the plaintiff is dated April 2nd, 1906, so that what we are asked to believe is that Jwala Singh got an entry forged which excluded from the pedigree the father of the claimant, Gangu Singh, whom he had squared, and his own grandfather. This I hold to be simply inconceivable. I hold this to be a genuine entry and admissible in evidence for what it is worth. It is of some value as showing the Panwar Thakurs of Behta connecting themselves in the *pandas'* books with that branch of their clan which had its head-quarters at Wazirpur, and it lends corroboration to the oral evidence through the following steps of the pedigree which the plaintiff has to prove, *viz.*:—

That Bhawani Singh (father of the plaintiff's donor Madho Singh) was the son of Dunde Singh, who was the son of Shahzade Singh.

The rest of the plaintiff's documentary evidence does not consist of a *panda's* book at all, but of three photographs of pages from a book kept by Arjun Panda of Muttra. This man was got into Court under a warrant of arrest; he either is in reality a most unwilling witness for the plaintiff, or he has contrived most artistically to suggest that he is. His evidence and that of the witness Kishun Kunwar, proves that Jwala Singh got these photographs taken early in 1906, and we know that they were put in evidence before the Assistant Collecor in the mutation proceedings of that year. The loss of this one book, out of ten or twenty which Arjun keeps, is a fact so extraordinary that I do not really believe it to be due to mere coincidence. I strongly suspect that the book has either been wilfully destroyed, or is being kept back, but I hesitate to form an opinion as to whether this is done at the instigation and in the interests of the plaintiff or of the defendant. The general tone of Arjun's evidence, taken in connection with what has apparently happened to another important document in the case presently to be noticed, inclines my suspicions against the defendant. I note that the photographs were admitted as secondary evidence in the Court below, apparently on the strenght of Arjun's evidence, and that their admission does not seem to have been seriously contested on behalf of the defendant. Following, therefore, the principles laid down in *Harripria Debi* v. *Rukmini Debi* (2), I do not think we should reject this secondary evidence on appeal merely on the contention that the loss of the original has not been satisfactorily proved. For all that, now the production of the original is from any point of view most unfortunate. Translations of the photographs are given as papers Nos. 15, 17 and 19 on pages 59, 60 and 61 R. The first looks to me like a genuine page from the *panda's* book; it mentions, Tilak Singh as a son of Dunde Singh, and gives Tilak Singh's four sons, including the plaintiff's donor, Gangu Singh. It purports to do this on the strength of information given by Parbat Singh, brother of Gangu Singh, in the *Sambat* year 1939,—1882 A. D. The second is, I think, also genuine and good evidence as far as it goes. It purports to be made in the *Sambat* year 1851—(1794 A. D.) —by Bhikam Singh, son of Sabit Rai, son of Kunjal Shah, son of Dulab Rai, the family being described as Panwar Thakurs of Allahganj. Subsequent entries follow, all dealing with the defendant's side of the

(2) 19 C. 438; 19 I. A. 79.

pedigree, which I have already noted as sufficiently proved.

The real fight is over the photograph No. 19. Unfortunately, two pages have been photographed side by side, and in the absence of the original, it is simply impossible to tell whether there really was any apparent connection between the two in the book. The left-hand page as it appears in the photograph again begins with the year 1794 A. D., and goes to prove the defendant's side of the pedigree. The right-hand page, if one could only rely on it, sets forth the pedigree put forward by the plaintiff from Bhagwant Rai, through Deo Rai and Shahzade Singh, down to Dunde Singh and, moreover, it distinctly connects the plaintiff's branch with the defendant's by giving Deo Rai and Dulab Rai as amongst the five sons of "Thakur Bhagwant Singh." There is a repetition of a portion of the pedigree in a different hand, with a date "*Sambat* 1851," and this would seem purposeless in a forgery; but as the evidence stands, we do not know in what context this page really came in Arjun's book, and I cannot say that I feel justified in drawing any clear presumption as to its genuineness, or in assigning to it any evidential value.

The other missing document in the case is a pedigree of Gopal Singh's family, found amongst other papers in Tilok Kunwar's house when her property was taken charge of under the Collector's orders. That there was such a document there at the time is beyond question. It was entered as No. 127 in the list prepared at the time under the direction of Munshi Debi Sahai, *Tahsildar*. It is not now forthcoming. The suggestion for the defence is that it is really the paper No. 32 printed at page 54 A which is a pedigree of the Wazirpur family taken from the Settlement Records of 1872. Munshi Debi Sahai himself, however, called as a witness for the plaintiffs, is positive that this is not the right paper, and he gives a description of the missing document inconsistent with the appearance of paper No. 32. He is corroborated by Ghansham Das, *patwari* of Islamganj, and, of course, by all the witnesses for the plaintiff who profess to remember anything about the paper. Gopal Singh, in spite of the confiscation of his estate, was the representative of the elder branch of the Allahganj family. We know he kept amongst his papers an old *farman* of the Emperor Mohammad Akbar Shah, which was paper No. 128 on the *Tahsildar's* list, and must date from somewhere about the beginning of the nineteenth century; there seems nothing intrinsically improbable in the suggestion that he also kept an old pedigree bearing the branches of the family then in existence, and it may be kept up to date by subsequent additions. At any rate, it does not appear possible that any sane person should have thought of noting down in an official list the paper No. 32 as the pedigree or family-tree of Gopal Singh. His name is not mentioned in it, nor does it refer to the Allahganj family except by a mention of their distant ancestor, Bache Shah. I am driven, therefore, to the conclusion that an important piece of documentary evidence in the case has disappeared or been made away with. The suggestion that the plaintiff has contrived this disappearance because he found the pedigree did not mention his branch of the family, seems in any case a little difficult, and is contradicted by the fact, proved by the Assistant Collector's order in the mutation case, that Jwala Singh was clamouring for the production of this paper during those proceedings in the middle of the year 1906. Of course, no one accuses the Collector of Farrukhabad of wilfully suppressing evidence; the question is whether the subordinates employed in the Court of Wards Department are to be presumed to be above temptation in such a matter, and whether there is not a reasonable basis for the presumption that the disappearance of this paper was contrived early in 1906 in the interests of *Musammat* Phul Kuar or in those of the daughter and of the daughter's son of that lady, who appear from other evidence in the case to have survived *Musammat* Tilok Kuar. I am at any rate not prepared to say that the learned Subordinate Judge was wrong in drawing an inference favourable to the plaintiff, and to the credibility of the oral evidence for the plaintiff, from the disappearance of this pedigree of Gopal Singh.

This oral evidence upon which the plaintiff's case must in the main rest is certainly voluminous. It can scarcely be contended that it is not sufficient, if believed, to establish his case. After all, the issue is a

fairly narrow one. The defendant's side of the pedigree, that is to say, the descent of Lekha Singh (grandfather of Kunwar Bahadur Singh and Lal Bahadur Singh) from Bhagwant Rai is proved by abundant evidence. It remains for the plaintiff to show that his donor Gangu Singh was the son of one Tilok Singh, that his donor Madho Singh was the son of one Bhiwani Singh, that the said Bhawani Singh and Tilok Singh were sons of Dunde Singh who was the son of Shahzade Singh, who was the son of Deo Rai, who was the son of Bhagwant Rai. For the lower steps in their pedigree, on ecan surely trust the oral evidence, if only on the ground that the witnesses could so easily have been contradicted if they had deposed contrary to the facts; and up to Shahzade Singh there is some corroboration in the way of documentary evidence. The crux of the whole case really turns on the question whether Shahzade Singh was in fact son of Deo Rai and Deo Rai of Bhagwant Rai. (It is just worth while to note that the translators of the printed record are responsible for the invention of one "Dillu Rai" whose appearance in place of "Deo Rai" at various points in the record gave us a lot of trouble until we satisfied ourselves that he was a pure myth). Now, considering the way in which pedigrees are undoubtely handed down by oral tradition in Thakur families, there is nothing in itself surprising in the supposition that a number of witnesses connected with these Thakurs of Allahganj and Behta by marriage or otherwise are able to depose with confidence to this comparatively short pedigree. Some of them profess to do so on the strength of oral tradition handed down from their ancestors; others rely both upon oral tradition and on the assertion that they have heard Gopal Singh in his life-time read out the family pedigree kept at his house. This is, of course, the document which has disappeared; and if we are right in assuming that there really was such a pedigree and that it has disappeared, it is obvious that it must have contained the name of Bhagwant Rai and must have shown either Dulab Rai as his only son or other sons as well. So that when witnesses depose positively that they have seen this pedigree, or heard it read, and that it gave Deo Rai as a son of Bhagwant Rai, and Shahzade Singh as a son of Deo Rai, their evidence is entitled to weight. As a matter of fact, it seems to me that much of the difficulty we felt in dealing with the oral evidence is due to the unsatisfactory manner in which it has been recorded. Take Raghunath Singh, the first witness on this point. He is a Thakur of the Panwar clan, a landholder, sixty-eight years of age, and resident of the Hardoi district. He claims descent from Rao Sheopal Singh, the founder of the Wazirpur estate. When he has thus explained his own connection with the family, he goes on to give a pedigree of the family to which the parties belong, starting with Bache Shah, great-grandfather of Bhagwant Rai. The record of the lower Court simply says:—The witness stated the following pedigree, and proceeds to give the whole in the form of a regular genealogy. There are fifty-two names in the pedigree, and the mere effort of memory involved in repeating it appears prodigious. One would wish to have the record in narrative form, arranged so as to convey some sort of idea of what the witness actually did say. Moreover, the mere fact of framing the record in narrative form would have been useful to the Court itself which heard the evidence, as helping it to disregard superfluous statements about collateral branches and concentrate its attention on endeavouring to form a correct opinion as to the precise weight to be assigned to the essential points in the witness' evidence. What grounds had he for feeling certain that Bhagwant Rai had a son called Deo Rai, and that this Deo Rai was the father of Shahzade Singh? We have to make the best of the record as it stands, and we are bound to attach due weight to the fact that the oral evidence for the plaintiff, taken as a whole, was found satisfactory and convincing by the Court which heard it. The cross-examination as a rule does not help one much. Raghunath Singh, for example, was chiefly cross-examined with a view to showing that he could remember less about the pedigree of his own family than about that of the plaintiff. To some extent, this contention was made out; indeed, the witness, perhaps because his powers of memory were temporarily exhausted by the strain which had just been put upon them, made an extraordinary blunder when he omitted the name of his own grandfather from the list he was asked to give of his great-grandfather's sons. It does not seem to me, however, that cross-examination on these lines can by itself lead to any decisive result. Personally, I am a good deal less impressed by any of the points

supposed to have been made against Raghu-Nath Singh in cross-examination than by the positive assertion extracted from him that he remembered having himself seen the missing pedigree in Gopal Singh's house and that this pedigree gave the names of Dulab Rai and Deo Rai as brothers. Other witnesses who similarly depose at length to the pedigree set up by the plaintiff are Ganga Singh, who is the son of a sister of Madho Singh; Balwant Singh, who is a connexion by marriage of the defendant's branch of the family, Badhi Singh, an aged Thakur who comes from a village in the Shahjehanpore district, and says he is connected by marriage with the same family although he falls into some apparent contradictions in the course of his cross examination as to the nature of that connexion; Madho Singh, a Panwar Thakur from the Farrukhabad district who claims descent from the Wazirpore family, Hanwant Singh, Bhup Singh and Komal Singh, also Panwar Thakurs and claiming the same connexion; Kunjan Singh who is a connexion by marriage of Gangu Singh; Nibha Singh another Panwar Thokur claiming descent from Bharat Shah, grandfather of Bhagwant Rai's grandfather; Budhi Ram, a Brahmin from village Behta, who says that his father was family priest of the Panwar Thakurs both at Allahganj and at Behta, and Narain Singh, another Panwar Thakur, who gives in detail a tremendous pedigree going right back to Rao Sheopal Singh. All these witnesses were subjected to detailed cross-examination and their evidence has been criticised before us on much the same lines as I have already indicated in discussing the cross-examination of Raghu Nath Singh. It would be easy to criticise any one of these depositions upon matters of detail; but it cannot be denied that we have here a large body of respectable evidence, in itself entitled to considerable weight, and not shown to be seriously tainted with partiality which has been accepted without hesitation by the Court before which it was produced.

Over and beyond this, the plaintiff has produced a good deal of other evidence in support of the proposition that the Panwar Thakurs of the village Behta were generally regarded by persons likely to know the truth as a junior branch of the Panwar Thakurs of Allahganj, and were treated as such upon various ceremonial occasions. There is a great deal of evidence that certain observances in token of mourning are carried out by the Behta people in the case of death in the Allahganj family and *vice versa*. As a specimen of the evidence on this part of the case, I take Naurang Singh, a Panwar Thakur from village Kumbhror, which is another of the villages owned by a branch of the family which has its head-quarters at Wazirgunj. This man deposes generally that the Thakurs of Allahganj and Behta are recognised as belonging to one and the same family, and that they shave their heads and moustaches in token of mourning "on the death of a person in each other's family." He gives instances in which this ceremony was observed. He adds that on the occasion of certain formal assemblies, when the Panwar Thakurs who claim connexion with the family which has its head-quarters at Wazipore come together, the Thakurs from Behta are treated as being connected in a special manner with the Thakurs of Allahganj, though placed in a position of inferiority as a junior branch of the family. I may add that this witness as well as others, who do not profess to repeat the entire pedigree, is prepared to state positively, on the authority of family tradition, that Dulab Rai, the ancestor of the Allahganj Thakurs, had a younger brother named Deo Rai, from whom the Thakurs of Behta were descended. It may be added finally that admissions were obtained from more than one witness for the defendant which go to corroborate the plaintiff's case. The witness Narain Singh admitted that the Thakurs of Behta were at any rate descendants of the *eponymous* Rao Sheopal Singh. He also admitted that several witnesses who have given evidence for the plaintiff were connexions of the same family. Thanna Singh, a Panwar Thakur of Wazirpore, after giving evidence in favour of the defendant as to Gopal Singh's auction purchase of 1879 having been effected with money which really belonged to Kunwar Bahadur, proceeded in cross-examination to make a number of admissions in favour of the plaintiff on the question of pedigree. He distinctly stated that, according to family tradition derived by him from his ancestors, Bhagwant Rai had in fact two sons, Dulab Rai and Deo Rai, and that Lala Singh and his brothers, who appear

in the plaintiff's pedigree as first cousins of Madho Singh, were descended from Deo Rai. Such evidence as was attempted to be produced by the defendant in rebuttal of the plaintiff's case on the question of pedigree is distinctly meagre and of a purely negative character. No attempt was made to produce any witness who professed himself able to carry back the genealogy of Madho Singh and Gangu Singh for four or five generations, and so to demonstrate the precise point at which the pedigree set up by the plaintiff deviates from the truth.

It seems to me useless to discuss the oral evidence in further detail. In a general way, it may be said that the credibility of the witnesses for the plaintiff does not seem to be assailed on the ground that they have any adequate motive for making statements which they know to be false, but rather upon the mere ground that they could not have had adequate and certain knowledge of the facts to which they depose. The pedigree of what may be described as the noble branch of the family, that of the *taluqdars* of Allahganj, would, I think, be a matter of notoriety amongst members of their clan who claim descent from the same common ancestor, and even amongst Thakurs connected with the family by intermarriage. There seems to me no element of improbability whatever involved in the fact that a large number of witnesses produced for the plaintiff should be able to repeat this part of the pedigree correctly. Indeed, there is no real doubt that they have done so. As regards the Thakurs of Behta, there is this much at any rate to be said, that they seem to have been widely recognised as a junior branch of the Allahganj family and as more closely connected with that family than any other sub-division of the same clan could claim to be. It must, moreover, have been fairly obvious to every one, for a good many years before this litigation opened, that the direct main line of Dulab Rai was coming to an end in the persons of Kunwar Bahadur Singh and Lal Bahadur Singh with the possibility thus opening of the succession to a large estate, having to go into a collateral branch, it is perhaps not surprising that attention should have been drawn to the pedigree of the Behta Thakurs, and that a number of witnesses should now be found who are able to recall the same with confidence on the strength of oral tradition handed down in their family. On a review of the entire case, I am unable to dissent from the finding of the Court below that the plaintiffs have proved their pedigree by reasonable and credible evidence. I would, therefore, dismiss this appeal with costs.

CHAMIER, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO 169 OF 1912.

June 24, 1912.

Present:—Mr. Justice Piggott.

SHEO DAS DUBE—PLAINTIFF—APPELLANT

versus

DALGANJAN DUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Sale by widow to next reversioner—Legal necessity.

A sale by a Hindu widow to the nearest reversioner, living at the time of the sale, is equivalent to a sale with the consent of the said reversioner and is, therefore, sufficient to pass a good title independently of any direct evidence in support of the plea that the sale was for legal necessity.

Bajrangi Singh v. *Manokarnika Baksh Singh*, 30 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 17 M. L. J. 695; 35 I. A. 1; *Pulin Chandra Mandal* v. *Balai Mandal*, 35 C. 939; 12 C. W. N. 837; 8 C. L. J. 289; *Bihari Lal* v. *Madho Lal Ahir Gayawal*, 19 I. A. 30, 19 C. 236, followed.

Maradamuthu Nadan v. *Srinivasa Pillai*, 21 M. 128; *Ringappa Naik* v. *Kamti Naik*, 31 M. 366; 18 M. L. J. 300, 3 M. L. T. 355, dissented from.

Second appeal from the decision of the District Judge of Jaunpur, dated the 18th November 1911.

Mr. *Benimadho Ghose*, for the Appellant.

Mr. *G. W. Dillon* (with him Mr. *Mangal Proshad Bhargava*), for the Respondent.

JUDGMENT.—This second appeal raises a plain question of law. A Hindu widow in possession as such of her late husband's estate sold certain *zemindari* property which formed a portion of the said estate to the next reversioner, that is to say, to the one person who would have been entitled to succeed to the entire estate if the succession had opened by the death of the widow at the very time of the sale. As a matter of fact, the vendee died before the succession

actually opened, and the plaintiff and two other persons (impleaded as *pro forma* defendants) were the nearest reversioners at that moment. The plaintiff sues to recover from the heirs of the vendee his one-third share in the property sold by the widow. Both Courts below have held that a sale to the nearest reversioner living at the time of the sale is equivalent to a sale with the consent of the said reversioner and was, therefore, sufficient to pass a good title independently of any direct evidence in support of the plea that the sale was for legal necessity. Now, there can be no doubt that if the widow had transferred the whole of her late husband's estate, instead of only a portion of the same, to the next reversioner, the latter would have obtained a clear and indisputable title, independently of any evidence as to legal necessity. Moreover, since the ruling of their Lordships of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1), it cannot be denied that if the widow had sold the property now in dispute to a stranger, with the consent of the nearest reversioners, the vendee would have acquired a clear title, which the actual reversioners on the death of the widow could not have contested by calling on him to prove by direct evidence that the sale was one for legal necessity. Nevertheless, the appellant contends that on the sale now in dispute the vendee took nothing but the life estate of the widow. He has on his side two decisions of the Madras High Court, *Marudamuthu Nadan* v. *Siniwasa Pillai* (2) and *Rangappa Naik* v. *Kamti Naik* (3). The former decision, as a whole, can no longer be considered good law since the Privy Council ruling in *Bajrangi Singh's* case (1). The latter has been adversely criticised by the Calcutta High Court in *Pulin Chandra Mandal* v. *Balai Mandal* (4), where it is suggested that the Madras High Court's view is based on a misunderstanding of the Privy Council ruling in the older case of *Behari Lal* v. *Madho Lal Ahir Gayawal* (5).

(1) 30 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 17 M.L. J. 605; 35 I. A. 1.
(2) 21 M. 128.
(3) 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355.
(4) 35 C. 939; 12 C. W. N. 837; 8 C. L. J. 280.
(5) 19 C. 236; 19 I. A. 30.

I agree with the learned Judges of the Calcutta High Court. In *Behari Lal's* case (5), the widow had in fact transferred to the next reversioner the whole of her husband's estate, and not merely a portion of it but she had endeavoured so to frame the transaction as to reserve her own life-interest. It was held that she could not do this, but that to confer a good title, the transfer must be one of such a nature that "the whole estate should get vested at once in the grantee." The meaning is that *qua* the property transferred, the widow must reserve nothing to herself, the idea that she could not execute a complete and valid transfer of a portion only of the estate could not be before the Court in a case in which the transfer, if valid, at all did in fact cover the entire estate.

Moreover, the rule laid down by the Madras High Court would seem to lead to extraordinary and undesirable results in actual working. A Hindu widow feels herself in need of ready-money, she goes to the next reversioner, lays her case before him and asks his permission to sell a portion of the estate. It is now admitted that he can give her permission to sell to a stranger, and that his consent will relieve such stranger vendee from the obligation of hereafter proving legal necessity for the sale otherwise than by pleading the presumption raised by the consent of the next reversioner. According to the Madras High Court, however, if the next reversioner wishes to purchase himself, and so to keep the property in the family, he can only do so subject to the risk that he himself or his heirs after him may be put to proof, perhaps many years later, of the fact that there was legal necessity for the sale. On this view of the law, some curious questions might well arise in case the next reversioner thought fit, as a matter of precaution, to arrange for a sale in favour of a relative of his own.

I prefer, therefore, to follow the Calcutta view, as the learned District Judge has done.

There was a suggestion thrown out in argument that the deed in suit does not purport to convey more than the widow's life-estate. I have examined the document, and I fail to see in what other or clearer terms a complete transfer by way of sale

could have been effected. There is no force in this contention.

I accordingly dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1567 OF 1910.
July 2, 1912.
Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.
KAMALA KANT CHAKI AND OTHERS—DEFENDANTS—APPELLANTS
versus
BEJOYA KANTA LAHIRI—PLAINTIFF—RESPONDENT.

Abandonment—Notice to Collector, if necessary—Abandonment complete even without such notice—Landlord may prove abandonment without giving notice—Question of intention—Bengal Tenancy Act (VIII of 1885), s. 87 cls. (2) & (3).

A notice to the Collector under clause (2) of section 87 of the Bengal Tenancy Act is not necessary to make an abandonment complete and effectual. The notice is important for the purpose of the suit which the tenant is allowed to bring under clause (3), but is not essential to complete the abandonment; and a landlord who has not given such notice is still at liberty to prove that an abandonment has in fact taken place. The question of abandonment or no abandonment is one of intention to be determined upon the facts of the particular case in which the question arises.

Ram Pershad v. *Jawahir*, 12 C. W. N. 899, at p. 902, 7 C. L. J. 72, followed.

Appeal from the decree of the Sub Judge of Mymensingh, dated March 3rd, 1910, reversing that of the Munsif of Iswargunge, dated July 19th, 1909.

Babu *Chandra Kant Ghosh*, for the Appellants.

Babu *Tarak Chandra Chakravarti*, for the Respondent.

JUDGMENT.—The defendants were formerly the tenants of the plaintiffs in respect of a non-transferable *ryoti* holding. In 1897, the defendants mortgaged the holding by way of conditional sale and put the mortgagee in possession. It is clear from the judgment of the Subordinate Judge that he has found that the defendants then left the village without making any arrangement for the payment of the rent due to the plaintiff. On the 7th *Falgun* 1306, that is, in the year 1900 one Nabin Nath executed a *kabuliat* in the plaintiff's favour for a term of five years, which expired before the present suit was brought. Two days after, he acquired the mortgage interest from mesne assignee and he then entered into possession of the holding. He remained in possession till the year 1904 when the defendants brought a suit against him to redeem the mortgage. In that suit they were successful and upon payment into Court of the sum due upon the mortgage, they were restored to possession. The plaintiff then brought the present suit to recover possession on the footing that the defendants had abondoned the holding and that as against him they had no right to evict Nabin Nath and take possession themselves. The first Court dismissed the suit holding that there had been no abandonment and that the relationship of landlord and tenant between the plaintiff and the defendants had never ceased and still subsisted. The Subordinate Judge in the Court below came to a different conclusion. He found that the evidence established an abandonment of the holding by the defendants in 1894 and upon that basis he made a decree in favour of the plaintiff. The defendants have appealed to this Court.

The decision before us has turned principally on the effect of clauses (2) and (3) of section 87 of the Bengal Tenancy Act. In our opinion, the provisions contained in those clauses do not help the defendants.

It is true that the plaintiff gave no notice to the Collector under clause (2) of his intention to treat the holding as abandoned but such a notice is not necessary to make an abandonment complete and effectual. The notice is important for the purpose of the suit which the tenant is allowed to bring under clause (3) but is not essential to complete an abandonment; and a landlord who has not given such notice is still at liberty to prove that an abandonment has in fact taken place. As authority, we need only refer to the case of *Ram Pershad* v. *Jawahir* (1) where earlier cases are considered. As there pointed out, the question of abandonment or

(1) 12 C. W. N. 899 at p. 902; 7 C. L. J. 72.

no abandonment is one of intention to be determined upon the facts of the particular case in which the question arises. In the present case, the finding of the Subordinate Judge upon that issue is in the affirmative and as we are unable to say that the Subordinate Judge committed any error of law in ariving at that finding, it is now conclusive. If the payment of the mortgage-debt by the defendant in 1904 or 1905 be, so far as it goes, some evidence as to what their intention was in 1894, the Subordinate Judge regarded it as evidence to which in the circumstances, no great weight could be attached and we cannot say that he was wrong in law in so treating it. If they abandoned the holding in 1894, they were not in a position after the plaintiff had re-entered in 1900 to change their minds or their intention and go back to the original state of things.

The finding on the question of abandonment is sufficient to support the decree which the Subordinate Judge has made. The defendants had no right as against the plaintiff to transfer the holding by sale or mortgage and the plaintiff is not concerned with the mortgage transaction or any of its developments. On the other hand, the holding having been abandoned, the plaintiff had a right to re-enter as he did and to settle the land with another tenant. Whatever right the defendants may have had against Nabin Nath as between the plaintiff and the defendants, the possession of Nabin Nath must be treated as the possession of the plaintiff and not as the possession of the defendants. The plaintiff was entitled to treat Nabin Nath's possession as rightful possession under the *kabuliats* and cannot be forced to treat it as wrongful possession under the mortgage. As against the plaintiff, the defendants by their own act have deprived themselves of the title which they once had and are in no better position than trespassers. If it be of any importance, it is not the fact that the person now entitled to actual possession is Nabin Nath, because the term for which he engaged has long since expired.

It is idle to say that because the plaintiff gave no notice under clause (2), the defendant had no opportunity to bring a suit under clause (3). What issue could have been tried in such a suit except the issue which has been tried and finally determined between the parties in the present suit, whether or not in 1894 there was a voluntary abandonment of the holding on the part of the defendants? What difference does it make whether that issue was raised in a suit instituted by the defendants or in a suit instituted by the plaintiff?

The payment of the mortgage-debt did not, as is apparently suggested for the defendants, give them any sort of equity against the plaintiff. The transfer by mortgage was an infringement of his rights. He was not bound to recognise the transfer and never did so. He was no party to the suit for redemption and the payment made by the defendants and their recovery of possession was subject to his rights which he was free to assert if he chose, unless the defendants were able to prevail upon him to come to some understanding with them. It is not to be wondered at if the plaintiff considers them bad tenants but it may not even now be too late for them to approach him with a view to arriving at an arrangement.

We have said that the finding of the Subordinate Judge on the question of abandonment is sufficient to support his decree. But, on the face of the record, there is also this observation to be made. As we have shown, the defendants were in effect evicted by the plaintiff in 1900 and two years later their right (assuming that they had any right) to recover possession by suit against the plaintiff became barred under Article 3 of Schedule III of the Tenancy Act [*Ram Pershad* v. *Jowahir* (1)]. The result is that in the view we take, this appeal must be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 225 OF 1912.

June 17, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

NAZIMUDDI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Practice—Assessors' opinions how to be taken—Cross-examining assessors, contrary to law—Right of private defence—Rioting—Right of private defence, if exceeded—Punishment—Conviction set aside—Re-trial—Criminal Procedure Code (Act V of 1898), ss. 403, 423.

A trial is altogether vitiated if the assessors are not asked and are apparently not allowed to give an independent opinion on the case.

The cross-examination of the assessors is entirely contrary to law. Section 309 of the Code of Criminal Procedure gives the Judge no power to question the assessors until they have delivered their opinions orally and he has recorded such opinions.

If there is anything obscure in their verdicts, there is no objection to the Judge asking questions to clear up such obscurity; but he is bound to allow the assessors to express their own opinions independently in their own words on the whole case before interfering with them in any way or asking them any question whatever except "what is your opinion."

When a Court finds that an accused had the right of private defence in any case, it ought not to convict any of them of rioting. It is impossible that a man who is acting in the exercise of a legal right can be a member of an unlawful assembly.

Any person who exceeds the right of private defence is liable to be punished for the specific offence of culpable homicide or other crime which he may be found to have committed in excess of that right.

When a conviction is set aside and a re-trial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed. Having regard to the provisions of section 423 of the Criminal Procedure Code, the provisions of section 403, in that respect, cannot apply.

Krishna Dhan Mandal v. *Queen-Empress*, 22 C. 377, relied upon.

Appeal from the conviction and sentence, two years' rigorous imprisonment, passed by the Additional Sessions Judge of Backerganj, under section 147, Indian Penal Code, on March 8th, 1912.

Mr. *Jasperz*, Counsel, with Babu *Rajendra Chandra Guha*, for the Appellant.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is an appeal from the conviction and sentence passed by the learned Additional Sessions Judge of Backerganj upon one Nazimuddi. The Judge, disagreeing with both the assessors as to the innocence of the accused, though he says he agrees with their findings of fact, has sentenced the appellant Nazimuddi to two years' rigorous imprisonment under section 147, Indian Penal Code.

The trial appears to us to be altogether vitiated by the fact that the assessors were not asked and apparently not allowed to give an independent opinion on the case.

We have pointed out to this learned Judge before and we must do so again that his method of cross-examining the assessors is entirely contrary to law and results in grave miscarriage of justice. The law, section 309 of the Code of Criminal Procedure, gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions.

If there is anything obscure in their verdicts, there is no objection to the Judge asking questions to clear up such obscurity; but he is bound to allow the assessors to express their own opinions independently in their own words on the whole case before interfering with them in any way or asking them any question whatever except "what is your opinion." We never get a verdict on the facts from assessors who sit with this learned Judge and we are always greatly embarassed on appeal by his erroneous practice.

But in this case, the conviction cannot stand on the face of the judgment.

The findings are throughout contradictory and it is difficult to understand what the Judge meant to hold, but when he did find that the accused had the right of private defence in any case, he could not convict them or any of them of rioting. It is impossible that a man who is acting in the exercise of a legal right can be a member of an unlawful assembly.

Any person who exceeds the right of private defence is liable to be punished for the specific offence of culpable homicide or other crime which he may be found to have committed in excess of the right.

The conviction under section 147 is, therefore, on the findings of the Judge, untenable and must be set aside. But we think there must be a re-trial in this case since the conclusion that the accused had the right of private defence is erroneous on the Judge's

own findings. He nowhere finds that the complainant had no *bona fide* claim to the paddy he was carrying away. He finds indeed to the contrary that the complainant, as guardian of his step-son, who was the rightful owner of the land left by his father, had been getting land for the boy's maintenance and that lately owing to a quarrel the accused had arbitrarily denied his rights. He finds that complainant married the boy's mother 8 or 9 years before and there had been no dispute hitherto and, therefore, there must have been an amicable arrangement which has recently broken down. But this does not make complainant a thief or a trespasser and there is no right of private defence against a person asserting a *bona fide* right. Then, again, he finds that the assaults did not take place in the field but outside Afiluddi's house where the complainant says it did, and that the attack was on the back of two defenceless laden coolies who were not committing any offence. He also seems convinced that it is quite likely that Nazimuddi struck the blow which killed Yakutali but he says that the evidence is entirely that of the complainant and his men. Of course, it is. The evidence for the prosecution must be used to prove the prosecution case. Independent persons are not likely to turn up in cases of this kind. He says people living near should have been examined but there is no allegation that any of them saw the occurrence. He does not say he has any reason to disbelieve the complainant and his witnesses. These are only a few examples of contradictory and inconsistent findings which we cannot further enlarge upon for fear of prejudicing the case on re-trial.

When a conviction is set aside and a re-trial ordered, it is settled law that the whole case is re-opened and the accused must be tried again on all the charges originally framed and having regard to the provisions of section 423 of the Criminal Procedure Code, the provisions of section 403 in that respect cannot apply. *Krishna Dhan Mandal* v. *Queen-Empress* (1).

We might, following the rule in *Queen Empress* v. *Jabanulla* (2), alter the finding ourselves but in that case we should be precluded from interfering with the sentence and, as pointed out by Banerjee, J., this is not one of those cases where such an alteration could be made inasmuch as the accused has been acquitted of the major charge and convicted on a very minor one. He can only be dealt with on the major charge by directing a re-trial which opens the whole case and places it upon the same footing as if there had been no previous trial at all.

We do not think it necessary to refer to our powers in revision under section 439, which we could exercise independently without any reference to section 417 which is a purely enabling section giving the Local Government certain powers and by implication taking them away from private parties but not in any way touching the jurisdiction or revisional powers of this Court in all matters connected with Criminal trials whether there has been a conviction or an acquittal.

Had it been necessary to get over the difficulty raised in *Krishna Dhan* v. *Queen-Empress* (1) by the use of our revisional powers, we should have had no hesitation in using them. But the setting aside of a finding of the Sessions Court under section 423 enables this Court to order a re-trial and it is now settled law that that order re-opens the whole case.

The conviction and sentence under section 147 is set aside and a re-trial ordered on the original charges before the learned Sessions Judge of Backerganj, who will approach the case with an open mind.

The appellant will remain on bail to the satisfaction of the Sessions Judge pending the re-trial.

Re-trial ordered.

(1) 22 C. 377.
(2) 23 C. 975.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 232 OF 1911.

January 16, 1912.

Present:—Mr. Drake-Brockman, J. C.

RAMKRISHNAPURI—APPLICANT

versus

MOHANLAL—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 195 (6) (7) (a)—Sanction to prosecute—Appeal—Jurisdiction—Sanction granted by Additional District Judge—Power to revoke sanction—Central Provinces Courts Act (II of 1904), ss. 15, 17.

RAMKRISHNAPURI *v.* MOHANLAL.

Clause (*a*)of sub-section(7), of section 195, Criminal Procedure Code, defines the word 'ordinarily' for all cases where appeals from a lower Court lie to more than one higher Court.

When a Civil Court in practice tries suits of values so different that appeals from some of its decisions lie to one and appeals from other decisions to another higher Court, then the Court authorized to revoke or grant a sanction under sub-section (6) of section 195, is the Appellate Court of inferior jurisdiction.

Revision against the order of the Divisional Judge, Nagpur Division, dated the 25th November 1911, revoking the sanction granted by the Additional District Judge, Nagpur, on the 11th August 1911.

Messrs. *P. S. Kotwal* and *P. R. Naidu*, for the Applicant.

Mr. *J. Mittra* and *Dr. H. S. Gour*, for the Non-Applicant.

JUDGMENT.—This is an application for revision of an order passed by the Divisional Judge, Nagpur Division, on the 25th November 1911, revoking a sanction given by the Additional District Judge, Nagpur, for the applicant Mohanlal's prosecution for an offence punishable under sections 183 and 186, Indian Penal Code.

The proceedings arise out of Suit No. 14 of 1897 instituted in the Court of the Civil Judge, Nagpur, and decided by that officer on the 9th October 1897. The claim was for money and the defendant Sitaram was directed by the decree to pay Rs. 12,029-12-10, costs included. Sitaram died in July 1909 and in the same month, his widow, Deoki Bai, was brought on the record as his legal representative. Later in the same month, a warrant was issued for attachment of certain moveables described in an inventory given as required by rule 12, Order XXI, Civil Procedure Code. The Nazir himself was sent to carry out the attachment but reported on the 21st July that he had been unable to complete it because he had been obstructed by Mohanlal, brother-in-law of the deceased judgment-debtor. The report was read by the District Judge, Mr. W. R. Dhobley, in the presence of Mohanlal on the 4th September 1909, and the latter was ordered to file a written statement showing cause why he should not be sent for trial for an offence punishable under section 183, Indian Penal Code. This order was complied with on the 11th September and the District Judge then decided to defer decision regarding Mohanlal's prosecution till some objections filed in respect of articles, which the Nazir had succeeded in attaching, should have been disposed of. The last of the objections was settled on the 7th May 1910, and in the following July, the decree-holder moved the then District Judge, Mr. Prem Narayan, to sanction Mohanlal's prosecution under sections 183 and 353, Indian Penal Code In August 1910, the District Judge transferred the application to the Additional District Judge for disposal. Pleadings and evidence on both sides were recorded and the sanction already referred to was accorded on the 11th August 1911.

Mohanlal moved the Divisional Judge to revoke this sanction. At the hearing, the decree-holder took the preliminary objection that the Divisional Judge is not the authority empowered under sub section(6), section 195, Criminal Procedure Code, to revoke a sanction granted by a Judge of a District Court. In August 1911, the Additional District Judge was trying all suits of the Nagpur district over Rs. 3,000 and not over Rs. 25,000 in value besides dealing with all applications arising thereout. The Divisional Judge held that inasmuch as suits over Rs. 3,000 and not over Rs. 5,000 in value are necessarily more numerous than those over Rs. 5,000, appeals from the Additional District Judge would ordinarily lie to his Court. He referred also to section 17 (3), Central Provinces Courts Act, 1904, which makes the District Court and any Additional Judge thereof subordinate to the Divisional Court. On the merits, he considered that sanction to Mohanlal's prosecution should not have been given.

The main question argued here is whether the Divisional Judge had jurisdiction to revoke the sanction accorded by the Additional District Judge. According to the contention on behalf of the decree-holder, the applicant for revision, section 13, Central Provinces Courts Act, shows the intention of the Legislature to be, that ordinarily the District Court shall try only suits beyond the pecuniary jurisdiction of a Subordinate Judge, *i. e.*, over Rs. 10,000 in value. The conclusion pressed for is that the expression "Court to which appeals ordinarily lie" in section 195 (7), Criminal Procedure Code, makes the Judicial Commissioner's Court the only one which can revoke a sanction granted

by a Judge of a District Court, inasmuch as all appeals from the decisions of such a Judge in suits over Rs. 10,000 in value, lie to the Judicial Commissioner's Court.

It will be convenient to set out here *in extenso* the provisions of law which have to be construed: they form parts of sub-sections (6) and (7), section 195, in the Code of 1898 and run thus :—

"(6) Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate.....

(7) For the purposes of this section, every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say :—

(*a*) where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate."

The corresponding provisions in the Code of 1882 were thus worded :—

"Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate.....

For the purposes of this section, every Court, other than a Court of Small Causes, shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie."

No explanation of the term "ordinarily" was thus vouchsafed in the older Code. It was, however, interpreted in *Anant Ramchandra In re* (1) and *Maduray Pillay* v. *Elderton* (2) to mean "in the majority of cases." This interpretation is convenient enough in connection with Criminal Courts ; for the great majority of decisions passed by such a Court must necessarily be appealable under section 407, 408 or 410, Criminal Procedure Code. But the position is very different when we come to Civil Courts, which exercise jurisdiction without restriction as regards value in ordinary suits and also deal with suits and proceedings under special Acts such as the Guardians and Wards Act, 1890, the Provincial Insolvency Act, 1907, the Indian Divorce Act, 1869, and the Probate and Administration Act, 1881. Can it reasonably be expected that a person dissatisfied with the order of a District Court in the Central Provinces on his application for sanction to prosecute another shall take out statistics of the suits instituted in that Court by values ? How is the period for which statistics should be taken to be determined ? All difficulty on this score has been removed by clause (*a*) of section 195 (7) of the 1898 Code, which, in perfectly general terms, defines the term under consideration for all cases where appeals from a lower Court lie to more than one higher Court. There is no need for statistics. Owing to the character or amount of its litigation, a particular district may be without enough Munsifs to try all suits not over Rs. 1,000 in value, with the result that a Subordinate Judge or even the District Judge may have to try suits within the jurisdiction of a Munsif's Court. Similarly, the local Court of the Subordinate Judge may be unable to cope with all suits over Rs. 1,000 and not over Rs. 10,000 in value. These positions are expressly contemplated and provided for by clauses (*b*) and (*c*) of section 15, Central Provinces Courts Act, 1904, with which may be compared section 17, Central Provinces Civil Courts Act, 1885, section 39, Punjab Courts Act, 1884, and section 21, Bengal, North Western Provinces and Assam Civil Courts Act, 1887. That the Legislature had the orders of Civil Courts specially in its contemplation when it enacted clause (*a*) in sub-section (7) of section 195 in the 1898 Code is further indicated by the fact that in section 405 where the expression "Court to which appeals ordinarily lie" again occurs, no explanation has been inserted : the Courts whose orders are therein dealt with are exclusively Criminal Courts. I hold, then, that clause (*a*) aforesaid furnishes a complete definition of the term "ordinarily" in the cases which it covers, and, consequently, that when a Civil Court in practice tries suits of values so different that appeals from some of its decisions lie to one and appeals from other decisions to another higher Court,

(1) 11 B. 438.
(2) 22 C. 487

there is no need to consider, for the purpose of applying sub-section (6), section 195, Criminal Procedure Code, which set of values gives it the greater part of its work. It follows that the Divisional Judge had jurisdiction in the present case.

The merits of the case have also been argued. The main point urged is that the Divisional Judge misapprehended the evidence when he worte that the Nazir intended to have the person of the judgment-debtor and her female companions searched. There is certainly room for this contention, but nonetheless I agree with the Divisional Judge that in view of the long delay in applying for sanction, the interests of justice do not require that the application should be allowed. The objections, till the disposal of which Mr. Dhobley postponed decision of the question orally raised by the decree-holder on the 4th September 1909, namely, whether Mohanlal should be put on his trial for unlawfully obstructing the Nazir, could obviously have no connection with property which owing to the alleged obstruction the Nazir refrained from attaching. The delay which has occurred will certainly add greatly to the difficulty of ascertaining the truth as to Mohanlal's conduct and was quite possibly due in some measure to a determination on the decree-holder's part that if the objections failed, he would not press the charge of obstruction. I decline then to interfere with the Divisional Judge's order revoking sanction. The application for revision is dismissed.

Application dismissed.

BOMBAY HIGH COURT.
CRIMINAL REVISION NO. 353 OF 1911.
February 11, 1912.
Present:—Sir N. G. Chandavarkar, Kt., Judge, and Mr. Justice Batchelor.
EMPEROR—APPLICANT
versus
LALJI BHANJI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 235 (1)—Joinder of charges—Same transaction—Criminal breach of trust—Falsification of accounts—Penal Code (Act XLV of 1860), ss. 408, 465.

A. was tried at one trial on two charges; the first charge was under section 408 of the Penal Code for having committed criminal breach of trust as a servant; the second charge was under section 465 for making false documents for the purpose of committing the offence of criminal breach of trust as a servant. There was only one act of criminal breach of trust charged against *A.* It was contended for *A.* that the whole trial was illegal and void as he was tried at one trial for two distinct offences:

Held, that the case fell under section 235 (1) of the Criminal Procedure Code, as there was only one act of criminal breach of trust charged against *A.*, and the falsification of accounts charged was an offence which formed part of the transaction as to the criminal breach of trust, because the accounts alleged to have been falsified related to the act charged under section 408 of the Penal Code. The offences charged were, therefore, all offences connected with one another and arising out of the same transaction.

Emperor v. *Nathalal Bapuji*, 4 Bom. L. P. 433; *Kasi Viswanathan* v. *Emperor*, 30 M. 328, 5 Cr. L. J. 341, 2 M. L. T. 177, 17 M. L. J. 141, distinguished.

Application for revision from conviction and sentence, recorded by the Second Additional Sessions Judge of Ahmedabad, on appeal from conviction and sentence passed by the Sub Divisional Magistrate, First Class, at Viramgaum.

Mr. *L. A. Shah*, for the Applicant.
Mr. *K. N. Koyajee*, for the Complainant.

JUDGMENT.—The petitioner Lalji Bhanji was accused No. 1 at the trial before the Magistrate, and the charge against him was, *first*, under section 408 of the Indian Penal Code, and, *secondly*, under section 465 of the said Code. The first charge was that he in or about the months of January and February 1911, at Viramgaum, being a clerk of Messrs. Byramji and Ardeshir, and, being entrusted with Rs. 204-4-0 in such capacity, did commit criminal breach of trust punishable under section 408 of the Indian Penal Code. The second charge was that he in or about January, February and March 1911, at Viramgaum, did make false documents, *viz.*, the transhipping register, daily reports and monthly bills (Exhibits E., F. and G.), intending that the documents forged shall be used for the purpose of committing the offence of criminal breach of trust by a servant. He was convicted by the Magistrate of both these offences. But in appeal the learned Sessions Judge confirmed the conviction on the first charge, and reversed that on the second charge upon the ground that the petitioner ought not to have been tried for both these offences because they were not of the same kind. The learned Sessions Judge held that the trial on

the second charge was illegal. It is now urged before us by Mr. Shah, the learned Pleader for the petitioner, that the whole trial was illegal and void because the petitioner had been tried for two offences of distinct kinds; and that the illegality, admitted by the learned Sessions Judge as to the second charge, tainted also the trial on the first charge. In support of his contention, Mr. Shah relies upon the decision in *Emperor* v. *Nathalal Bapuji* (1), which has been followed by the Madras High Court in *Kasi Viswanathan* v. *Emperor* (2). But, in our opinion, those two decisions are distinguishable from the present case. In the Madras case, the accused had been tried and convicted on a charge which alleged three distinct acts of criminal breach of trust under section 409, and three distinct acts of falsification of accounts, which were offences under section 477A of the Indian Penal Code. That is to say, there were six distinct offences in all, and the learned Judges who decided that case held that section 235 did not cover the case because the falsification of accounts connected with one act of criminal breach of trust could not be said to have formed part of the same transaction with the other acts of criminal breach of trust. They proceeded to remark in their judgment as follows:—"Such act of criminal breach of trust may, no doubt, be said to form part of the same transaction with the falsification of accounts made with a view to conceal that act of breach of trust." But with reference to that, they said that the principle could not apply because in the case before them the charge did not form part of the same transaction with the other breaches of trust and falsifications which were committed on altogether different occasions. That was also the principle of the ruling of this Court in *Emperor* v. *Nathalal Bapuji* (1). There also, there were several acts of criminal breach of trust and falsification of accounts, some of them unconnected with the rest, and charged against the accused.

The present case falls within clause (1) of section 235 of the Code of Criminal Procedure. Here there was only one act of criminal breach of trust charged against the petitioner, and the falsification of accounts charged was an offence which formed part of the transaction as to the criminal breach of trust, because the accounts alleged to have been falsified related to the act charged under section 408, Indian Penal Code. Therefore, they were all offences connected with one another and arising out of the same transaction.

For these reasons, the conviction and sentence must be confirmed and the Rule discharged.

Rule discharged.

(1) 4 Bom. L. R. 433.

(2) 30 M. 328, 5 Cr. L. J. 341, 2 M. L. T. 177, 17 M. L. J. 141.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 715 OF 1912.

June 21, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

REAZUDDI AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 34, 149, 325—Rioting—Charge of grievous hurt by implication under s. 149—Acquittal under rioting—Conviction under substantive offence not allowed.

When a Court draws up a charge under section 325 read with section 149, Penal Code, it clearly intimates to the accused persons that they did not cause grievous hurt to any body themselves but that they are guilty by implication of such offence, inasmuch as some body else, in prosecution of the common object of the riot in which they were engaged, did cause such grievous hurt.

When these persons are acquitted of rioting, all the offences which they are said to have committed by implication disappear, and they cannot be convicted of the substantive offence under section 325.

Section 34 can only come into operation when there is a substantive charge of causing grievous hurt. The considerations which govern section 34 are entirely different and in many respects the opposite of those which govern section 149.

Rule against the order of the Deputy Magistrate of Rangpur, dated April 12th, 1912, convicting the petitioners under sections 147, 325/149, of the Indian Penal Code, and sentencing them each under section 147 to undergo rigorous imprisonment for three months and further directing them under section 106, Criminal Procedure Code, each to execute a bond of Rs. 100 with two sureties of Rs. 100 each to keep the peace for one year, which order was on appeal modified by the Sessions Judge of Rangpur, on May 13th, 1912.

Babu *Manmotha Nath Mukherji*, for the Petitioners,

In re ALIMIA.

Babu *Brojendra Nath Chatterjee*, for the Crown.

JUDGMENT.—We are clearly of opinion that this Rule must be made absolute and a re-trial ordered upon the ground on which it was issued. When a Court draws up a charge under section 325 read with section 149, it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves, but that they are guilty by implication of such offence, inasmuch as some body else, in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt. Now, when these persons are acquitted of rioting, obviously, all the offences which they are said to have committed by implication disappear, and the defence cannot be called upon to answer to the specific act of causing grievous hurt merely because it may have appeared in the evidence; for the Court having already declared by its charge that they did not commit a specific act and not having given effect to the evidence for the prosecution by framing a fresh charge, the defence would not be justified in wasting the time of the Court in defending themselves on a charge which had never been brought against them. This will be perfectly clear if the offence disclosed by the evidence was the heinous one of murder and the Court framed no charge of murder, but went on with the charge of rioting. Obviously, in that case, the accused could not be called upon to defend themselves on the charge of murder, for it is only in the Sessions Court that the said charge can be tried. The Magistrate appeals to the provisions of section 34, but section 34 can only come into operation when there is a substantive charge of causing grievous hurt. The considerations which govern section 34 are entirely different and in many respects the opposite of those which govern section 149, and it is now settled law that when a person is charged by implication under section 149 he cannot be convicted of the substantive offence.

The present conviction, therefore, is bad and must be set aside and the accused must be re-tried on the substantive charge under section 325. They will remain on the same bail pending their re-trial.

Conviction set aside.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 64 OF 1911.

August 31, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Russell.

In re ALIMIA ABASIMIA—ACCUSED.

Bombay District Police Act (IV of 1890), ss. 57, 58 —Finder, rights of—Finder producing property on Police requisition—Rights not waived—Power of Magistrate to order property to vest in Government.*

Where the finder of property hands it over to the Police on their requisition but does not waive his rights as finder, the Magistrate ought not, under section 58 (2) of the Bombay District Police Act, to order the property to vest in Government.

Reference by the District Magistrate of Ahmedabad.

FACTS.—In this case, a person found a currency note of Rs. 50 on a public road. When the Police came to know of the matter, the finder was required to produce the note and he complied with the requisition.

The matter was reported to the Magistrate

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* The sections runs as follows:—

57. The Police shall take temporary charge of all unclaimed property found by or made over to them; and shall deliver all such property to the Police-patel, if any, of the town or village in which the same was found, and take a receipt therefor, from the patel who shall forward such property to the Magistrate to whom such Police-patel is subordinate. If in any such case, there be no Police-patel of such town or village, the Police shall forthwith report to such Magistrate as the Magistrate of the district shall, from time to time, appoint in this behalf, and act thereafter as the said first-mentioned Magistrate shall direct.

58. (1) If the property, regarding which a report is made to a Magistrate under the last preceding section or under section 19 of the Bombay Village Police Act, 1867, appears to such Magistrate to have been left by a person who has died intestate and without known heirs and to be likely, if sold in public auction, to realize more than ten rupees net proceeds, he shall communicate with the District Judge with a view to its being dealt with under the provisions of section 10 of Regulation VIII of 1827, *a Regulation to provide for the formal recognition of heirs, etc*, or other law in force.

(2) In any other case, the Magistrate shall issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto to appear before himself or some other officer whom he appoints in this behalf and establish his claim within six months from the date of such proclamation. If no person within such period establishes his claim to such property, it shall be at the disposal of Government, and may be sold in public auction under the orders of the Magistrate.

(3) The provisions of section 10 of the Regulation aforesaid shall be deemed not to apply to intestate property which is dealt with by a Magistrate under sub-section (2).

who ordered that the note should vest in the Government. The District Magistrate referred the case for the decision of the High Court on the following grounds:—

The law as regards the rights and liabilities of a finder of goods is contained in sections 71, 168 and 169 of the Contract Act. Among other rights, the finder is entitled to the possession of his find as against every one except the true owner (*Armorie* v. *Delamirie*, Smith's Leading Cases). Again, Explanation 2 to section 403 of the Indian Panal Code enacts additional rights and liabilities of the finder. The reasons given by the Magistrate for the final order imply that he had on the record, and did consider, the claim of the finder before he passed the order vesting the note in Government and thus there can be no presumption that the finder had waived his rights as such. As a matter of fact, it was on the Police requisition that the note was handed over and the finder did apply to the District Superintendent of Police before the final order was passed. The scope of section 57, District Police Act, is limited to property *found* by the Police or *made over* to the Police by the finder *suo motu*, not *under requisition*. Under those circumstances, the order vesting the note in Government under section 58 (2) of the District Police Act should be quashed and the note ordered to be returned to the finder.

JUDGMENT.—The Court quashes the order of the First Class Magistrate of Ahmehabad and directs that the currency note of Rs. 50 be returned to the finder Alimia Abasimia.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 668 OF 1911.

(CRIMINAL REVISION PETITION NO. 483 OF 1911.)

May 2, 1912.

Present:—Mr. Justice Sundara Aiyar.

GOVINDA REDDI—PETITIONER

versus

EMPEROR—RESPONDENT.

Madras Forest Act (Mad. Act V of 1882), *s.* 26, *rr.* 8 *&* 9—*Charge under rule* 8—*Omission to state that the place from where accused cut tree was "reserved forest"—Material defect.*

A charge framed under rule 8, section 26 of the Madras Forest Act, must clearly state that the place from where the accused cut a tree was a 'reserved forest.' The omission to state this is a material defect and vitiates the trial.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the conviction and sentence of the First Class Sub-Divisional Magistrate of Bellary, in Criminal Appeal No. 20 of 1911, dated 5th September 1911, presented against the sentence of the Stationary 2nd Class Magistrate of Adoni, in C. C. No. 252 of 1911.

Messrs. *R. Sadagopachariar* and *V. Vencatachariar*, for the Petitioner.

Mr. *J. L. Rosario*, Acting Public Prosecutor, for the Crown.

ORDER.—In this case the accused has been convicted of an offence under rules 8 and 15 framed under section 26, Madras Forest Act, V of 1882. The charge runs in these terms:—"You are charged with having committed an offence under rules 8 and 15, framed under section 26 of Act V of 1882, in having got the accused Nos. 3 to 6 to cut without license a Neradu tree worth about Rs. 60 in the Vanka Poramboke Survey No. 162 of Noulakallu village about the month of April 1911."

Although the charge mentions rule 8, it does not state clearly that the Vanka Poramboke Survery No. 162, in which the Neradu tree is said to have stood, was a 'reserved forest,' or 'reserved land'. And, apparently, there is no evidence on record to show that the place in question was 'reserved land.' Without such evidence, a conviction under rule 8 could not be supported.

The learned Public Prosecutor contends that, on the facts found, the accused would be guilty of an offence under rule 9.

That depends on whether the accused had any right to cut the tree in question under rule 7. The accused, no doubt, pleaded that the tree was not cut in the place in question and that it belonged to some one else. But if the fact of its having been cut at the Venka be true, it might be open to the accused to say that it was required by him for an agricultual or domestic purpose. I think it would not be safe to convict the accused, on the facts as they stand, of an offence under rule 9,

I think, in the circumstances, the proper course would be to set aside the conviction and to direct a re-trial for an offence under rule 8 or rule 9 at the option of the prosecution. If the charge be framed under rule 8, it must clearly state that the place where the tree was cut was 'reserved land'. The fine, if paid, must be refunded.

Conviction set aside.

BOMBAY HIGH COURT.
CRIMINAL APPEAL No. 485 OF 1911.
February 14, 1912.
Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.
EMPEROR—PROSECUTOR.
versus
GANPAT BALKRISHNA RODE—ACCUSED.

Evidence Act (*I of* 1872), *s.* 73—"*Purports*", *meaning of*—*Handwriting*—*Comparison*—*Anonymous document.*

The word "purports" in section 73 of the Evidence Act means "alleged". It is not necessary under the section that the writing, which is in dispute, must itself in terms express or indicate that it was written by the person to whom it is attributed.

When an anonymous writing is produced and ascribed by the prosecution to a particular person, then the case for the prosecution must be taken to be that, having regard to the admitted documents, and the comparison between them and the disputed writing, the prosecution alleges that the disputed document *purports* to have been written or made by the accused.

An anonymous writing ascribed to a particular person may, therefore, be compared under section 73 of the Evidence Act.

Barindra Kumar Ghose v. *Emperor*, 14 C. W. N. 1114; 37 C. 467, 7 Ind. Cas. 359; 11 Cr. L. J. 453, dissented from.

Criminal appeal from the order of acquittal passed by the Sessions Judge of Thana, on appeal from conviction and sentence passed by the Magistrate, first Class, Kolaba.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

Mr. *Branson* with him Mr. *B. V. Desai*, for the Accused.

JUDGMENT.—In my opinion, the case is a very clear one, and the learned Sessions Judge has fallen into errors both of law and of fact in reversing the careful judgment of the Magistrate, who tried this case and convicted the accused.

First, we have the admitted handwriting of the documents which consist of letters, deeds and post cards. The handwritting on them is admitted to be that of the accused. Now, comparing that handwriting in *modi* with the *modi* handwritting on the disputed letter, Exhibit 1A, I have no hesitation whatever in saying that it is the accused's handwriting. The resemblance, in my opinion, is very close, and whoever is familiar with *modi* handwriting must, I think, come to that conclusion. It is unnecessary for me to detail the reasons which have led me to that conclusion, but I may say in short that the *matras*, the cast of the writing, and the similarity of most of the letters, all are, in my opinion, a warrant for holding that the writer of Exhibit 1A is the same as the writer of Exhibits J, I, K, and the post-cards (Exhibit G).

Then, there is the evidence of the Post-master. The learned Judge has not disbelieved him, at the same time he does not appear to have applied his mind to the testimony of that witness with the attention it deserved. I think that it is impossible to give any sound reason for setting aside the clear statements of the Post-master, who is positive in affirming that he saw Nadkar post two letters, one of which happens to be Exhibit 1A.

And then there is the evidence of Nadkar himself. I think that on these grounds, we must come to the conclusion that the trying Magistrate was right. The learned Sessions Judge seems to have been influenced in his opinion as to Exhibit 1A by the law laid down in a judgment of the Calcutta High Court [*Barindra Kumar Ghose* v. *Emperor* (1)], which he has cited, on the construction of section 73 of the Evidence Act. That section says:—"In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, or seal has not been produced or proved for

(1) 14 C. W. N. 1114; 37 C. 437; 7 Ind. Cas. 359; 11 Cr. L. J. 453.

any other purpose." And in the Calcutta judgment, the words "by whom it purports to have been written or made" have been construed to mean that the writing which is in dispute must itself in terms express or indicate that it was written by the person to whom the writing is attributed. One meaning of the word "purports", as given by Murray in his Dictionary, is "alleged," and, therefore, it is reasonable to construe these words to mean " by whom it is alleged to have been written or made." Or even if we take the word "purports" in the sense which is generally attributed to it, we may say that when an anonymous writing is produced and ascribed by the prosecution to a particular person, then the case for the prosecution must be taken to be that, having regard to the admitted documents, and the comparison between them and the disputed writing, the prosecution alleges that the disputed document purports to have been written or made by the accused. Any other construction would exclude a number of writings and thus enable the offenders to escape from the law. The practice hitherto in this Court, so far as my knowledge goes, is in support of this construction of the section and I am not aware that it was ever objected to till now.

For these reasons, the appeal preferred by Government from the order of acquittal ought to be allowed, and the order of the learned Sessions Judge must be set aside, and the order of the Magistrate convicting and sentencing the accused ought to be restored.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITIONS NOS. 1449 AND 1526 OF 1911.

January 17, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

GIRWAR NARAIN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 222, 224, 239—Charges—Misjoinder—Criminal misappropriation or breach of trust—Same parcel of money—More than one accused—Charges how to be framed—Abetment.

In section 222 of the Criminal Procedure Code, the wording refers to a single accused; and this must be so because it is impossible to hold that two persons can be guilty of misappropriating one and the same parcel of money; section 239, therefore, has no application, because more than one person cannot be charged with the offence of misappropriation.

If two persons are responsible for a misappropriation, the charges against them must be of misappropriation in one case and of abetment in the other. It is, of course, open to the Court to frame charges in the alternative: *firstly*, that *A.* misappropriated the money, *B.* being the abettor; or, *secondly*, that *B.* misappropriated and *A.* was the abettor.

These Rules were obtained by two persons, who were tried together and convicted under section 408 of the Indian Penal Code and sentenced to three months' rigorous imprisonment by the District Magistrate of Bhagalpore on October 20th, 1911. The conviction and sentence were upheld by the Sessions Judge of Bhagalpore on November 11th, 1911.

FACTS.—The two petitioners and another person, named Shoshi Bhushan, who was acquitted by the Magistrate, were tried together upon the charge that while they were collecting the rents of their master as a *Tahsildar*, *patwari* and *naib patwari*, respectively, they committed criminal breach of trust with respect to a total sum of Rs. 53-11-4½ p. of which Rs. 10 was received from Karu Mandar on April 3, 1910, Rs. 16-10-6 was received from the same tenant on September 27, 1910, Rs. 17-0-10½ was received from Munshi Mandar on September 29, 1910 and Rs. 10 was received from Dwarka Mandar on September 16, 1910. The first two accused were convicted and sentenced as mentioned before.

On appeal, the learned Sessions Judge disposed of the question of misjoinder thus:—

Accused No. 1 urged that separate items could not be included in one charge. But although the charge specified items, it is a charge of a general deficiency under section 222, Code of Criminal Procedure; even though the items can be separately proved, such charge is legal. There is much authority on this. The latest case appears to be of *Emperor* v. *Ibrahim Khan* (1). The second contention is that the two appellants ought not to have been tried together. But this depends upon the first point, the contention being that section 234 only applies to a single accused. But this is not a case to which section 234 has application.

The accused obtained the above Rules.

(1) 33 A. 36; 7 Ind. Cas. 186; 7 A. L. J. 897; 11 Cr. L. J. 442.

GIRWAR NARAIN *v.* EMPEROR.

Babus *Krishna Proshad Sarbadhikary* and *Monmatha Nath Mukherjee*, for the Petitioner in No. 1449.

Babu *Narendra Nath Seth*, for the Petitioner in No. 1526.

Babus *Nares Chandra Sinha*, for the Opposite Party in both.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Bhagalpur to show cause why the conviction and sentence passed on the petitioner should not be set aside on the grounds, *firstly*, that there has been misjoinder of charges, and, *secondly*, that the findings on the evidence do not show that there was specific misappropriation of any portion of the money by either of the accused persons, or that there was complicity between them.

We have heard the learned Vakil in showing cause and we have carefully considered the explanation given by the District Magistrate; but we are still of opinion that, having regard to the provisions of section 222, cl. (2), there has been a misjoinder of charges in this case. It is unnecessary to refer, as the learned Judge does, to section 234. It is enough to point out that in section 222 also, the wording of the section refers to a single accused; and it must be so, because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money. One may be guilty of misappropriating a portion of it or one may be guilty of abetting the other. The misappropriation of the actual money must be the act of a single person, and, therefore, section 239 has no application, because more than one person could not be charged with this particular offence of misappropriation of a single sum. This really covers the second ground of the Rule, which shows how easily an accused may be prejudiced by a charge drawn up in this vague manner.

As far as the finding that there was complicity between the two petitioners goes, that would only amount to a finding that one of them abetted the other. It is extremely difficult, upon the judgment of either of the Courts below, to discover which of the accused was, in their opinion, the principal and which was the abettor. Ordinarily speaking, the person into whose hands the money came and who was bound to account for it and who has not accounted for it is the person who would be liable to be charged with misappropiation. Now, if the *patwari* was bound to account to the estate through the *Tahsildar* for moneys collected by him, and the *Tahsildar* made false entries and thereby facilitated misappropriation of the money, the *Tahsildar* would be liable to be charged with abetment, but the specific act of misappropriation in the absence of any evidence that the money passed into the hands of the *Tahsildar* would lie against the *patwari* alone. The difficulty in this case is that there is no finding that the actual money passed into the hands of the *Tahsildar*. If the *patwari* handed over the money he collected to the *Tahsildar* and the *Tahsildar* falsified the accounts, then, of course, the *Tahsildar* alone would be responsible for the misappropriation and there would then have to be a clear finding on evidence that the *patwari* abetted him. But, be that as it may, the charges against these two persons must be of misappropriation in one case and of abetment in the other. It is open, of course, to the Court to frame charges in the alternative; *firstly*, that the *patwari* received money and misappropriated it, the *Tahsildar* being the abettor; or, *secondly*, that the *patwari* handed over the money to the *Tahsildar* who misappropriated it and that the *patwari* abetted him in such misappropriation. But if it is found necessary to draw up such charges in the alternative, clearly the different items will have to be distinguished, because the evidence as regards the receipt and credit of each item is different.

In setting aside the conviction and sentence and directing a new trial, we, therefore, leave it to the District Magistrate to decide which items should be charged as misappropriated by the *Tahsildar* or by the *patwari* with or without abetment of the other. But, if these two persons are tried together, the charge against one must be of misappropriating a sum of money and the charge against the other must be of abetting him in so doing. The materials before us are not sufficient to give any more specific directions.

The Rule is made absolute, the conviction and sentence are set aside and there will be a re-trial according to law.

The petitioner will remain on the same bail pending the re-hearing.

This judgment will govern both the Rules.

Rules made absolute.

MADRAS HIGH COURT.
FULL BENCH.
CRIMINAL REVISION CASE No. 421 OF 1911.
(CRIMINAL REVISION PETITION No. 318 OF 1911.)
March 15, 1912.
Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Ayling.
KRISHNAMAL—PETITIONER
versus
KRISHNAIYANGAR AND ANOTHER—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 499—Defamation—Will, registration of—Defamatory statements by party opposing Will—Privilege—Absolute privilege—Registrar, whether a Court.

Defamatory statements made by a party opposing the registration of a Will are not so absolutely privileged as to exempt him from liability to punishment for an offence under section 499, Indian Penal Code.

The Registration officer in such proceedings is not a Court.

Potaraju Venkata Reddy v. *Emperor*, 14 Ind. Cas. 659; (1912) 1 M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 416; 23 M. L. J. 39: *Atchayya* v. *Gangayya*, 15 M, 138, *Queen Empress* v. *Tulja*, 12 B. 36; *Queen-Empress* v. *Ram Lall*, 15 A. 141, *Marudaya Pillai* v. *Perumal Pillay*, 2 M. L. J. 280; *Queen-Empress* v. *Ramaya Naidu*, 4 M. L. J. 189 and *Manavala Goundan* v. *Kumarappa Reddy*, 17 M. L. J. 313; 30 M. 326; 2 M. L. T. 267, referred to.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sub-Divisional 1st Class Magistrate of Coimbatore, in Calendar Case No. 23 of 1911.

Mr. *R. Sadagopachariar*, for the Petitioner.

Dr. *S. Swaminathan*, for the Respondent.

ORDER OF REFERECE TO A FULL BENCH.

In this case, the petitioner before this Court was the complainant in Calendar Case No. 23 of 1911 on the file of the Sub-Divisional Magistrate of the Head-Quarter Division, Coimbatore. She charged the two accused with defamation by imputing to her sexual immorality in a statement made by the accused before the District Registrar of Coimbatore in answer to a petition put in by her, asking for the registration of a Will. The Sub-Divisional Magistrate discharged the accused on the ground that their statement was absolutely privileged, and that they were, therefore, not liable to be punished under section 500, Indian Penal Code. The question whether a statement by a defendant in a Civil suit or by one who occupies a similar position is absolutely privileged or not is one on which the decisions of the Indian Courts are not uniform. A Bench of this Court has already made a reference to the Full Bench, in *Potaraju Venkata Reddy* v. *Emperor* (1), on the question whether statements made by an accused person in his defence are absolutely privileged or not. Having regard to the importance of the question and the fact that it is likely to arise for decision frequently, we consider it desirable that the question arising in this case for decision should also be referred to a Full Bench. We, therefore, refer the question whether a defamatory statement, made by a person opposing the registration of a Will in his petition to the Registrar objecting to the registration, is absolutely privileged so as to exempt the party making it from liability to be punished for an offence under section 499, Indian Penal Code.

This case may be heard along with Criminal Revision Case No. 216 of 1911.

N. B.—The petition has not been heard on the merits.

This case coming on for final hearing on Friday, the 29th day of February 1912, upon hearing the arguments of Mr. V. Venkatachariar for Mr. R. Sadagopa Chariar, Vakil for the Petitioner and of Mr. B. Narasimha Rau for Dr. S. Swaminathan, Counsel for the Respondents, and the case having stood over for consideration till this day, the Court expressed the following

OPINIONS

WHITE, C. J.—The question referred to us is whether a defamatory statement, made by a person opposing the registration of a Will in his petition to the Registrar objecting to the registration, is absolutely privileged so as to exempt the party making it from liability to be punished for an offence under section 499, Indian Penal Code.

In *Potaraju Venkata Reddy* v. *Emperor* (1), we expressed the opinion that a statement made by a prisoner in his defence was absolutely privileged and we based this opinion upon the ground that the English rule of common law, that anything said in the course of a judicial proceeding before a Court of competent jurisdiction by Counsel, witness or party was

(1) 14 Ind. Cas. 659; (1912) 1 M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 416; 23 M. L. J. 39.

absolutely privileged, applied in India. The question put to us is limited to a statement made by a person opposing the registration of a Will. Our answer to this question must, in the first instance, depend on the view we take on the general question as to whether a Registration officer is a Court so as to render proceedings before him absolutely privileged.

What we should look to, in considering this question, as it seems to me, is the general scheme and purpose of the Registration Act and not to the special proceedings under particular sections.

The duties of the Registration officers are, in the main, administrative, though, no doubt, for the purpose of discharging these administrative duties, powers of a judicial or quasi-judicial character have been conferred upon them. The head of the establishment is an officer called the Inspector-General of Registration and he controls the department as an administrative officer.

There is no appeal from the decision of a Registration officer to a Civil Court. If a party deems himself aggrieved by the refusal of the officer to register a document, he must institute a suit (section 77). An order of a Registration officer decides no question of right as between parties, beyond the question of the right of the party who presents the document to have the document registered. The powers conferred by section 39 (compelling the attendance of witneses), section 63 (discretion to administer an oath), section 75 (4) (compelling attendance of witnesses and making orders as to costs),are,no doubt, powers which are exercised by Courts of justice; but the fact that a Registration officer has these powers does not, in my opinion, make him a Court of justice for the purposes of the question we have to consider. The powers are necessary in order to enable him to discharge his administrative functions.

Section 87 protects a Registration officer in the same way as section 77 of the Penal Code protects a Judge; but this does not, in my opinion, make him a Judge. The inference, which I should be disposed to draw from the provision in section 84 (3) of the Registration Act, that in section 228 of the Indian Penal Code, the words "judicial proceeding" should include proceedings under the Registration Act, would be that, for other purposes proceedings before a Registration officer were not "judicial proceedings." Similarly, as it seems to me, the inference to be drawn from section 483 of the Code of Criminal Procedure is that a Registration officer is not for ordinary purposes "a Civil Court."

I do not think the definitions of "Court" in the Evidence Act and "Court of Justice" in the Penal Code afford us much assistance. These definitions were framed for the purposes of the Acts in which they are to be found.

In *Atchayya* v. *Gangayya*(2), a Full Bench of this Court held that a Registrar, acting under sections 72 to 75 of the Registration Act, was a Court for the purposes of section 195 of the Criminal Procedure Code. A contrary view had been taken in *Queen-Empress* v. *Tulja* (3). In *Queen-Empress* v. *Ram Lall* (4), Knox, J. declined to follow the Madras Full Bench decision.

In *Marudaya Pillai* v. *Perumal Pillai* (5), this Court held that a District Registrar exercising his ordinary functions of registering a document, the execution of which is not denied, is not a Court within the meaning of section 195 of the Criminal Procedure Code. In *Queen-Empress* v. *Ramaya Naidu* (6), this Court held that a Sub-Registrar acting under sections 34 and 35 of the Indian Registration Act, III of 1877, is not a Court within the meaning of section 195 of the Criminal Procedure Code. Since this case was argued before us, Mr. V. Venkatachariar has called our attention to a case, *Manavala Goundan* v. *Kumarappa Reddi* (7), where Subramanya Aiyar, J., held that a District Registrar is not a Court within the meaning of section 622 of the Code of Civil Procedure (1882) and that an order as to costs made by a District Registrar was not subject to revision.

So far as section 195 of the Code of Criminal Procedure is concerned, the matter has now been set at rest by the Legislature. See section 195 (2).

It is not necessary to consider for what (if any) purpose, in the absence of express enactment, a Registration officer is, or is to be deemed to be, a Court. The only question before us is, is he a Court for the purpose of rendering a statement made in an "objection petition" put in in the proceedings referred

(2) 15 M. 138.
(3) 12 B. 36.
(4) 15 A. 141.
(5) 2 M. L. J. 286.
(6) 4 M. L. J. 189.
(7) 17 M. L. J. 313; 30 M. 326; 2 M. L. T. 267.

In re HARI PADA MUKHERJI.

to in the Order of Reference, a statement made on a privileged occasion. For the reasons I have stated, and for the reasons given by West, J., in dealing with the question of sanction for prosecution for perjury in *Queen-Empress* v. *Tulja* (2), in my opinion, he is not.

I would answer the question which has been referred to us in the negative.

SANKARAN NAIR, J.—I agree.

AYLING, J.—I agree.

Answered in the negative.

CALCUTTA HIGH COURT.
CIVIL RULE No. 866 OF 1912.
April 29, 1912.
Present:—Mr. Justice Brett and
Mr. Justice Sharfuddin.
In re HARI PADA MUKHERJI—
PETITIONER.

Legal Practitioners Act (*XVIII of* 1879), *s.* 36—*Tout—Inquiry to be made by Magistrate himself—Power not to be delegated—Evidence to be recorded—Opportunity of cross-examination of witnesses to be given to alleged tout.*

An inquiry, under section 36 of the Legal Practitioners Act, must be made by the District Magistrate himself, and he cannot delegate his powers to any subordinate officer.

In re Chandi Charan Dey, 12 C. W. N. 842 and *In re Prasanna Kumar Das*, 12 C. W. N. 843 *note*, followed.

The decision of a Court determining that a person is a tout must be based on substantial legal evidence.

In re Sitdeshwar Boral, 4 C. W. N. 36, relied upon.

The person against whom the evidence is directed must have an opportunity of cross-examining the witnesses.

Rule against the order of the District Magistrate of Howrah, dated December 9th, 1911.

Messrs. *K. N. Chaudhuri*, *S. N. Haldar* and Babu *Bir Bhushan Dutt*, for the Petitioner.

JUDGMENT.—The present petitioner, in consequence of a complaint made to the District Magistrate of Howrah on the 26th October 1911 by some members of the Criminal Court Bar Association that he was acting as a tout, was called on to show cause why he should not be dealt with under the provisions of section 36 of the Legal Practitioners Act. The learned District Magistrate did not himself conduct the whole of the proceedings against the petitioner but he ordered the Joint Magistrate to inquire into the matter and report to him. The evidence appears to have been taken by the Joint Magistrate but the petitioner does not appear to have been present while the witnesses were examined nor does he appear to have been given an opportunity of cross-examining them. The Joint Magistrate, on the 15th November 1911, reported to the District Magistrate that the petitioner should be called on to show cause why he should not be enlisted as a tout. The learned District Magistrate recorded an order approving of the course suggested by the Joint Magistrate and thereafter it appears that a notice was served by order of the joint Magistrate on the 21st November 1911 on the petitioner calling upon him to show cause why he should not be proclaimed as a tout. On the 27th November, the petitioner showed cause and on the same day, the Joint Magistrate recorded the following order:—"The cause shown is not satisfactory. I think he may be proclaimed as a tout. Forwarded to the District Magistrate." On the 9th December 1911, the District Magistrate recorded the following order.—"I am satisfied from the evidence recorded and the report submitted by the Joint Magistrate that Hari Pada Mukerjee is a tout. The cause shown by him is not satisfactory. He will, therefore, be enlisted as a tout under section 36 of the Legal Practitioners Act." The petitioner applied to this Court on the 12th February 1912 and obtained this Rule on the District Magistrate to show cause why the order complained against should not be set aside on the ground that it does not appear to have been passed in accordance with the provisions of the Act.

The learned District Magistrate has submitted an explanation to this Court and we have also heard the learned Counsel in support of the Rule and, in our opinion, the Rule must be made absolute. From his explanation, the learned District Magistrate appears not to have been aware of the decisions of this Court determining the procedure to be adopted in proceedings under section 36 of the Legal Practitioners Act. Those decisions are in the cases of *Chandi Charan Dey, In re* (1) and *In the matter of Prasanna Kumar Das* (2), and lay down distinctly that an inquiry under section 36 of the Legal Practitioners Act must be made by the District Magistrate himself and

(1) 12 C. W. N. 842.
(2) 12 C. W. N. 843, *note*.

that he cannot delegate his powers to any subordinate officer. In *In re Siddeshwar Boral* (3), it is distinctly laid down that the words "proved to their or his satisfaction" in section 36 of Act XI of 1896 refer to proof by any of the means known to the law of the fact upon which the Court is to exercise its judicial determination and that, in fact, the decision of the Judge determining that a person is a tout must be based on substantial legal evidence. In the present case, the District Magistrate himself does not appear to have recorded the evidence. The evidence which was taken by the Joint Magistrate does not appear to have been taken in accordance with the provisions of the law and the petitioner against whom that evidence is directed does not appear to have had an opportunity of cross-examining the witnesses. We, therefore, make the Rule absolute, set aside the order of the District Magistrate passed under section 36 of the Legal Practitioners Act and direct that, should the Magistrate think it necessary to take further proceedings against the petitioner, he will do so in strict accordance with the provisions of section 36 of the Legal Practitioners Act.

Rule made absolute.

(3) 4 C. W. N. 36.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 455 OF 1912
May 2, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Imam.
RAKHAL DAS SINGH AND OTHERS—PETITIONERS
versus
EMPEROR AND OTHERS—OPPOSITE PARTY.

Hat—*Holding* hat *on one's own property, if unlawful —Whether injunction may issue not to hold* hat—*Duty of Magistrate in case of establishment of rival* hat—*Breach of peace—Order not to molest people attending other* hat—*Criminal Procedure Code* (*Act V of* 1898), *s.* 144.

The holding of a *hat* on a man's own property is not in itself a wrongful act and, therefore, any ulterior consequences which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace, unless those ulterior consequences are made the basis of the proceedings.

An injunction cannot be issued to a person restraining him from doing a lawful act upon his own property.

Therefore, an order directing a man not to use his property in a lawful manner, for instance, not to establish a *hat* on his own land, does not come within the purview of section 144 of the Criminal Procedure Code.

What the Magistrate in this case ought to have ordered the parties to do was not to obstruct or allow their servants to obstruct any person from attending the other market if he wished to do so.

Rule against the order of the Sub-Divisional Magistrate of Narail, dated March 5th, 1912, directing the petitioners to close their *hat* at Peruli, under section 144, Criminal Procedure Code.

Babu *Hemendra Kumar Das*, for the Petitioner.

Mr. *Pugh*, for the Crown.

Babu *Monmatha Nath Mukherjee*, for the Opposite Party.

JUDGMENT.—We are of opinion that this Rule must be made absolute on the ground upon which it was issued. As a matter of fact, the order expires on its own force in the next three days and, therefore, there is not much occasion to set it aside now. But we wish to emphasise the clear distinction between interfering with the rights of private proprietors with whatever ulterior motive they may do acts which they have a right to do and the perpetration of wrongful acts by such proprietors. The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace. And the question whether section 144, 107 or 145 should be utilised for the purpose is, a matter within the discretion of the Magistrate. What we want to point out is that holding of a *hat* on a man's own property is not, in itself, a wrongful act and, therefore, any ulterior consequences which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace unless those ulterior consequences are made the basis of the proceedings. And in the present proceedings, the only ground mentioned for the issue of this injunction was that the Magistrate was satisfied from a report of the Police that by opening a new *hat* at Peruli only half a mile from the old and long established *hat* at Gazirhat, the petitioners were about to disturb the public

ranquility. Now an order in that form is, in our opinion, without jurisdiction. Under section 144, Criminal Procedure Code, a Magistrate is empowered to direct the parties to take such order with their property as may be necessary to prevent obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully empolyed, or danger to human life, health or safety or a disturbance of the public tranquility, or a riot or an affray. Now, directing a man not to use his property in a lawful manner (for the establishment of a *hat* is a perfectly lawful act) cannot, in our opinion, come within the purview of this section. What the Magistrate ought to have ordered these people to do is not to obstruct or allow their servants in any way to obstruct the public or any other person from crossing the *khal* from their side in order to attend the Gazirhat market if he wished to do so. That is really what the Magistrate finds and tells us in his explanation is the cause of the present proceedings. It is not that the petitioners are not entitled to hold a *hat* but that its promoters did not shrink from using threats, and, if necessary, force to compel the public to go to their *hat* and to prevent them from going to the Gazirhat market. The strongest measures should be taken by the local authorities to put down any such lawless acts; and the powers which are vested in the Magistrate are, in our opinion, ample enough to prevent any such interference with the liberties of the subjects. But an injunction cannot be issued not to do a lawful act upon a man's own property. It is, therefore, necessary to set aside these proceedings and to make the Rule absolute.

Rule made absoulte.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1094 OF 1911.
December 6, 1911.
Present:—Mr. Justice Holmwood and
Mr. Justice Sharfuddin.
KUMEDA CHARAN GHOSE—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 406, 417—Criminal breach of trust—Cheating—Landlord sending for tenant—Payment of rent by tenant—Illegal demand by landlord—Detention of money paid—Criminal offence.

A tenant was sent for by his landlord to whom the tenant paid Rs. 90 as rent. The landlord deducted Rs. 25 towards a subscription and refused to grant a *dakhila* or return the money until Rs. 25 more was paid:

Held, that the landlord did not commit any criminal offence.

Khoda Bux v. *Backaya*; 32 C. 941; 9 C. W. N. 1006; 2 Cr. L. J. 764, distinguished.

Rule against the order of the Sessions Judge of Midnapore, dated July 17th, 1911, confirming that of the Deputy Magistrate of that place, dated June 13th, 1911, convicting the petitioner under sections 406 and 417 of the Indian Penal Code and sentencing to pay a fine of Rs. 300.

FACTS.—The accused was the landlord of the complainant. Litigation has been going on between them for some years. On the day of occurrence, the tenant was sent for for payment of rent. The tenant paid Rs. 90. The landlord took Rs. 25 as a *swadeshi* subscription out of the amount and said that until Rs. 25 more was paid, he would neither grant a *dakhila* nor return the money.

The tenant thereupon brought this charge against his landlord, the petitioner, who has been convicted and sentenced as mentioned above.

The accused then obtained this Rule.

Babu *Monmatha Nath Mukerjee*, for the Petitioner.

Babu *Sris Chandra Chowdhury*, for the Crown.

JUDGMENT.—We are of opinion that the Rule in this case must be made absolute. The case of *Khoda Bux* v. *Backaya* (1) goes as far as the law could possibly be taken in the direction of misrepresentation by conduct. In that case, there was, however, positive conduct subsequent to the receiving of the mortgage-money to show fraudulent intention, *viz.*, the return of a bogus unstamped bond to an illiterate messenger. Here the transaction was between the principals and there was no subsequent misrepresentation, only an illegal demand. The case does not, in our opinion, come within the purview of the criminal law.

The conviction and sentence we set aside, and the fine, if paid, must be refunded.

Rule made absolute.

(1) 32 C. 941; 9 C. W. N. 1006; 2 Cr. L. J. 764.

KALI CHURN SINGH *v.* SHEO BAKHSH SINGH.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No 379 OF 1908.
April 3, 1912.
Present:—Mr. Justice Coxe and
Mr. Justice Imam.
Mowar KALI CHURN SINGH—PLAINTIFF
—APPELLANT
versus
Mowar SHEO BAKSH SINGH AND OTHERS
—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Suit for declaration of right—Defence on ground of special custom—Suit decreed—Second suit by plaintiff for partition—Same defence taken by son of previous defendant.*

G., the father of the present defendant, was recorded as a *jagirdar* in the Collector's Register. A suit was brought by the present plaintiff for declaration of his rights against *G.*, which seems to have been almost identical in nature with the present suit. The plaintiff claimed under the ordinary law, but *G.* contested the suit on the ground that he was entitled to the *jagir* under a custom of primogeniture. The Court held in that case that the special custom was not proved and that the plaintiff was entitled to succeed. The plaintiff then brought this suit for partition. Defendant was not made a party to the previous suit. He contested the suit on the ground of primogeniture:

Held, that the matter was now *res judicata*, and the defendant could not take up the same defence which his father had taken in the former suit.

Appeal from the decree of the Sub-Judge of Palamau, dated May 23rd, 1908.

Babus *Tara Kishore Choudhury*, *Nagendra Nath Ghose* and Mr. *J. W. Chippendale*, for the Appellant.

Babu *Mohendra Nath Roy*, Dr. *Sarat Chandra Basak* and Babu *Harihar Prosad Sinha*, for the Respondents.

JUDGMENT.—This is a suit for partition of property which was admittedly at one time a *jagir* of one Dhurup Singh, the common ancestor of the plaintiff and the defendants. It apparently descended to his eldest son, Bhukan Singh, but in Bhukan Singh's time was resumed, and after that was again granted in the name of Pahalwan Singh, the third son of Dhurup Singh, and not in the name of Baiju Singh, the second son, who was the plaintiff's ancestor. It is a matter of controversy in this case whether the *jagir* was given exclusively to Pahalwan Singh or given to him as the representative of the whole family.

Only one name is recorded as *jagirdar* in the Collector's Register. After Pahalwan Singh, Jhao Singh was recorded, after him, Odit Singh, after him, Ghinu Singh and after Ghinu, the present defendant No. 3, Nursing Dyal Singh. In the time of Ghinu Singh, a suit was brought by the present plaintiff for declaration of his rights, which seems to have been almost identical in nature with the present suit except that partition was not sought. The plaintiff succeeded and obtained a decree which was affirmed on appeal by this Court.

In the present case, the learned Subordinate Judge has found that this decision was wrong, that the *jagir* belonged to Nursing Dyal Singh alone and that the plaintiff was not in possession and not entitled to succeed. The plaintiff appeals to this Court.

It appears to us that the decision of the learned Subordinate Judge cannot be sustained. In our opinion, the matter is now a *res judicata*.

The issues in the former suit, as we gather from the decision of this Court, were as follows:— *Firstly*, is the plaintiff in possession of the property in suit? If not, can the suit proceed? *Secondly*, does the rule of primogeniture prevail in the family of the parties? *Thirdly*, was the property in suit granted in *jagir* to Pahalwan as alleged by the defendants? On the first point, the learned Judges observed that it was contended on behalf of the defendants that the Court below was wrong in holding that the possession of the plaintiff was made out so as to entitle him to maintain his suit for a declaratory decree. But they agreed with the Court below in the conclusion arrived at, namely, that the possession of the plaintiff was made out. On the second point, they held that it lay upon the defendants to prove that there was any special custom governing the succession to this *jagir* as against the ordinary Hindu Law of succession and that the defendants had failed to discharge that burden, or, in other words, that the rule of primogeniture was not proved to prevail in the family of the parties. On the third point, they held that the plaintiff's ancestor along with other members of the family had been in possession of the lands of the *jagir* by virtue of their right by inheritance and that the grant of the *jagir* was not to Pahalwan Singh alone.

These findings seem to us completely to dispose of the present suit in which these identical questions are raised. It is no body's case that the plaintiff has been dispossessed since the decision of the former suit.

The only reason given for holding that the suit is not concluded by the rule of *res judicata* is that if, as is alleged by the plaintiff, the family is governed by the ordinary *Mitakshara* law, it must be held that the defendants obtained an interest in the property at birth and did not derive their rights from Ghinu. It would follow, therefore, that as they were not parties to the former suit though they were alive at the time, they are not bound by the decision.

With this question, we are only concerned in so far as it affects the defendant No. 3. The contesting defendants are defendants Nos. 1 to 10. Of these, defendants Nos. 1, 2, 9 and 10 were parties to the former suit while defendants Nos. 4 to 8 disclaim all title to the property. As regards defendant No. 3. we find, on reference to his written statement, that he states distinctly that the property is impartible and governed by the rule of primogeniture. In that case, it is perfectly clear from the decision in *Sartaj Kuari* v. *Deoraj Kuari* (1) that he obtained no right at birth at all and could not properly have been made a party to the former suit during his father's life-time. In these circumstances, it appears to us that he must be regarded as claiming under Ghinu.

It does not appear to us to be of any importance what the plaintiff's case is. A reference to section 11, Civil Procedure Code, shows that what has to be considered in these cases is what the defendant himself claims, and, as we have said above, on the allegations in his written statement, he must be regarded as claiming under Ghinu.

Reference has been made to an alternative claim put forward by the defendants Nos. 4 to 8. If they had put forward the alternative case that even though the rule of primogeniture did not apply, yet the *jagir* was granted to Pahalwan Singh alone, something might have been said for it. But the only alternative prayer they put forward is that if the plaintiff succeeds in getting a decree for partition, that is to say, if it is found that others besides Pahalwan Singh's descendants are interested in the *jagir*, the share of these defendants also may be separated. To this prayer, the plaintiff has no objection.

We have been invited to go into the merits of the case, but we think that it is not proper for us to consider the correctness of a former decision of this Court based on the same materials with regard to the same matters in controversy and between persons whom we regard as the same parties.

It appears to us, therefore, that the appeal must be allowed with costs and a preliminary decree given to the plaintiff for partition.

Appeal allowed.

(1) 10 A. 272; 15 I. A. 51.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 344 OF 1912.

June 18, 1912.

Present:—Mr. Justice Robertson.

THE MUNICIPAL COMMITTEE OF DELHI—DEFENDANT—APPELLANT

versus

MAMAN CHAND AND ANOTHER—PLAINTIFFS RESPONDENTS.

Punjab Municipal Act (XX of 1891), s. 94 cls. (a) and (c)—Superstructure built on an old chhatta—*Material alteration—Security of building affected.*

The re-placing of an old by a new superstructure, upon an old *chhatta* or bridge over a lane is a material, alteration within the meaning of clause *(a)* of section 94 of the Punjab Municipal Act and affects the security of the old building within the meaning of clause (*c*) of the same section. Therefore, the Committee acts *intra vires* if it requires the removal of such new superstructure erected without its permission.

Second appeal from the order of the Additional Divisional Judge, Delhi Division, dated 27th October 1911, modifying that of the Munsif, 1st class, Delhi, dated 29th June 1911, decreeing plaintiffs' claim in part.

The Hon'ble Mr. *Shadi Lal*, for the Appellant.

Mr. *Oertel*, for the Respondents.

JUDGMENT.—This is only an application for revision, but the case is important and I think the lower Courts have misunderstood the law, and the position.

It is quite clear from the finding of the first Court which is not traversed that the plaintiff has in fact built a new superstructure upon an old *chatta* or bridge over a lane. The new structure may be quite safe *per se* but its position upon the *chatta* may very well render that dangerous. The old *chatta* can only bear a certain amount of weight—it is clear that the structure now

built on it is not identical with what was there before and it is quite clear that the re-placing of the old by a new superstructure "affects the security." It is not for the owner but for the Committee in such a case to judge how it affects that security. It may, no doubt, increase the security, in which case no objection could be raised, but even a change which increases security certainly affects it, and must, under section 94, be approved by the Committee. A private individual may very well take a different view on that point from an expert, and the Committee are the custodians of the public safety in such matters, and must decide in what manner the security is affected. I agree that the Committee cannot order the removal of such portions of the *chatta* as existed before, but they are perfectly competent to order the removal of the whole of the new superstructure as it was undoubtedly a material alteration [*vide* the additions of arches found by the first Court, section 94 (*a*)] and it certainly affected the security; section 94 (*e*). The evidence of the Municipal Engineer makes this quite clear. I, therefore, hold that the Committee were acting *intra vires* in calling on the plaintiff to remove the new superstructure erected without permission. The old part of the *chatta*, of course, cannot be ordered to be removed. The application for revision is so far accepted as to restrict the injunction to that part of the *chatta* which has not been re-built; the order for the removal of the superstructure cannot be interfered with. Costs against the respondents in this Court.

Revision partly accepted.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT CALCUTTA.

March 20, 1912.

Present:—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

JADU LAL SAHU AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharani JANKI KOER—PLAINTIFF—RESPONDENT.

Pre-emption—Right of Hindus in Behar—Ceremonies to demand pre-emption, if may be performed by manager of disqualified proprietor—Co-sharers—Payment of Government revenue jointly, whether constitutes co-parcenary to give rise to right of pre-emption.

A right or custom of pre-emption is recognised as prevailing among Hindus in Behar.

Fakir Rawot v. *Sheikh Emambuksh*, B. L. R. Sup. Vol. 35; W. R. (F. B.) 143, followed.

The manager of an estate, in charge of the Court of Wards of a disqualified proprietor under the Court of Wards Act, 1879, is competent, independently of the provisions of section 40 of the Act, to observe on behalf of the proprietor the formalities to demand the right of pre-emption in accordance with the prescriptions of the law.

The claim to co-parcenary, on which a pre-emptor's right of pre-emption is based, may arise out of the fact that the vendor and pre-emptor are jointly liable for the payment of the Government revenue assessed on the property, because that joint liability arises from the fact that they own undivided interests.

Appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 31st January 1908, reported at 35 Calcutta 575, which affirmed a judgment and decree of the Second Subordinate Judge of Mozufferpur, dated the 17th September 1906

The plaintiff (first respondent) was the widow of the late Maharajah of Bettiah, whose estate was being administered by the Court of Wards; she was represented in the suit by her next friend, Mr. J. R. Lowis, the Manager of the estate under the Court of Wards. The suit was brought to establish the plaintiff's right of pre-emption in respect of certain property situated in the Champaran District in Behar, in which the plaintiff, the first defendant (second respondent) and defendants Nos. 12 to 25 (respondents Nos. 3 to 16) were co-sharers.

The first defendant was the vendor of the property in dispute, the purchasers being defendants Nos. 2 to 11, here inafterreferred to as the purchasers. Defendant No. 3 died during the pendency of the case, and defendants Nos 2 and 4 to 11 are the present appellants. Defendants Nos. 12 to 25 were joined as *pro forma* defendants, no relief being sought against them.

The property in dispute was the share of the first defendant in *Mahal* Motihari, which she had sold to the purchasers by a deed, dated 28th July 1904. The consideration was stated in the deed to be Rs. 39,967. The plaintiff and the first defendant claimed that the deed did not include part of the first defendant's share in Tolah Begampur, which formed part of *Mahal* Motihari. That was sold by first defendant to the plaintiff by a deed dated 24th February 1905.

JADU LAL SAHU *v.* JANKI KOER.

Mr. Lowis, the Manager of the Raj, first became aware on the 13th August 1904 that the sale had been completed. The information was conveyed to him by a letter from Mr. Leslie, the Solicitor to the Raj. Mr. Lowis immediately, upon receipt of Mr. Leslie's letter, performed the ceremony of *Talab Mawasibat*, and on the 15th August proceeded to Motihari, where he performed the ceremony of *Talab Istishad*, first at the Raj office and then at the Collectorate.

The suit was instituted on the 9th March 1905. The plaint, in addition to setting out the facts as above, further alleged that the consideration for the sale was falsely stated in the deed of 28th July 1904, being, in fact, only Rs. 26,000, and not Rs. 39,967. The plaintiff prayed for a declaration that she had a right of pre-emption in respect of the first defendant's share in Mahal Motihari, save and except the share in Tolah Begampur already referred to, but that if it was held that, that share passed by the conveyance, then that she had a right of pre-emption in respect of that also, for an inquiry as to the actual consideration paid, and for an order that the purchasers should convey to her the property bought by them, on her paying them the actual consideration found on such inquiry to have been paid.

The defendants Nos. 12 to 25 did not appear. The first defendant filed a written statement in which she admitted the sale, but alleged that the consideration was in fact only Rs. 26,000.

The purchasers, in their written statement, denied that plaintiff had any cause of action. They alleged that the ceremonies of *Talab Mawasibat* and *Talab Istishad* had not been duly performed, and pleaded that those ceremonies could not be performed for the plaintiff by her Manager. They also alleged that the real consideration was Rs. 39,969; that the share in Tolah Begampur passed by their conveyance; and that by her subsequent purchase of that share, the plaintiff had lost her right of pre-emption. They further pleaded that the plaintiff's Manager had information of the negotiations for sale long before the execution of the deed of sale, that he refused to pay adequate consideration, and that they on such refusal themselves completed the transaction.

The following issues were settled :—

1. Has plaintiff a cause of action for the suit?

2. Could the plaintiff perform the preliminary ceremonies of *Talab Mawasibat* and *Talab Istishad* through her Manager and were these ceremonies duly performed?

3. Was there any talk of sale of the disputed property with the plaintiff's Manager, and did he decline to purchase the same?

4. Was the plaintiff or her Manager aware of the proposal for sale to defendants Nos. 2 to 11? Did that take away the plaintiff's right of pre-emption?

5. Whether Tolah Begampur was purchased by defendants Nos. 2 to 11 prior to plaintiff's purchase?

6. Is the subsequent purchase of Tolah Begampur by the plaintiff invalid, and did that purchase extinguish plaintiff's right of pre-emption?

7. What is the real consideration of the property sold?

8. To what relief, if any, is the plaintiff entitled?

On the 11th July 1906, the purchasers filed a petition praying that the first issue might be disposed of before going to trial of the remaining issues, on the ground that the pre-emptor and purchasers not being Muhammadans, the right of pre-emption could only been based on a local custom, which had not be alleged in the plaint. The Subordinate Judge, on the 14th July 1906, delivered a preliminary judgment on that issue. He held that the purchasers' petition was an attempt to raise a fresh issue, which had not been raised in the written statement, namely, whether such a custom did, in fact, exist, and that that issue could not be raised at the stage which the suit had then reached. He further held on the authorities that the adoption of the Muhammadan Law of pre-emption by the Hindus in Behar had been judicially recognized, and decided the issue in plaintiff's favour.

The Subordinate Judge delivered his final judgment on the remaining issues on the 12th September 1906. On the second issue, he held that the ceremonies of *Talab Mawasibat* and *Talab Istishad* could be performed for plaintiff by her Manager, and that they had in fact been

duly performed, and in each case without unnecessary delay. On the third and fourth issues, he found that there was no prior offer of the property to Mr. Lowis and refusal by him to buy, that he first knew of the sale on 13th August 1904, and that he had not, by his conduct prior to that date, done anything to relinquish his right of pre-emption. On the fifth issue, he held that the portion of Tolah Begampur subsequently sold to plaintiff was not included in the purchaser's conveyance, and on the sixth issue, that such subsequent purchase did not extinguish plaintiff's right of pre-emption. On the seventh issue, he held that the true consideration for the sale was Rs. 26,000. In the result, the suit was decreed with costs, and it was ordered that, on payment by plaintiff to the purchasers of Rs. 26,000 within two months from the date of the judgment, she should get possession of the property in dispute.

Against that decree, the purchasers appealed to the High Court of Judicature at Fort William in Bengal, and on the 31st January 1908, the High Court delivered its judgment affirming the judgment and decree of the Subordinate Judge on all the issues. For report of the judgment of the High Court, see *Jalu Lal Sahu* v. *Janki Koer* (1).

Against the decree of the High Court, the purchasers appealed to His Majesty in Council.

Mr. *K. Brown*, for the Appellants: The plaintiff has no right of pre-emption as it is not alleged and proved that there is any custom among the Hindus in this part of Behar giving them such a right. The High Court has erred in taking judicial notice of the existence of the custom, which was not established by evidence. The High Court relied on Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, p. 376, Article 351, where, on the authority of *Fakir Rawot* v. *Sheikh Emambaksh* (2), it is said that the custom of pre-emption is recognised as prevailing among Hindus of Behar. But that case is considered in *Kanti Ram* v. *Wali Sahu* (3), where it is laid down that there is no judicial finding to the effect that the custom of pre-emption is recognised among the Hindus of Behar. The right of pre-emption in this case could only exist, if its existence is proved by custom. Digest of Anglo-Muhammadan Law, by Wilson; 3rd Edition, p. 378, Article 354. The Muhammadan Law of Pre-emption and text of the Hidaya relating to it are not to be applied to a case between a Hindu and a Muhammadan in the British territories. Even if the plaintiff and the first defendant were co sharers in the *mahal* and in the villages comprised therein, they ceased to be such when proceedings were instituted under Act V of 1897 (B. C.) and partition took place. Any right of pre-emption, if it existed, was destroyed by reason of those proceedings and partition: *Govind Chundar Goopto* v. *Raj Kishore Sein* (4) and *Wahed Ali Khan* v. *Hunuman Prasad* (5).

The Manager appointed by the Court of Wards has no power to perform the first ceremony. The lower Court said that his power would depend upon the statute under which he was appointed. But the Court of Wards Act, (iX of 1879, B. C.), gives him no such power: See sections 12, 14, 15, 18, 38, 39, 40, 41, 49, 50 and 80. The Manager has no power to bind the ward or the ward's estate by a contract for the purchase of immoveable property: *Mir Sarwar Jan* v. *Fakhruddin Mahommad Chowdhuri* (6). The evidence shows that there was delay in asserting the right and the plaintiff is not, therefore, entitled to succeed; *Nundo Pershad Thakur* v. *Gopal Thakur* (7). The Manager's acts ought to have been ratified at once as the right could only be exercised without delay, and the plaintiff should not succeed for want of immediate ratification. Cunningham and Shephard's Contract Act, 10th Edition, section 200, p. 438; *Dibbins* v *Dibbins* (8); *Bird* v. *Brown* (9); *Lyell* v. *Kennedy* (10). Lastly, if the plaintiff has a right of pre-

(1) 35 C. 575.
(2) (1863) B. L. R. Sup. Vol. 35; W. R.(F. B.)143.
(3) 2 B. L. R. A. C. 330, 11 W. R. 251.
(4) 14 W. R. 365.
(5) 12 W. R. 484; 4 B. L. R. A. C. 139.
(6) 15 C. L. J. 69; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) 1 M. W. N. 22; 9 A. L. J. 33; 14 Bom. L. R. 5; 39 C. 232; 13 Ind. Cas. 331.
(7) 10 C. 1008.
(8) (1896) 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595.
(9) (1850) 19 L. J. Ex. 154; 4 Ex. 786; 14 Jur. 132.
(10) (1889) 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353.

emption as a co-sharer in respect of any of the villages in question, such right does not extend to more than 16 villages, in which the plaintiff and the 1st defendant were co-sharers. Their joint liability to pay the land revenue assessed on the villages respectively owned by them, did not make them co-parceners under the Muhammadan Law. In the absence of such a co-parcenary, there is no right of pre-emption.

Messrs. *De Gruyther*, K. C. (*E. U. Eddis* with him), for the Respondents.

[LORD SHAW:—We want you to explain the point rela'ing to a "co sharer."]

[LORD ROBSON:—We will not trouble you about the powers of a "Manager."]

A co-sharer is the same as a co-partner. The essential condition is that the person claiming the right of pre-emption must be a co-sharer in the property sold. The unit of area for revenue purposes is a *mahal*, which has fixed, definite boundaries. A *mahal* is divided into *putties* which are again divided into smaller divisions. All persons whose lands are within the boundaries of a *mahal*, are co-sharers, and the right of pre-emption exists, if they are co-owners. See Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, pp. 378 and 379; Hidaya, Book XXXVIII, Ch. 1, p. 548; The Oudh Laws Act (XVIII of 1876), section 9; *Jeobraj Singh* v. *Tookun Singh* (11); *Mahadeo Singh* v. *Musammat Zeenut-un-nissa* (12), *Munna Lal* v. *Hajira Jan* (13).

[Mr. Amir Ali referred to *Sheikh Mahomed Hossein* v. *Shah Mohsun Ali* (14).]

[Lord Shaw: It is not necessary to trouble you further.]

Mr. *Broun*: In that case, I will say nothing more.

JUDGMENT.

AMEER ALI, J.—The suit, out of which this appeal arises, was brought by the plaintiff-respondent to establish her right of pre-emption in respect of certain undivided shares in a number of villages comprised in *Mahal* Motihari, situated in the district of Champaran.

The shares in question belonged to a Muhammadan lady named Barkatunnissa, the first defendant to this action, who sold the same to the Sahu defendants by a deed of sale, dated the 28th of July 1904. Barkatunnissa owned an interest in 24 out of the 31 villages comprised in the *mahal*, whilst the plaintiff possesses shares in 18. The vendors had admittedly no proprietary interest in *Mahal* Motihari prior to their purchase from Barkatunnissa.

The plaintiff claims that as a co-sharer in the *mahal*, she is entitled to the right of pre-emption in respect of the shares sold to the Sahus by the first defendant.

Champaran appears to have been part of the Civil Division of Saran until sometime after the institution of the suit. The action was accordingly brought in the Court of the Subordinate Judge of Saran, but owing to the subsequent amalgamation of Champaran with Tirhoot, it was tried before the Subordinate Judge of Mozzufferpur (the Suddar station of Tirhoot), who decreed the plaintiff's claim. This decree has been affirmed by the High Court of Bengal.

It has been urged on behalf of the appellants that as the right claimed is a creation of the Mussulman Law, and it is not proved that the Mussulman Law of pre-emption is in force among the Hindus of the district of Champaran, both the pre-emptor and the vendees being Hindus, the action must fail.

The suit was instituted on the 7th of March 1905, the Sahu defendants filed their defence on the 16th of June, and issues for trial were settled on the 27th of September 1905. It was not, however, until the 11th of July 1906, when, as the learned Judges of the High Court observe, " the suit was ripe for hearing," that the Sahu defendants for the first time raised a question as to the existence of the right of pre-emption among the Hindus of Champaran. Both the Courts in India have, in their Lordships' judgment rightly, overruled the defendants' objection.

The law of pre emption, under which the plaintiff claims the right, was introduced into India with the Muhammadan Government. The Province of Behar, to which the district of Champaran appertains, was an integral part of the Muhammadan Empire and consequently it would not be surprising to find that in Behar the right of pre-emption

(11) 14 W. R. 476.
(12) 11 W. R. 169; 7 B. L. R. 45 *note*.
(13) 33 A. 28; 7 A. L. J. 879; 7 Ind. Cas. 404.
(14) 6 B. L. R. 41; 14 W. R. 1 (F. B.).

is enforcible irrespective of the persuasion of the parties concerned.

In the case of *Fakir Rawot* v. *Sheikh Emambuksh* (2), a Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of pre emption among the Hindus of Behar. In delivering the judgment, the Chief Justice (Sir Barness Peacock) reviewed the earlier cases bearing on the subject, and held that:—" . . . . a right or custom of pre emption is recognised as prevailing among Hindus in Behar, and some other Provinces of Western India; that in districts where its existence has not been judicially noticed, the custom will be a matter to be proved; that such custom, when it exists, must be presumed to be founded on and co-extensive with the Muhammadan Law upon that subject, unless the contrary be shown; that the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan Law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan Law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest time of which we have record."

In their Lordships' judgment, the decision in *Fakir Rawot's* case (2) is conclusive on the point raised on behalf of the defendants. Their abstention from taking the objection in a definite and distinct form at the earliest stage of the case was, it may fairly be presumed, due to the explicit enunciation of the law in the ruling referred to.

It has also been contended that the formalities insisted upon by the Mussulman Law as essential preliminaries to the assertion of the right, could not be performed by the Manager of the plaintiff's estate appointed by the Court of Wards.

It appears that the plaintiff is a "disqualified proprietor" under the Court of Wards Act (Bengal Act IX of 1879), having been declared to be incompetent to manage her property and her estate is in the charge of the Court of Wards. Section 40 of the Act, which defines the general duty of Managers appointed by the Court of Wards, provides that he shall manage the property committed to him diligently and faithfully for benefit of the proprietor, and shall in every respect act to the best of his judgment for the ward's interest as if the property were his own."

The Mussulman Law insists that the first formality technically called "the immediate demand" should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale, otherwise the right of pre-emption falls to the ground. The second formality consists in the repetition of the "demand", with as little delay as possible under the circumstances, in the presence of witnesses either before the vendor or the vendee or on the premises. The Courts in India have found that the ceremonies were duly performed by the Manager in accordance with the prescriptions of the law. Had he failed in performing either of the ceremonies, he would have caused irreparable loss to the plaintiff, as her right would have been absolutely defeated by his laches. In their Lordships' opinion, Mr. Lowis, as Manager of the plaintiff's estate, was competent, independently of the provisions of section 40 of the Court of Wards Act, to observe the formalities on her behalf. The section, however, which defines his duties appears to their Lordships to fully clothe him with authority to act as he did; the validity of his action, therefore, did not depend on its subsequent adoption by the Court of Wards. In this view, the English cases cited at the Bar have no application to the present case.

It was also urged that the claim to co-parcenary, on which the plaintiff's right of pre-emption was based, arose out of the fact that the vendor and pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the *mahal*, and that this joint liability does not constitute the co-parcenary contemplated by the Muhammadan Law. This argument seems to proceed on a misconception of the land system of India. A *mahal* is a unit of property; it may consist of one village or of several villages: it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the estate. Their joint liability for the Government revenue arises from the fact that they own undivided inter-

ests in the property; and that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue Authorities, when the share so partitioned becomes a separate unit of property.

On the whole, their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Sanderson, Adkin, Lee* and *Eddis.*

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 303 OF 1911.

April 16, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

JAGARNATH SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Mohant MOHABIR DAS AND OTHERS—DECREE HOLDERS—RESPONDENTS.

Limitation Act (XV of 1877), ss. 7, 8—Execution creditor—One of two execution creditors minor—Whether other can grant valid discharge—Limitation for petition of execution—Execution—Limitation.

A joint execution creditor is a joint creditor within the meaning of section 8 of the Limitation Act of 1877.

Surja Kumar v. *Arunchundra*, 28 C. 465: 5 C. W. N. 767; *Bholanand Jha* v. *Padmanund Singh*, 6 C. W. N. 348 and *Sheikh Jamir* v. *Srimati Lal Bibi*, 7 C. L. J. 308, relied upon.

Anando Kishore Das Bakshi v. *Anando Kishore Bose*, 14 C. 50, distinguished.

Periasami v. *Krishna Ayyan*, 25 M. 431: 12 M. L. J. 166, dissented from.

Where one of two joint execution creditors is a minor, the other execution creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minor.

Bholanand Jha v. *Padmanund Singh*, 6 C. W. N. 348, distinguished.

Appeal from the order of the District Judge of Bhagalpur, dated March 23rd, 1911, reversing that of the Munsif of Beguserai, dated August 13th, 1910.

Babu *Dwarka Nath Mitter*, for the Appellants.

Babu *Upendra Chandra Chatterjee*, for the Respondents.

JUDGMENT.—The sole question in controversy in this appeal is, whether an application for execution of a decree is barred by limitation. The decree was made *ex parte* on the 12th August 1902, in favour of two persons, of whom, one Mohabir Das was an infant represented by Ajodhya Singh and Daulat Singh and the other Siaram Das, was *sui juris*. The present application for execution was presented on the 4th February 1910. The judgment-debtors, now appellants before us, objected to the execution on the ground that a previous application presented on the 5th July 1906 was barred by limitation. The learned Judge has held that as one of the execution creditors was an infant, the application of the 5th July 1906 was saved by the operation of section 8 of the Limitation Act of 1877. That section provides that when one of several joint creditors or claimants is under any such disability as is mentioned in section 7 and when a discharge can be given without the concurrence of such person, time will run against them all, but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others. Two questions, therefore, require consideration, *first*, whether an execution-creditor is a creditor within the meaning of section 8 of the Limitation Act of 1877, and *secondly*, whether in the case before us, the adult decree-holder was competent to give a discharge without the concurrence of the infant execution-creditor.

In so far as the first question is concerned, it is not disputed that the cases of *Surja Kumar* v. *Arunchunder Roy*(1); *Bholanand Jha* v. *Padmanund Singh* (2) and *Sheikh Jamir* v. *Srimati Lal Bibi* (3), support the view that a joint execution creditor is a joint creditor within the meaning of section 8 of the Limitation Act of 1877. The learned Vakil for the appellant has, however, placed reliance upon the decisions in *Anando Kishore Das Bakshi* v. *Anando Kishore Bose* (4) and *Periasami* v. *Krishna Ayyan* (5). The case of *Ananado* v. *Ananado* (4) is, in our opinion, distinguishable. There the application with which the Court had to deal was

(1) 28 C. 465; 5 C. W. N. 767.
(2) 6 C. W. N. 348.
(3) 7 C. L. J. 308.
(4) 14 C. 50.
(5) 25 M. 431; 12. M. L. J. 166.

not an application for execution of a decree but an application for assessment of mesne profits which is an application in a pending suit. [*Puran Chand* v. *Roy Radha Kishen* (6).] It is not necessary for us to consider whether the case was correctly decided even from the latter point of view. It is sufficient for us to state that as in the present case the application is for execution of a joint decree, the principle of the decision in *Anando* v. *Anando* (4) can have no application.

In so far as the decision in *Periasami* v. *Krishna Ayyar* (5) is concerned, we have only to observe that it is not binding upon us, and it is well known that the Madras High Court took a view in relation to this question which was not adopted by any of the other High Courts, see for instance the cases of *Govindram* v. *Tatia* (7) and *Zamir Hasan* v. *Sundar* (8). It is further worthy of note that the Legislature has in the Limitation Act of 1908 altered the language of section 8 so as to make the principle of that section explicitly applicable to applications for execution of decrees. This, therefore, is a legislative affirmance of the rule adopted by the Calcutta, Bombay and Allahabad High Courts and legislative reversal of the view adopted in Madras. In our opinion, the first contention of the appellant cannot be supported.

As regards the second question, reliance has been placed upon the decision of this Court in the case of *Bholanand Jha* v. *Padmanand Singh* (2), where the learned Judges appear to have held that an execution creditor can give a valid discharge in respect of not only his own interest in the decree but also the interest of his joint execution creditors. That decision, however, must be taken to have been based on the special facts of the litigation before the Court, and it is not necessary for us to examine whether the case was correctly decided upon its own special facts. It is clear, however, in view of the provisions of section 461 of the Code of 1882, that no valid discharge could have been given in the present case by the next friend of the infant execution creditor in so far as his interest in the decree was concerned. No doubt, under section 231, an application for execution of a joint decree may be presented by one of the several joint decree-holders but section 461 provides that where, as here, there is a decree for money or other moveable property for the benefit of a minor, the next friend for the suit, who is other than a statutory guardian, cannot receive the money unless the Court grants him leave to receive the property, and, in the latter event security is required from him and directions are given by the Court for the protection of the property from waste and to ensure its proper application. It is plain that the provisions of this section were not brought to the notice of the Court in the case of *Bhola Nand Jha* v. *Padmanand Singh* (2). It is further clear from the cases already mentioned that the view has uniformly been followed that a joint execution creditor is not competent in the case of the description now before us to grant a valid discharge so as to bind the interest of the other execution creditors.

The result is that as the case is completely covered by section 8 of the Limitation Act of 1877, the order of the District Judge must be affirmed and this appeal dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

(6) 19 C. 132.
(7) 20 B. 383.
(8) 22 A. 199.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 985 OF 1911.

May 2, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re PURUVALA PERUMALA CHETTY —APPELLANT.

Suit for possession—Finding that property belongs to plaintiff and another—Decree for joint possession—Whether can be passed.

Where plaintiff sues for exclusive possession of property and it is found that plaintiff is entitled only to joint possession with the defendants, it is open to the Court to give plaintiff a decree for joint possession, but plaintiff cannot claim it as a matter of right.

Second appeal against the decree of the Temporary Subordinate Judge of North Arcot, in A. S. No. 917 of 1910, preferred against the decree of the District Munsif of Tirupati, in O. S. No. 224 of 1907.

Mr. *C. Narasimhachari*, for the Appellant.

This second appeal coming on for orders as to admission under the provisions of

Order XLI, rule 11 of Act V of 1908, the Court delivered the following

JUDGMENT.—The finding of the Appellate Court is that the land claimed by the plaintiff did not belong to the 2nd defendant alone but to him and to his cousin, the 1st defendant, jointly. The lower Appellate Court holds that the lands belonging to the family in the villages of Panore, in which the plaint land is situate and Kalayambakam, were both left undivided. It is contended in second appeal that the lower Appellate Court ought to have given the plaintiff a decree at least for joint possession along with the 1st defendant. It would, no doubt, be open to the Court to give a decree for joint possession where the plaintiff in his plaint asks for his exclusive possession. But it cannot be said that the plaintiff is entitled to this as a matter of right. Whether joint possession should be given or not would depend on the circumstances of each case. Here the lands are in the possession of lessees and not of either of the defendants. It might be inconvenient in such a case to award joint possession to the plaintiff. He did not ask for it in his plaint and does not seem to have asked for it in the lower Courts. There is nothing to prevent him from enforcing his right to the 2nd defendant's share of the lands by a fresh suit.

I reject this second appeal.

Appeal rejected.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1693 OF 1909.

June 28, 1912.

Present:—Mr. Justice Brett and Mr. Justice Sharfuddin.

DEBENDRA CHANDRA ROY—DEFENDANT No. 1—APPELLANT

versus

BEHARI LAL MUKHERJI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Bond—Executant if can be attesting witness—Validity of mortgage—Charge—Decision of first Court that charge was created—No appeal by plaintiff—Whether Appellate Court could hold that mortgage-bond valid against other executant—Transfer of Property Act (IV of 1882), s. 100.

Defendants Nos. 1 and 2 executed a mortgage-bond in favour of the plaintiff. The defendant No. 2 wrote the bond and signed as an executant and also as the writer and one of the two attesting witnesses. The first Court held that the bond did not create a valid mortgage as there was only one attesting witness but that it created a charge under section 100 of the Transfer of Property Act. The plaintiff did not appeal, but the defendants did. The lower Appellate Court held that no charge was created but that the bond could be taken as a mortgage against defendant No. 1 because it was possible to treat defendant No. 2 not as one of the executants but as the writer and one of the two attesting witnesses. A decree was made against defendant No. 1 for one-half of the amount to be recovered by sale of one-half of the mortgaged property:

Held (1) that the lower Appellate Court was not justified in re-opening the question as to the validity of the document as a mortgage, for the Court of first instance had decided against its validity and there was no appeal against that finding by the plaintiff;

(2) that a party to a document cannot, under any circumstances, be allowed to sign it both as an attesting witness and as an executant;

Seal v. *Claridge*, 7 Q. B. D. 516 at p. 519; 50 L. J. Q. B. 316; 44 L. T. 501; 29 W. R. 598; *Prannath Sarkar* v. *Jadu Nath Saha*, 32 C. 729; 9 C. W. N. 697 and *Royzuddi Sheikh* v. *Kalinath Mookerjee*, 33 C. 985, 4 C. L. J. 219, followed.

(3) that, therefore, the bond could not be held to be valid as against defendant No. 1 as a mortgage;

(4) that as the document, if valid, amounted to a mortgage, no charge was created by it on the property.

Royzuddi Sheikh v. *Kalinath Mookerjee*, 33 C. 985, 4 C. L. J. 219, relied upon.

(5) that, the plaintiff could sue on the personal covenant, but that remedy having been barred, the suit should be wholly dismissed.

Appeal from the decree of the Sub-Judge of Nadia dated May 4th, 1909, modifying that of the Munsif of Krishnaghar, dated April 23rd 1908.

Babus *Siva Prosonna Bhattacharyya* and *Jaitndra Mohan Sen*, for the Appellant.

Babu *Girija Prosanna Roy Choudhury*, for the Respondents.

JUDGMENT.—The present appeal arises out of a suit brought by the plaintiffs-respondents to recover a sum of Rs. 522-8 on a registered mortage-bond. The bond in question purported to have been executed by the defendants Nos. 1 and 2. In the Court of first instance, an objection was taken to the bond on the ground that it did not create a valid mortgage as there was only one attesting witness to the document. It appears that the defendant No. 2 wrote the bond and that, after writing it, he signed his name as an executant of the bond and afterwards as the writer and as one of the attesting witnesses. The Court of first instance held that this objection was valid

and that the document could not have effect as a mortgage. The Munsif, however, was of opinion that, under the provisions of section 100 of the Transfer of Property Act, the bond could take effect as creating a charge on the property covered by it for the realization of the debt and he, therefore, gave a decree to the plaintiffs for the recovery of the amount claimed by sale of the property, on which he held a charge had been created.

The defendants appealed to the lower Appellate Court but the plaintiffs did not file a cross-appeal nor did they put in any cross-objection. On the hearing of the appeal before the lower Appellate Court, however, that Court, after first arriving at a conclusion that the Munsif was wrong in holding that any charge could be held to be created under the provisions of section 100 of the Transfer of Property Act and after setting aside the finding of the Munsif on that ground, took up the question which had, in fact, been decided against the plaintiffs and in respect of which there was no appeal to that Court and decided that though the mortgage-bond could not be taken to be valid and operative as against both the executants, still it could be taken as a mortage-bond binding, so far as one-half of the amount of the mortgage-debt was concerned, against the defendant No. 1 because it was possible to treat the defendant No. 2 not as one of the executants of the bond but as the writer and one of the attesting witnesses to it. On that finding, the lower Appellate Court gave the plaintiffs a decree in modification of the decree of the Court of first instance for the recovery of one-half of the mortgage-money by sale of one-half of mortgaged property.

The defendant No. 1 has appealed to this Court and, in support of the appeal, it has been argued, *first*, that the lower Appellate Court was not justified in re opening, in appeal the question as to the validity of the document as a mortgage, the Court of first instance having decided against its validity and there having been no appeal against that finding of the first Court and, *secondly*, that the lower Appellate Court was entirely wrong in the view which it took with regard to that document and in holding that it could be treated as a valid mortgage against the defendant No. 1 by regarding the defendant No. 2, one of the executants, not as an executant but as the writer and one of the attesting witnesses to the document. In our opinion, both these grounds are sound. The Subordinate Judge certainly ought not to have re-opened the question which had been decided by the Court of first instance and in respect of which there was no appeal. We also hold that the view which the learned Judge has taken with regard to the document is incorrect. The authorities are clear that a party to a document cannot, under any circumstances, be allowed to sign a document as an attesting witness and a person, who has once signed as an executant and as in the present case as one of the persons who were borrowing the money on the bond cannot be allowed to have his position altered from an executant of the bond to that of a witness for the purpose of rendering the document valid as a mortgage against the other executant. The authorities in support of this view are to be found in the cases of *Seal* v. *Claridge* (1), *Prannath Sarkar* v. *Jadunath Saha* (2) and *Royzuddi Sheikh* v. *Kalinath Mookerjee* (3). Disagreeing, therefore, with the finding of the lower Appellate Court, we hold that the document on which the suit was brought cannot be held to be valid as against the defendant No. 1 as mortgage. The lower Appellate Court held, and we think rightly, that the Court of first instance was wrong in holding that any charge on the property described in the document could be held to be created by the document. Section 100 of the Transfer of Property Act expressly states that where immoveable property of one person is by act of parties or by operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and, in this case, there can be no doubt that the document, if valid, amounted to a mortgage. In these circumstances, it is impossible to hold that any charge by it was created on the property. This is indeed the view which was taken by this Court in the case of *Royzuddi Sheikh* v. *Kalinath Mookerjee* (3). The only benefit which the plaintiffs could derive from the document would be to bring

(1) 7 Q. B. D. 516 at p. 519; 50 L. J. Q. B. 316; 44 L. T. 501; 29 W. R. 598.
(2) 32 C. 729; 9 C. W. N. 697.
(3) 33 C. 985; 4 C. L. J. 219.

a suit against the presons who had executed it on the basis of the personal covenant contained in the bond. This is in accordance with the view taken by this Court in the case of *Tofaluddi Peada* v. *Mahar Ali Shaha* (4). Such a suit, however, ought to have been brought within three years from the date when the money was borrowed and, as in the present case, it appears that the present suit was not brought till more than five years after the execution of the document and the date when the loan was taken, the plaintiff's claim to recover on the personal covenant is clearly barred. The result, therefore, is that we decree the appeal, set aside the judgment and decree of the lower Appellate Court and direct that the plaintiff's suit is dismissed with costs in all Courts.

Appeal allowed.

(4) 26 C. 78.

CALCUTTA HIGH COURT.
CIVIL RULE No. 3030 OF 1912.
June 7, 1912.
Present:—Mr. Justice Mookerjee and
Mr. Justice Beachcroft.
JOGENDRA NATH CHATTERJEE—DECREE-HOLDER—AUCTION-PURCHASER—PETITIONER
versus
MANMATHA NATH GHOSE AND ANOTHER—JUDGMENT DEBTORS—OPPOSITE PARTY.

Sale in execution—Application to set aside sale—Person who had attached property sold, before judgment—Whether entitled to apply to set aside sale—Present interest—Difference between attachment before judgment and attachment after judgment—Civil Procedure Code (Act V of 1908), O. XXI, r. 90 and O. XXXVIII, r. 5.

An attachment before judgment does not by itself create any interest in the property attached.

Sewdut Roy v. *Sree Canto Maity*, 33 C. 639, 10 C. W. N. 634 and *Basiran Malo* v. *Katyani Debi*, 10 Ind. Cas. 305; 38 C. 448; 15 C. W. N. 795, followed.

Motilal v. *Karrabuldin*, 25 C. 179, 24 I. A. 170, 1 C. W. N. 639 and *Sankaralinga Reddi* v. *Kandasami*, 30 M. 413, 17 M. L. J. 234, 2 M. L. T. 365, referred to.

Therefore, a person, who has obtained an attachment of property before judgment under Order XXXVIII, rule 5 of the Code of 1908, is not a person whose interest is affected by the sale of that property at the instance of a decree-holder against the defendant in suit, within the meaning of rule 90 of Order XXI of the Code, and, consequently, he cannot apply to set aside the sale under rule 90.

Rule in the matter of Miscellaneous Appeal No. 27 of 1911 of the second Sub-Judge's Court, Burdwan, and Miscellaneous Suit No. 103 of 1911 of the Munsif's Court at Asansole.

Babu *Shiba Prosanna Bhattacharya*, for the Petitioner.

Babu *Baidya Nath Dutt*, for the Opposite Party.

JUDGMENT.—The question of law which requires decision in this Rule is one of first impression; namely, whether a person, who has obtained an attachment of property before judgment under Order XXXVIII, rule 5 of the Code of 1908, is a person whose interest is affected by the sale of that property at the instance of a decree-holder against the defendant in the suit within the meaing of rule 90 of Order XXI of the Code. It appears that the petitioner, Jogendra Nath Chatterjee, in execution of a decree for money which he held against his judgment-debtor, Basanta Kumar Chatterjee, purchased the disputed property at the execution sale on the 21st April 1911. On the 31st March 1911, the property had been attached at the instance of the opposite party, Monmatha Nath Ghose, during the pendency of a suit which he had instituted. On the 20th May following, Monmatha Nath Ghose applied for reversal of the sale under rule 90 of Order XXI of the Code. The application was resisted by Jogendra Nath Chatterjee on the ground that Monmatha Nath Ghose had no *locus standi* to make the application under rule 90. Effect was given to this contention and the application was refused. Upon appeal, that order has been discharged and the original Court has been directed to consider the matter on the merits. The Subordinate Judge has held that Monmatha Nath Ghose is entitled to apply under rule 90 as his interest has been affected by the sale. The question for consideration is, whether this view of the scope ef rule 90 is well founded.

On behalf of the petitioner, it has been contended that an attachment before judgment does not by itself create any interest in the property attached; and in support of this view, reliance has been placed upon the cases of *Sewdut Roy* v. *Sree Canto Matiy* (1) and

(1) 33 C. 639; 10 C. W. N. 634.

Basiran Malo v. *Katayani Debi* (2). On behalf of the opposite party the contrary view has been maintained, and reliance has been placed upon the cases of *Moti Lal* v. *Karrabuldin* (3) and *Sankarlinga Reldi* v. *Kundasami Teven* (4). In our opinion, the petitioner is entitled to succeed.

As was pointed out by Mr. Justice Woodroffe in the case of *Sewdut Roy* v. *Sree Cant Maity* (1), the object of an attachment before judgment is simply to safeguard the property, so as to enable the plaintiff to realise the amount of his decree if he should get one. He has, however, no lien or charge on the property which remains that of the defendant. He has a security; but this does not import present property or even beneficial interest. Substantially the same view was taken in the case of *Basiran Malo* v. *Kattayani Debi* (2), where the distinction between the two kinds of attachment, namely, attachment before judgment and attachment in execution, was explained, and it was pointed out that the objects for which the two kinds of attachment are made are entirely different. An attachment prior to decree is not an attachment for the enforcement of the decree; but it is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment after decree, on the other hand, is an attachment made for the immediate purpose of carrying the decree into execution, and it pre-supposes an application on the part of the decree-holder to have his decree executed. The cases of *Motilal* v. *Karrabuldin* (3) and *Sankaralinga Reldi* v. *Kandaswami Tevan* (4) are not opposed to this view. In those cases, there was an attachment after judgment, and it was pointed out that even such an attachment in execution merely prevents alienation. It is further worthy of note that rule 90 requires that the applicant should be either the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale; in other words, such person must have an existing interest which is affected by the sale. The position of a person who has obtained an attachment before judgment and has not yet obtained a judgment, is that he has a chance of obtaining a judgment for the satisfaction whereof he is entitled to proceed against the property given to the Court by way of security. He had undoubtedly no present interest which is affected by the sale. We are, therefore, of opinion that the applicant under rule 90 had no *locus standi* and that his application was rightly rejected by the Court of first instance.

The result is that this Rule is made absolute, the order of the Subordinate Judge discharged and that of the Court of first instance restored with costs both here and in the Court of appeal below. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

(2) 38 C. 448; 10 Ind. Cas. 305; 15 C. W. N. 795.
(3) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639.
(4) 30 M. 413; 17 M. L. J. 334; 2 M. L. T. 365.

CALCUTTA HIGH COURT.
CIVIL RULE NO. 5187 OF 1911.
May 17, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Richardson.

SARAT CHANDRA BISWAS—PLAINTIFF—PETITIONER

versus

ASHRAF ALI AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 153 (b)—Rent suit valued at less than Rs. 50—Trial by Munsif—Appeal—Jurisdiction of Appellate Court—Civil Procedure Code (Act V of 1908), s. 115—Two decrees of first Court—Decision of Appellate Court by one judgment—One rule on single petition—High Court's power to interfere—Question of jurisdiction not taken before Appellate Court—High Court's power to entertain objection.

Two rent suits were tried by a Munsif who was invested with powers under section 153 (*b*) of the Bengal Tenancy Act. In both the suits, the amount claimed was less than fifty rupees. The Munsif decreed them and the defendants appealed. The Sub-Judge decreed the appeals in one judgment. A Rule was granted by the High Court on a single petition in both the cases:

Held, (1) that no appeal lay to the Sub-Judge, and that, although the point was not taken before the lower Appellate Court, the High Court could entertain the objection as it was a question of jurisdiction.

(2) that it was competent to the High Court to grant a Rule on a single petition which would have the effect of setting aside two decrees which were made the matter of a single appeal.

Rules in the matter of Rent Appeals Nos. 122/98 and 123/99 of 1911 of the Court

of the Sub-Judge of Chittagong, (Rent Suits Nos. 685 and 687 of 1910 of the Court of the Munsif of Hathazari).

Babu *Khitish Chandra Sen*, for the Petitioner.

Babu *Protodh Kumar Das*, for the Opposite Party.

JUDGMENT.—In this case, it appears that two rent suits were tried by a Munsif who was invested with powers under section 153 (*b*) of the Bengal Tenancy Act. In one suit, the amount claimed was Rs. 40-2, in the other it was Rs. 19-7. The Munsif decreed both the suits in favour of the plaintiff. The defendants then lodged appeals in both cases before the Subordinate Judge, who decreed the appeals in one judgment. A Rule was granted to show cause why the order of the Subordinate Judge should not be set aside. On the merits, the ground put forward by the petitioner is that under the circumstances, the decrees of the Munsif were final and that no appeal lay to the Subordinate Judge. This appears to us to be so. The point was not taken before the lower Appellate Court, but it is a question of jurisdiction. On the merits, therefore, this Rule is made absolute and the petitioner is entitled to his costs, the hearing fee being assessed at one gold *mohur*.

A preliminary objection, however, was raised before us, that it is not competent to this Court to grant a Rule on a single petition which would have the effect of setting aside two decrees, although these two decrees were made the matter of a single appeal. We are not inclined to agree that the powers of this Court are so limited. But in any case, it makes no practical difference because we have power to act under section 115, Civil Procedure Code, in either of the cases. Therefore, either taking the Rule as it stands or acting under the provisions of section 115 in one of these appeals, we see no reason to modify the order which we have just made.

Rule made absolute.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 590 OF 1911.

June 24, 1912.

Present:—Mr. Justice Piggott.

BHAGWANDIN—PLAINTIFF—APPELLANT

versus

MATA DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 25—Remission of issue— Direction to take further evidence, whether necessary—Discretion of Court.

Where an Appellate Court remands a case under Order XLI, rule 25, with the object of obtaining from the lower Court a finding on a specific issue, after a reconsideration of the whole of somewhat complicated evidence in the case, with special reference to the pleas urged on behalf of the plaintiff, it is in the discretion of the Appellate Court not to direct additional evidence to be taken, if it is of opinion that it is not required.

Second appeal from the decision of the District Judge of Allahabad, dated 18th March 1911.

Mr. *Haribans Sahai*, for the Appellant.

Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—The essential facts of this case are given in my remand order, dated the 26th of April 1912. I may so far recapitulate them as to point out that a share of $10\frac{1}{2}$ pies in an undivided *patti* of $4\frac{1}{2}$ annas was mortgaged by one *Musammat* Jitan, the recorded owner of the same and was eventually brought to sale under a mortgage decree and purchased by the ancestor of Debi Prasad, defendant No. 5, on the 20th of October 1897. The twelfth paragraph of the plaint distinctly admits that the auction-purchaser has been in adverse possession, so far as this share is concerned, since the 20th of October 1897. The plaintiff is himself a co-sharer, apparently of a share of one-anna in the same undivided *patti* and has been receiving and enjoying the profits of this share. He claims that he is entitled to the same rateable proportion in the share of a $10\frac{1}{2}$ pies put up to sale as the property of *Musammat* Jitan and that his cause of action for a suit to recover possession of the said share accrued to him on the 20th of August 1897, when he was dispossessed by reason of the auction sale. Amongst other pleas raised in defence, was the plea that the plaintiff had never been in possession within limitation. This point was decided against the plaintiff by both the Courts below and the plaintiff came to this Court in second appeal. There had been in the Court of first instance a specific issue in the following terms:—"Whe-

ther the plaintiff has been in possession of the property in suit within twelve years of the institution of the suit or is the claim time-barred?" When the case was argued before me on the 26th of April 1912, it seemed to me that the Courts below, and more particularly the lower Appellate Court, had not considered the question of limitation in such a manner as to do justice to the plaintiff's case. The suit was instituted on the 12th of October 1909, and the mere adverse possession of the auction-purchaser from the 20th of October 1897 onwards, was not sufficient to put the case outside limitation. Moreover, it seemed to me that the question had not been fully considered whether prior to the auction sale, the plaintiff might not have been in constructive possession of the share claimed by him, either as a member of a joint Hindu family or as one of a body of co-sharers receiving and enjoying the entire profits of the *patti* jointly in spite of the specification of shares recorded in the village papers. I, therefore, remitted an issue to the lower Appellate Court on this point. The record has now been returned with a finding against the appellant and to this finding objections have been filed by the said plaintiff-appellant. I do not think there is any force in the contention that the finding returned does not cover the whole grounds taken by the remanded issue. The finding is *first* of all, that, except as a member of a joint Hindu family, the plaintiff had made out no case for constructive possession on his part during the period covered by the remanded issue; and *secondly*, that the family was not joint during the period referred to. I do not think this finding can be contested on any of the grounds taken in the memorandum of objections unless there be force in the contention that the lower Appellate Court erred in not admitting evidence on the remanded issue. Now I am, perhaps, to a slight extent, to blame for the difficulty which has arisen on this point. When I passed my remand order I was clearly of opinion that the plaintiff, having been put to proof of his possession within limitation by the fourth issue as framed in the Court of first instance and having nowhere pleaded in first or second appeal that he had been in any way misled by the frame of the issues, or that any evidence which he might otherwise have produced had been kept back by him in consequence of the form in which the issues were framed, had no right to produce further evidence upon my order of remand. I framed my issue on this assumption but I was, perhaps, in error in not laying down explicitly that the issue was to be tried on the evidence already on the record. The lower Appellate Court has, however, carried out my intention by declining to admit additional evidence. It is contended, however, that by reason of the wording of Order XLI, rule 25 of the Code of Civil Procedure, an Appellate Court remanding an issue under that rule is bound to direct additional evidence to be taken. I certainly think that the rule in question is framed on the assumption that where a Court has omitted to frame or try an issue or to determine any question of fact essential to the right determination of the suit, an issue remitted by the Appellate Court will ordinarily require to be tried on fresh evidence. In the present case, an issue had been framed which sufficiently covered the ground and my only object was to obtain from the lower Appellate Court a finding upon a narrower and more specific issue after a re-consideration of the whole of somewhat complicated evidence in the case with special reference to the pleas urged on behalf of the plaintiff. I think that the words "additional evidence required" in Order XLI, rule 25, aforesaid are at least sufficient to leave the Appellate Court discretion not to direct additional evidence to be taken if it is of opinion that it is not required. There remains only one point in the case and that is a contention embodied in the plaintiff's memorandum of appeal to this Court which is more or less independent of the particular issue remitted by me in my former order. The plaintiff contends that as he has all along been a co-sharer in this undivided *patti*, it does not really lie on him to prove possession within limitation but on the defendants to prove adverse possession based upon some definite assertion of adverse title. The plea was supported in argument by various rulings which either deal with the case of a recorded co-sharer claiming profits from a *lambardar* or otherwise appeared to me more or less distinguishable from the particular case before me. I think, however, that this particular question does not arise in this case. The frame of suit excludes it. The suit is

in ejectment against the defendants who, according to the plaint, have been excluding the plaintiff from the enjoyment of profits since the 20th of October 1897. To such a suit, it is Article 142, and not Article 144, of the first Schedule to the Limitation Act (IX of 1908), which applies and the defendants are entitled to put the plaintiff to proof of his possession within limitation. I quite admit that such possession may be actual or constructive and the remanded issue was framed on this assumption. Accepting the finding on the remanded issue, I hold that this appeal must fail. It is accordingly dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 11 OF 1910.
April 21, 1912.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.
BASAWARAJU KRISHNA ROW PANTULU GARU—APPELLANT
versus
THE HEAD ASSISTANT COLLECTOR, BEZWADA—RESPONDENT.

Land Acquisition Act (I of 1894), s. 23—Market-value—Award based on speculations as to future development of the land.

An award of compensation under the Land Acquisition Act cannot be made on speculations and hypothetical schemes of the future development of the land.

Where a Land Acquisition Judge took the market-value of the land at Rs. 1-8-0 per square yard, but on the ground that the plot was a large one and the claimant could not dispose of it in 9 years, made a deduction of 25 per cent. and made further deductions on account of roads which would have to be made to sell the land as a building site:

Held, that this method of awarding compensation was improper.

Trustees for the Improvement of the City of Bombay v. *Kursandas Nathu*, 33 B. 28; 10 Bom. L. R. 688; 1 Ind. Cas. 451, distinguished.

Appeal against the award of the District Judge of Kistna, in O. P. No. 128 of 1908 in Compensation Case No. 3 of 1908, dated 20th October 1909.

Mr. *T. Prakasam*, for the Appellant.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, Advocate-General, for the Respondent.

JUDGMENT.—In this case the Government has acquired a site measuring 24,103 1/5 square yards near Bezwada Railway station. The District Judge has awarded Rs. 23,797 as the proper price of the land, including the compensation at 15 per cent. This works out at the rate of between 13 and 14 annas a square yard. This sum is somewhat in excess of what was awarded by the Collector. The claimant claimed at the rate of Rs. 2 per square yard and that is the claim he has put forward in the appeal. The learned Judge, in arriving at the award, has, in our opinion, proceeded on a wrong basis. He takes the market-value of land at Rs. 1-8; he then says, the plot is a very large one and the claimant would not be able to dispose of it in less than 9 years and for that reason he makes a deduction of 25 per cent. He makes a further deduction on account of roads which, according to him, will have to be made in order to sell the land as a building site, and he also deducts a certain amount for expenses of plan making etc. There is no evidence whatever to support this hypothetical scheme of development of the land. The learned District Judge appears to have proceeded on a ruling in *The Trustees for the Improvement of the City of Bombay* v. *Karsandas* (1), but that case has no application here. The land there was in a large commercial town and the scheme for development so far as it appears, was supported by evidence on record. In this case, the whole thing seems to be based on mere conjecture. Rejecting the process by which the Land Acquisition Judge arrived at his figure, we have, however, evidence on the record upon which, though it is not quite as satisfactory and conclusive evidence as might be expected, it is possible to arrive at a safe conclusion. There is evidence to show that certain plots very near the land in question have been sold in recent times at different rates varying from 15 annas to Rs. 2 a square yard. But these are all small plots of land. There is also evidence of two offers made to the claimant, one with respect to 1,000 square yards which a man proposed to buy at Rs. 1 8-0 a square yard and another with respect to a plot of 800 square yards for which the claimant was offered a rate of Rs. 1-4 per square yard. These offers the claimant refused; it appears that, since the date of those offers, he had no other offers

(1) 33 B. 28; 10 Bom. L. R. 688; 1 Ind. Cas. 451.

giving him a higher price for any large quantity of land. There is also evidence to show that from certain feeding houses on the claimant's land, he gets a rent of about Rs. 50 or 60 a month. No doubt, income of that character is not a very certain basis to be proved upon, but it ought to be considered along with the other evidence in the case. Taking at 20 years' purchase, that would amount to about Rs. 12,000 for a very small portion of the land acquired. The learned Advocate-General has argued that there is no clear evidence of any demand for such a large plot of land of 24,000 square yards, that, if there had been any real demand for it, the claimant would have been able to dispose of it by this time. He, therefore, suggests that the 14-annas per square yard which has been allowed by the District Judge is more than ample value for the land acquired. It is true that beyond the offer with respect to the plot of 1,000 square yards and another plot of 800 square yards already mentioned, there is no sufficiently reliable evidence to show that there has been a demand for any large plot of land in the acquired area. But there may be one explanation as to why there has been no further offer, since the date of Exhibits G & H, which refer to the two plots already referred to. The facts that the claimant refused to accept these offers apparently expecting a higher price might well be a reason why he did not get further offers afterwards on any large scale. The fact that he did not get any higher offers does not show that there was no demand for the land at the rate mentioned in Exhibits G & H. There is also the evidence of sale of small plots in the neighbourhood and of the income from the feeding houses. We may also mention the fact that the *Tahsildar*, who was examined on Commission in this case, has reported that the value of a plot of land of 2,000 square yards which the Government proposed to acquire in 1904 was Rs. 1-8-0 a square yard. As against all this evidence, two witnesses were examined on behalf of the Collector besides the *Tahsildar*. These men own two small plots of land not far from the land which has been acquired, but in a less favourable locality. They bought them at the rate of about 4-annas but their evidence shows that the price of those lands at the time they gave their evidence, that is in 1909, was at least one rupee a square yard. On considering the whole of the evidence, the conclusion we have come to is that one rupee a square yard for the entire plot would be a proper price. The decree of the District Judge will, therefore, be varied by increasing the amount awarded to Rs. 27,718 including the 15 per cent. for compulsory acquisition. Interest will be allowed on the excess amount at 6 per cent. per annum from 24th May 1907 when the Collector took possession of the land until payment. Each party will pay and receive proportionate costs.

Decree varied.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

April 23, 1912.

Present:—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Rani DHARAM KUNWAR—PLAINTIFF—APPELLANT

versus

BALWANT SINGH—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Widow—Authority to adopt—Power "to adopt another boy should the one adopted under authority die," meaning of—Widow making adoption, whether competent to question validity—Estoppel.

After the death of her husband, the plaintiff adopted a boy in 1877 declaring by deed that she did so in accordance with the Will of her husband. The boy died and in 1883, she adopted another boy still purporting to act in accordance with her husband's Will. This boy also died, so in 1890 she adopted the defendant. At that time she executed a deed with full appreciation of its contents. In the deed she said: "My husband made this Will—'I strictly order you to adopt some boy to me. * * If the son who might be adopted should die, you will have power to adopt another boy.'"

In the following year, one *B.*, claiming as reversionary heir, instituted a suit against the plaintiff and the defendant for a declaration that the adoption of the defendant was invalid. In her defence, the plaintiff informed the Court that she had full oral authority from her husband, and that he had not limited her to one, two, three, or four sons. That suit failed.

The plaintiff and the defendant having since quarrelled, the present suit was brought in order to get rid of the adoption altogether:

Held, on a consideration of all the facts, that the defendant was duly adopted.

Held, also, that, as the plaintiff asserted her authority in the most solemn manner, she could not now be

allowed to change her story without causing grave injustice to those who have acted in reliance upon her representations, and that she must, therefore, be held to her word and to the results of her conduct.

Appeal from a judgment and decree, dated the 4th August, 1908, of the High Court of Judicature for the North-Western Provinces at Allahabad, affirming a judgment and decree, dated the 26th February 1906, of the Court of the Subordinate Judge of Saharanpur, in whose Court the appellant, as plaintiff, sued the respondent to obtain a declaration that she had no power to adopt the respondent, that, in fact, she never did adopt him, and that a document, called a deed of adoption dated the 13th January 1899, was null and void. Both Courts in India dismissed the suit. For a report of the judgment of the High Court see *Dharam Kunwar* v. *Balwant Singh* (1).

The facts of the case are stated in the judgment of their Lordships.

Sir Robert Finlay, K. C., and Mr. *G. E. A. Ross*, for the Appellant:—The law of estoppel in India, as laid down in section 115 of the Indian Evidence Act, 1872, is the same as it is in England: *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2). The appellant is not estopped from raising the question of the validity of the adoption of the respondent on the ground that she had no authority from her husband to adopt him. The fact that the adoption in question took place on her representation does not estop her from saying that that adoption is invalid: *Omrao Singh* v. *Mehtab Koonwer* (3); *Parvatibayamma* v *Ramakrishna Row* (4); *Gurulingaswami* v. *Ramalakshmamma* (5) and *Gopee Lall* v. *Musammat Sree Chundraolee Buhoojee* (6). It is submitted that the cases of *Sukhbasi Lal* v. *Guman Singh* (7) and *Durga* v. *Khushalo* (8) relied on by the High Court are erroneous. The case of *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (9) was distinguished.

If it is decided that the appellant was not estopped as held by the Courts below, the question arises whether she had any authority from her deceased husband to adopt the respondent. It is submitted that even assuming that she had his authority as alleged, such authority will not extend to the adoption in question.

[Mr. AMEER ALI. Suppose the husband gave authority to adopt a son to perform his funeral rites, would that not be sufficient authority to adopt another boy in case one adopted died?]

[Mr. *De Gruyther* referred to *Kannepalli Suryanarayana* v. *Pucha Vankata Ramana* (10), where it is decided that it would be sufficient.]

There must be an express authority and an adoption actually made without such an authority is illegal and invalid: *Tulshi Ram* v. *Behari Lal* (11).

Mr. *De Gruyther*, *K. C.*, and Mr. *B. Dube*, for the Respondent, were not called upon, but Mr. *De Gruyther* referred to *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2).

JUDGMENT.

LORD ROBSON.—The appellant is the widow of one Raja Raghubir Singh, and she sued the defendant in the Court of the Subordinate Judge of Saharanpur to obtain a declaration that she had not adopted him as a son to her deceased husband, and that if, in fact, any ceremony of adoption had been performed, it was invalid owing to the absence of authority on her part from her husband to make such adoption. She further prayed that a document purporting to be a deed of adoption, dated the 13th January 1899, should be declared void as being executed by her without such authority as aforesaid.

The Subordinate Judge dismissed the suit with costs and the High Court of Allahabad confirmed his decree.

Raja Raghubir Singh was the owner of the extensive Landhaura Estate or Raj in the District of Saharanpur, in the United Provinces. He died on the 23rd April 1868, at the age of 20 years leaving the appellant, the Rani, his widow and sole heir. She was

(1) 30 A. 549; 5 A. L. J. 568; A. W. N. (1908), 231; 4 M. L. T. 385.
(2) 19 I. A. 203; 20 C. 296.
(3) 3 Agra 103*a*.
(4) 18 M. 145.
(5) 18 M. 53.
(6) 19 W. R. 12; 11 B. L. R., (P. C.) 391; I. A. Sup. Vol. 131.
(7) 2 A. 366.
(8) A. W. N. (1882), 97.
(9) 11 B. 381.
(10) 33 I. A. 145; 10 C. W. N. 921; 4 C. L. J. 171; 16 M. L. J. 276; 1 M. L. T. 260; 8 Bom. L. R. 700; 3 A. L. J. 702; 29 M. 382.
(11) 12 A. 328.

then only 14 years old, and *enciente*. Raghubir Singh was a religious man and was desirous of leaving behind him a son who should perform his *shradh* ceremonies and transmit to future generations the name and prestige of the Raj. When, during his last illness, he became hopeless of recovery, recognising the possibility that the child about to be born to his wife might be a girl, or might not survive, he gave formal and emphatic directions to his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of the 13th January 1899 and in her defence to the action of one Baldeo Singh, which will be hereafter referred to. In the deed, which she undoubtedly executed with full appreciation of its contents, she says:—

"He made this Will to me by way of precaution. If God forbid, you give birth to a daughter, or if a son be born but die after his birth, I strictly order you to adopt some boy to me so that he might perform my *shradh* ceremony and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid) the son who might be adopted under this authority should die in your life-time, you will have power to adopt another boy."

In her defence to Baldeo Singh's action, she informed the Court that she had full oral authority from her husband, and that he had not limited her to one, two, three, or four sons.

The Rani gave birth to a son on the 16th December 1868. He died on the 31st August 1870, leaving the Rani owner of the Raj. In 1877, she adopted a boy named Tohfa Singh, declaring by deed that she did so in accordance with the Will of her husband. Tohfa Singh died two years after and the Rani, thereupon, in 1883, adopted a boy named Ram Sarup, still purporting to act in accordance with her husband's Will. Ram Sarup died in 1885, and in 1893 the Rani made arrangements with a view to adopting a third boy. She executed an agreement in 1893 with one Lada Singh whereby he agreed to give her his son "to comply with the Will of her husband," but before the adoption was formally carried out, this boy unfortunately died in 1896.

These successive deaths seriously impressed the mind of the Rani, and she consulted her priests as to how the evil spirits might best be propitiated and appeased. Acting on priestly advice, she went on pilgrimages to Gaya and other places, and after making religious sacrifices, she proceeded to arrange for another adoption. On the 2nd June 1893 she entered into a written agreement with Ram Niwaz, the father of the respondent, whereby he made over to her his two sons, Balwant Singh (respondent) aged 14 years, and Tungal Singh, aged 12 years:—

"In order that she may adopt any one of them she pleases having regard to their capability and her choice. Now the sons of me, the executant, shall live under the protection and custody of the said Rani Sahiba, subject to the fulfilment of the further conditions necessary for the validity of the adoption, the enforcement of which depends upon a particular time which may be considered suitable according to the rules of astrology. I shall have no claim as to their protection and guardianship."

The Rani ultimately selected the respondent, Balwant Singh, and preparations were made for his adoption on an imposing scale. The 13th January 1899 was appointed for the ceremony, and on that day, a great entertainment was given by the Rani. The European and Indian officials of the district, together with hundreds of friends, relations and caste-fellows, were present at the invitation of the Rani, and were hospitably regaled by her. The religious ceremonies proper to an adoption were all carried out and the newly adopted son was conducted to the *gaddi*, or throne, where he was formally installed.

The Rani next proceeded to bring about the marriage of the respondent and that ceremony was celebrated at her expense and in a manner befitting his new rank. In fact, the respondent was thenceforth treated as a member of the Rani's family and cut off altogether from the family of his natural father.

In the following year, Baldeo Singh, claiming as reversionary heir, instituted a suit against the Rani and the respondent, in which he sought to have it declared that he was entitled to the property on the death of the Rani, and that the adoption of

Balwant Singh was invalid. The Rani defended that suit, and, acting upon her instructions, her Pleader made the statement as to her authority before mentioned, and she herself executed and filed a written statement alleging that she had in fact adopted the respondent, and that the adoption was valid in every respect. Baldeo Singh failed in that suit on the ground that he was not a reversioner and had no *locus standi* to impeach the adoption in question, but the allegations of fact by the Rani in regard to the adoption are now very properly pressed against her.

The adopted son and the Rani have since quarrelled, and in this action, she seeks to get rid of the adoption altogether.

At one time, she stated that the seal affixed to the deed of adoption was not her seal but she did not attempt to support this allegation by production of the seal regularly used by her, saying that she had mislaid it somewhere. However, documents admittedly executed by her and bearing seal impressions identical with that in dispute were produced and the genuineness of the seal on the deed of adoption was placed beyond doubt.

The learned Subordinate Judge stated the issues or questions arising in the case as follows:—

"1. Whether the plaintiff had knowledge of the contents of the deed of adoption when she executed it and got it registered, or whether she had no knowledge of them?

"2. Was or was not the defendant adopted by the plaintiff?

"3. Had or had not the plaintiff any authority from her husband to adopt the defendant?

"4. If the first and second issues be decided against the plaintiff, how will it affect the claim?"

With regard to the first of these questions, the Rani pleaded that she was a *pardanashin* lady, and never understood the contents of the document, or had even known what it was; but the learned Subordinate Judge formed the opinion that the long examinations to which she had, on different occasions, been subjected, and the extreme shrewdness which she displayed in dealing with the questions showed that she was an acute and intelligent lady, and that her only difficulties arose from the impossibilty of making her statements fit with undoubted facts. The deed was executed by her under circumstances of the greatest publicity, and with the assistance of competent and independent advice from many quarters. It was attested by no less than 28 witnesses. It was subsequently registered (on her own admission of execution) and was frequently and openly referred to by the Rani as a deed of adoption. The Trial Judge, therefore, found that she executed the deed with full knowledge and understanding of its contents, and the High Court agreed with him.

The Rani next denies that the adoption was in fact carried out. The great entertainment of the 13th January 1899 was, according to her, only an intimation to the public that she meant at some future time to carry the adoption into effect. On this point, except for the allegations of the Rani herself, the only evidence worth considering was practically all one way, and as to the Rani's testimony, the learned Judge says, in plain terms, that she had made so many untrue statements that it was impossible to believe her, while the evidence produced on her behalf was utterly unreliable and untrue. The High Court agree with this finding as to the justice of which there can be no doubt.

The third question, *viz.*, as to whether the Rani had authority from her husband to adopt the defendant, gives rise to the point which has been argued before their Lordships. The Rani contends that the authority conferred upon her by her husband did not extend, according to its strict wording, beyond the adoption of a second boy in case the first adopted son should die, and that such authority was, therefore, exhausted by the adoption of Ram Sarup. Their Lordships are of opinion that this was not the true effect of the authority, in fact, conferred upon the Rani. She may not have remembered with precision the words used by her husband on his death-bed, but whatever the exact words may have been, undoubtedly the effect they then produced on her mind, and on the minds of those about her was that which she set forth in her statement in Baldeo Singh's action, *viz.*, "that her husband had not limited the authority to make such adoption to one, two, three, or four sons."

That is the meaning on which she has consistently acted until her quarrel with the respondent, and the words ascribed to her

husband, according to her recollection, in the deed of adoption, have always, until this litigation, been regarded by her and her advisers as intended to express a general authority. What the deceased Raja intended was that, if necessary, "some boy" should be adopted to him "so that he might perform my *shradh* ceremony, and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate," but in expressing this intention, he saw that it might be defeated by death if construed in a restrictive sense as meaning some "one" boy, so he went on to deal with that contingency by directing, in substance, that effect was, in any event, to be given to the general intention, and if one boy died, another boy was to be adopted. The Trial Judge did not expressly decide this question of fact. He found, as did the High Court, that, in the circumstances of this case, the Rani was estopped from alleging want of authority.

Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view, she was speaking the truth in Baldeo Singh's action when she was pleading as to her authority. Their Lordships, however, do not differ from the Courts below in the view they have taken as to the applicability of the doctrine of estoppel in this case. Of course, the estoppel pleaded against the Rani must be taken as purely personal. It does not bind anyone who claims by an independent title, but, in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question. So far as the Rani herself is concerned, it would indeed be difficult to have a stronger case of estoppel. She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after that assertion has been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani purported to endow him. He married on the faith of his adoptive mother's word, and, no doubt, has creditors who have sold him goods or lent him money in like reliance on her good faith.

Under these circumstances, the Rani's argument that the doctrine of estoppel does not apply because the defendant could show no loss or detriment, is without any substance whatever and she must be held to her word and to the results of her conduct.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Barrow, Rogers* and *Nevill.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1362 OF 1911.

June 19, 1912.

Present:—Mr. Justice Karamat Husain.

KHUB CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NIADAR MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 55—Attachment—Part payment of decree certified—Whether attachment withdrawn—Execution.

An attachment of property cannot be deemed to be withdrawn when satisfaction of the decree in part only is certified to the Court, especially when the satisfaction in part is due to the payment of the money attached.

Second appeal from the decision of the Additional Judge of Meerut, dated 16th September 1911.

Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *Govind Prasad*, for the Respondents.

JUDGMENT.—Khub Chand owed Rs. 500 to *Musammat* Girnari. Mitra Sen and Niadar Mal had decrees against her. The amount of the decree of Mitra Sen (No. 599 of 1908) was Rs. 724 including costs and the amount of two decrees of Niadar Mal

In re RAMA REDDI.

was Rs. 379-1. Mitra Sen, in execution of his decree No. 599 of 1908, attached the sum of Rs 500 in the hands of Khub Chand on the 5th of February 1909. Niadar Mal on the 25th of March 1909 put his decrees into execution and applied for rateable distribution. On the 8th of September 1909, the assets of Girnari save the sum of Rs 500 were distributed. Mitra Sen got Rs. 161-12 and a balance of Rs. 562-4 remained due to him. The execution proceedings started by Mitra Sen were struck off. The order is silent as to the raising of the attachment of Rs. 500 which was effected on the 5th of February 1909. Mitra Sen, on the 5th of January 1910, certified to the Court the payment of Rs. 500 to him by Khub Chand in satisfaction of his decree, No. 599 of 1908, against Girnari. The result of this payment was that Rs. 62-4 remained due to him and that his decree was not wholly satisfied. On the 18th of March 1911, the plaintiff Niadar Mal, in executing his decrees, applied for the attachment of Rs. 500 in the hands of Khub Chand, who pleaded payment to Mitra Sen. The Court on the 8th of April 1911 directed him to seek the remedy that may be open to him. Niadar Mal, therefore, brought an action for a declaration that he was entitled to attach the Rs. 500. One of the pleas in defence was that the money was paid by Khub Chand to Mitra Sen while there was no subsisting attachment and that, therefore, the plaintiff had no cause of action against Khub Chand. The Court of first instance decreed the claim and the decree was upheld by the lower Appellate Court.

The contention in second appeal is, that the attachment of Rs. 500 came to an end as soon as the execution proceedings were struck off on the 8th of September 1909 on the satisfaction of the decree in part.

The contention has no force. Under section 64, Civil Procedure Code, "where an attactment has been made, any private transfer or delivery of the property attached—shall be void as against all claims enforcible under the attachment", and for the purposes of section 64, Civil Procedure Code, "Claims enforcible under an attachment include claims for the rateable distribution of assets. Niadar Mal had applied for rateable distribution and he would be entitled to the benefit of the attachment of Rs. 500 so long as the attachment thereof subsisted. Now, let us see when an attachment once made comes to an end. Order XXI, rule 55 is,—

"Where—

(*a*) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(*b*) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(*c*) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn". . . . .

The language of the rule leads me to infer that the attachment of a property cannot be deemed to be withdrawn when satisfaction of the decree in part only is certified to the Court especially when the satisfaction in part is due to the payment of the money attached. In my opinion, the attachment of Rs. 500 was not withdrawn on the 8th of September 1909 when the execution proceedings were struck off on satisfaction of the decree in part nor was it withdrawn on the 5th of January 1910 when Mitra Sen certified to the Court that he, in satisfaction of his decree received Rs. 500 out of Rs. 562-4 0 from Khub Chand. As the attachment of Rs. 500 was not withdrawn and as the plaintiff was entitled to the benefit of the attachment, his suit was rightly decreed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NO. 1605 AND 1606 OF 1911.

April 11, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re RAMA REDDI—4TH DEFENDANT—APPELLANT.

Minor—Sale of minor's property by step-mother—Prior mortgage—Benefit.

Where the step-mother of a minor, in order to discharge a mortgage by his father, sold the family property:

Held, that the sale was not binding on the minor since he was not personally liable for the debt and hence did not gain anything by the sale.

BENODE BEHARI BHADRA *v.* RAM SARUP CHAMAR.

Held, also, that the minor was entitled to recover the property on payment of the mortgage-debt of his father discharged by the sale.

Second appeal against the decree of the Subordinate Judge's Court of Coimbatore, in S. A. Nos. 223 and 250 of 1910, on the file of the District Court, presented against the decree of the Court of the District Munsif of Erode, in O. S. No. 1433 of 1909.

Mr. *T. Subramania Aiyar*, for Appellant.

JUDGMENT.—The plaintiff, a minor, is the son of one Peria Goundan deceased. Peria Gounden had executed a mortgage to one Ramaswami Reddi in the year 1891. Subsequent to his death, his widow, the first defendant, the step-mother of the plaintiff, executed a fresh mortgage to Ramaswamy in 1897 in discharge of the debt due under Exhibit 1 and in consideration of the receipt of another sum of Rs. 50. Then in June 1903, the mortgaged property was sold by first defendant to second and third defendants to discharge Ramasawmy's mortgage: and the second and third defendant sold the property a few months afterwards to the fourth defendant in November 1903. The plaintiff sues to recover the property from the fourth defendant on the ground that the mortgage and the sale made by the first defendant are not binding on him. The lower Courts have given the plaintiff a decree conditional on his paying the sum of Rs. 300 due on the mortgage executed by the first defendant in renewal of the original mortgage executed by Peria Goundan.

It is contended in second appeal that the sale ought to have been held to be binding on the minor. The Subordinate Judge says that no attempt was made to show that the sale was for the minor's benefit. It is argued that, as the object of the sale was to discharge the mortgage-bond of 1897, it must be held to have been justified by necessity. On the mortgage-bond only the mortaged property could have been proceeded against so far as the minor was concerned. If there was any covenant for payment in the document, that would not bind the minor. Nothing, therefore, was gained for the minor by the sale of the property without the receipt of any additional consideration on his behalf. His position would not have become worse by the sale not taking place. It was quite open to the fourth defendant to show, if he could, that the minor would have suffered detriment in some way, if the sale had not been made by his step-mother to discharge the debt due to Ramasawmy. No attempt was made to prove this. I am, therefore, of opinion that the lower Courts were right in holding that the sale would not bind the minor. I may observe that the 1st defendant did not as a fact purport to execute the sale-deed as guardian of the plaintiff. The plaintiff was not living with her or under her protection. It is stated that she was dealing with the property in question and the lower Courts have proceeded on the footing that the mortgage-deed executed by her for discharging the original executed by her husband would be binding on her step-son, the argument being that because she chose to cultivate the lands of her husband, that fact gave her the powers of a guardian. It is unnecessary to deal with this proposition, though I would find considerable difficulty in accepting it if I had to do so. I reject the second appeal.

S. A. No. 1606 follows.

Appeal rejected.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 195 OF 1910 WITH CIVIL RULE No. 3036 OF 1910.

June 25, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Chapman.

BENODE BEHARI BHADRA—DECREE-HOLDER—APPELLANT.

versus

RAM SARUP CHAMAR—JUDGMENT-DEBTOR—RESPONDENT.

Second Appeal—Application to set aside execution sale on ground of fraud—Difference between old and new Codes—Civil Procedure Code (Act XIV of 1882), s. 244—Civil Procedure Code (Act V of 1908), s. 104, sub-s. (2), s. 115, O. XXI, r. 90 and O. XLIII, cl. (j)—Sale held under old Code—Decision of lower Appellate Court under new Code—Whether second appeal lies—Revision—Limitation—Erroneous decision on point of limitation, no ground for interference in revision by High Court.

Under the Civil Procedure Code of 1882, a sale in execution could be impeached for fraud under section 244 thereof, and, therefore, a second appeal lay. But under the present Code of 1908, fraud is put on the same footing as material irregularity by Order XXI, rule 90, and section 104, sub-section (2) read with Order XLIII, clause (*j*), makes it clear that there is now no second appeal in such a case.

A sale was held in execution under the old Code. The first application to set it aside on the ground of fraud was made and allowed by the first Court under the old Code. The order was set aside on ap-

peal and the case remanded under the old Code. On remand, the application was dismissed by the first Court on June 12, 1909, that is, when the new Code had come into operation. There was an appeal and the original order was once more set aside and the case again remanded. A second appeal was preferred against the remand order:

Held, that this order having been made under the new Code, the appeal was incompetent.

An error in applying the law of limitation is not an error which can be corrected in revision; for it cannot be held that a Court, which has jurisdiction to decide a case, has acted without jurisdiction, or illegally, or with material irregularity in the exercise of its jurisdiction, where it makes a mistake in law through failure to appreciate the whole of the law on the subject.

Ram Gopal Jhoonjhoonwalla v. *Joharmal Khemka*, 15 Ind. 547: 39 C. 473 and *Sundar Singh* v. *Doru Shankar*, 20 A. 78, relied upon.

Har Prasad v. *Jafar Ali*, 7 A. 345, dissented from.

Appeal from the order of the Sub-Judge of Pabna and Bogra, dated January 29, 1910, reversing that of the Munsif of Bogra, dated June 12, 1909. A Rule was also obtained, as there was some doubt whether an appeal lay.

Babu *Shama Charan Roy*, for the Appellant and Petitioner.

Babu *Bipin Bihari Ghosh* (Junior), for the Respondent and Opposite Party.

JUDGMENT.—This is an appeal against an appellate order, which reversed an order of the Court of first instance, setting aside a sale in execution on the ground of fraud and material irregularity in publishing and conducting it, and remanded the case for further consideration.

A preliminary objection is taken that no such appeal lies under the present Code of Civil Procedure. This objection undoubtedly must prevail if the present Code applies; for under it fraud is put on the same footing as material irregularity by Order XXI, rule 90, and section 104, sub-section (2), read with Order XLIII, clause (*j*), makes it clear that there is now no second appeal in a case such as this.

Under the Code of 1882, a sale could be impeached for fraud under section 244 thereof, and, therefore, a second appeal lay. The sale, with which we are here concerned, was held on the 17th September 1900, that is to say, under the old Code. The first application for setting it aside was made on the 23rd July 1907, and allowed by the first Court on the 6th July 1908; but the order was set aside on appeal and the case remanded on the 6th November 1908. On remand the application was dismissed by the Court of first instance on the 12th June 1909. There was an appeal, and on the 29th January 1910, the original order was once more set aside and the case, again, remanded. The present second appeal is against the remand.

The new Code came into force on the 1st January 1909, and, therefore, both the original order and the appellate order with which we are now dealing, were made under it. The question is whether the matter of appeal is governed by it or by the old Code.

The learned Vakil, who appears on behalf of the appellant, relies on section 6, clause (*c*) of the General Clauses Act of 1897, and on the decision of the Judicial Committee in *The Colonial Sugar Refining Company Limited* v. *Irving* (1).

The case referred to is, no doubt, the highest authority for holding that the disturbance of an existing right of appeal is not a mere alteration of procedure, and that litigants have from the time they came into Court a vested right to any appeal then provided by law. Consequently, the general rule against the retrospective operation of a repealing Act applies, and unless it is otherwise expressly provided, the repealed provisions relating to appeals continue to govern the pending cases. Now, the law in India against the retrospective construction of a repealing enactment is to be found in section 6 of the General Clauses Act above referred to and that section (we quote only so much as is necessary) provides that where an Act repeals any enactment, then, "unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed." If the matter stood there, we are inclined to think that we should be constrained by the decision of the Privy Council to overrule the preliminary objection. But we must not overlook the words "unless a different in-

(1) (1905) A. C. 369 at p. 372; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

tention appears," which control section 6 of the General Clauses Act, 1897, and the provisions of section 154 of the Code of Civil Procedure, 1908, which provides that nothing in the new Code "shall affect any present right of appeal which shall have accrued to any party at its commencement." It seems to us that a "present right of appeal" can mean only a right existing on the 1st January 1909, to appeal against a particular order passed under the former Code and subsisting on that date. The words "present right" are well understood. The meaning to be placed upon them is clear, and in this connection we need only refer to the remarks of Lord Esher M. R. in *Hornsey Local Board* v. *Monarch Investment Building Society* (2). Having regard, then, to the express term of section 154 of the new Code, we are of opinion that there is here evidenced a distinct intention to limit the operation of the provisions of section 6 of the General Clauses Act, 1897, quoted above.

The preliminary objection, therefore, prevails and this appeal must be dismissed with costs as being incompetent. We assess the hearing-fee at 2 gold *mohurs*.

RULE No. 3036 OF 1910.

There remains an application that we should move in revision under section 115 of the Civil Procedure Code or section 15 of the Charter Act.

The first Court took all the appellant's evidence and dismissed the application on the ground of limitation, and also on the merits. The lower Appellate Court pointed out, however, that the applicant was a minor, and that, therefore, he was entitled to the benefit of section 7 of the Indian Limitation Act of 1877, which corresponds with section 6 of the present Indian Limitation Act of 1908. The order was consequently set aside, and, as we have said in dealing with the appeal, the case was remanded for fresh consideration. The contention on behalf of the petitioner before us is that the learned Subordinate Judge was clearly wrong in his decision on the point of limitation, the error being caused by his having obviously overlooked the provisions of section 9 of the Limitation Act, under which when once limitation has begun to run, no subsequent disability can stop it.

It appears that the original judgment-debtor, the father of the opposite party, died some time after the sale, and, therefore, time began to run. That being so, the learned Subordinate Judge does seem to have made a mistake; but the question is whether the mistake is one which can be put right by us in revision. The learned Vakil's argument is this that if a suit or an application is really barred by limitation, then section 4 of the Limitation Act lays it down that the Court is bound to dismiss it. If then the Court makes a mistake and fails to dismiss a suit which is in fact out of time, then it may be said to have acted without jurisdiction. This, no doubt, was the view expressed by Oldfield and Mahmood, JJ., in *Har Prasad* v. *Jafar Ali* (3), but precisely the contrary view was taken by Edge, C J., and Benerjee, J., in *Sundar Singh* v. *Doru Shankar* (4). We find it exceedingly difficult to hold that a Court, which has jurisdiction to decide a case, can be said to have acted without jurisdiction, or illegally, or with material irregularity in the exercise of its jurisdiction, where it makes a mistake in law through failure to appreciate the whole of the law on the subject, and we are inclined to follow the opinion recently expressed on the original side of this Court in *Ram Gopal Jhoonjhoonwalla* v. *Joharmal Khemka* (5) to the effect that an error in applying the law of limitation is not an error which can be corrected on revision.

We have been pressed with a number of other decisions of this Court, and particularly with that of *Bhagwan Ramanuj* v. *Khetther Moni Dassi* (6), where the learned Judges expressed the opinion that section 622 of the Code of 1882, with which section 115 of the present Code corrosponds, is evidently intended to authorize the High Court to interfere, and correct gross and palpable errors on the part of the Subordinate Courts so as to prevent injustice in non-appealable cases. We have no desire to say anything which might tend to limit by defining our powers under the section; but we hesitate to

(2) (1889) 24 Q. B. D. 1; 61 L. T. 867; 38 W. R. 85; 59 L. J. Q. B. 105; 54 J. P. 791.

(3) 7 A. 345.
(4) 20 A. 78.
(5) 39 C. 473; 15 Ind. Cas. 547.
(6) 1 C. W. N. 617 at p. 627.

accept this ruling in so far as it draws a distinction between gross and palpable errors and other errors. All that we need say is, that the fact that the lower Court seems to have overlooked section 9 of the Limitation Act is not, in our opinoin, sufficient to justify us in exercising our revisional powers.

We have assumed so far that section 9 of the Limitation Act does apply; but that section has been the subject of not a few decisions, and its applicability is not always obvious, so that, for aught we know, the learned Subordinate Judge may have noticed it, but come to the conclusion that it was not applicable, and he may possibly be right, although on facts, so far as they appear now, he would seem to have been wrong.

The result is that the Rule also must be discharged. We make no separate order as to costs.

Appeal dismissed. Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1116 OF 1909.

July 17, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

SAKKI REDDI APPALASAWMY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PAKKURTI VENKATASAWMI NAIDU (DECEASED) AND ANOTHER—PLAINTIFF AND HIS LEGAL REPRESENTATIVES—RESPONDENTS.

Registration Act (III of 1877), s. 17 cl. (d) proviso—Rent in kind.

The proviso to section 17, clause (*d*) of the Registration Act, is not confined to cases where the rent is payable in money; it applies also where the rent is wholly, or partly payable in grain.

Second appeal against the decree of the District Court of Godavary, at Rajahmundry, in A. S. No. 9 of 1908, persented against that of the Court of the District Munsif of Rajahmundry, in O. S. No. 942 of 1906.

FACTS.—The facts in this case are briefly as follows:

The plaintiff sued to recover from the defendants Rs. 552 8, being the value of grain rent due under an unregistered lease deed (Exhibit D) for five years.

The defendants denied that the plaintiff had any lands in the village, and alleged that they did not execute the Exhibit D, and that they were not the lessees.

The District Munsif held that Exhibit D was genuine, and gave a decree to plaintiff for Rs. 184-2-8, being the rent for one *fasli* because it was based on a contract in Exhibit D, consideration for which was help and loans given by the plaintiff, and disallowed the rest of the claim for damages for use and occupation because the plaintiff did not establish his title to the suit lands.

In appeal before the District Judge of Godavary, at Rajahmundry, it was contended for the defendants that the deed (Exhibit D.) was invalid for want of registration. The District Judge held that the document did not require registration because the term granted by the lease did not exceed five years and there was *no money rent reserved.*

The defendants appealed to the High Court.

Mr. *T. V. Seshagiri Aiyar*, for the Appellants.

Mr. *T. Prakasam*, for the 2nd Respondent.

JUDGMENT.—Both Courts have found Exhibit D to be genuine. The first question argued before us on behalf of the appellants is that the District Judge's view that Exhibit D did not require registration because the rent reserved is payable in grain is erroneous. The District Judge has based his opinion on an unreported judgment of this Court in S. A. No. 1524 of 190?. But upon reading the proviso to section 17 clause (*d*) of the Registration Act, we are, with all deference to the learned Judges who decided the second appeal referred to above, unable to hold that the proviso only refers to rent payable in money. The enactment in question is in these words: "Provided that the Local Government may, by order published in the local official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees." There seems to be nothing in that language to confine its operation to money rent and we do not perceive any reason why any such narrow construction should be placed upon the words as to exclude rent payable in grain as is the case here. Suppose the rent reserved was payable in so much gold or silver exceeding Rs. 50, should that make

any difference? We should think not. Or, suppose the rent reserved was Rs. 50 and a certain quantity of grain, would not that be rent exceeding Rs. 50? We are clearly of opinion that the rent mentioned in the proviso under discussion was not intended to be limited to rent payable in money.

Then, it has not been found by the lower Courts whether the value of the grain rent reserved exceeded Rs. 50 at the time of the execution of Exhibit D. But the onus of showing that it did not exceed that amount lay on the plaintiff who must contend that Exhibit D on which he relies was exempted from the operation of clause (*d*) of section 17 of the Registration Act by virtue of the proviso. We have not been referred to any evidence to show that the value of the grain payable was less than Rs. 50. On the other hand, the evidence of the plaintiff himself is that the value exceeded Rs. 50.

But it is contended on behalf of the respondent that he is entitled to compensation for use and occupation of the land. The learned District Judge has not considered this question at all, and before we decide it, it is necessary that we should have the finding of the District Judge both as to the plaintiff's title to the land and the amount of compensation he would be entitled to for its use and occupation by the 1st defendant during the years in dispute in the appeal.

We, therefore, request the District Judge to return findings on the following questions:—

1. Whether the plaintiff had valid title to the land in dispute at the date of Exhibit D?

2. If so, what would be the reasonable compensation for use and occupation of the land by the defendants during the year 1903?

Both the parties will be at liberty to adduce fresh evidence. The findings should be returned within two months from the date of this order and seven days will be allowed for filing objections.

[The finding was returned that the plaintiff had no valid title at the date of Exhibit D.

Accepting the finding, the High Court reversed the judgment of the lower Court].

Judgment reversed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 2304 OF 1912.

May 20, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.

JUGAL KISHORE MARWARI AND ANOTHER —DECREE-HOLDERS—AUCTION-PURCHASERS— PETITIONERS

versus

BEJOY KRISHNA MUKHERJEE— JUDGMENT-DEBTOR—AND AMBIKA DEBI —CLAIMANT—OPPOSITE PARTY.

Execution of decree—Attachment—Claim, dismissal of, for claimant's default—Purchase by decree-holder at execution-sale—Delivery of possession—Obstruction by claimant—Claimant not entitled to resist—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63, 97, 99.

The decree-holder attached his judgment-debtor's house. Thereupon the mother of the judgment-debtor preferred a claim under Order XXI, rule 58 of the Civil Procedure Code. She did not prosecute her claim which was dismissed for default. The decree-holder then purchased the house at the execution sale and applied for delivery of actual possession. The peon who went to execute the writ was obstructed and the claimant put in an application under Order XXI, rule 97 of the Code:

Held, that the order of dismissal of the claim was, under Order XXI, rule 63, final till a regular suit was instituted and successfully prosecuted; and that consequently the claimant could not now be allowed to practically re-iterate the claim which she had preferred and which was dismissed without investigation by reason of her own default.

Sankar Nath Pandit v. *Madan Mohan Das*, 5 Ind. Cas. 298; 11 C. L. J 61; 14 C. W. N. 298, relied upon.

Rule issued in the matter of Money Execution Case No. 932 of 1909 of the Court of the Munsif of Asansole.

Babu *Atul Krishna Roy*, for the Petitioner.

Babu *Nagendra Nath Ghosh*, for the Opposite Party

JUDGMENT.—We are invited in this Rule to set aside an order under rule 99 of Order XXI of the Code of 1908. The petitioners in execution of a decree against their judgment-debtor, one Bejoy Krishna Mukherjee, attached his house and the adjoining lands. Thereupon, one Ambica Debi, the mother of the judgment-debtor and the opposite party in this Rule, preferred a claim under rule 58 of Order XXI of the Code on the 10th December 1909. Her allegation at the time was that the house and the land belonged to her and that she was in possession thereof in her own right. She did not, however, prosecute her claim, with the result that it was dismissed on the 9th April 1910. Execution thereupon proceeded on the basis

of the decree, and on the 11th June 1910, the decree-holders purchased the property at the execution sale. They subsequently applied for delivery of possession, and on the 20th November 1911, symbolical possession was delivered to them. Later on, they applied for delivery of actual possession. The peon, who went to execute the writ, reported that he had been obstructed, and on the 13th January 1912, the mother of the judgment-debtor put in an application under rule 97 of Order XXI of the Code. The Court did not investigate whether the objector was *bona fide* in possession of the property; but made an order the effect of which was denial of all assistance to the auction-purchasers in their endeavour to obtain possession of the property purchased by them. The order of the Court below clearly cannot be supported.

Even if it be assumed that the application of the objector could have been entertained, the Court could not make an order under rule 99 without an investigation as to whether she was in possession of the property in good faith and on her own account. This position has not been controverted on behalf of the opposite party and it has been suggested that the case should be remitted to the Court below in order that the requisite inquiry may be made. We are not, however, prepared to accede to this prayer. The application clearly ought not to have been entertained. The objector, as we have already stated, made an application under rule 58 on the 10th December 1909. Her claim was dismissed on the 9th April 1910. It is true that there was no investigation on the merits but that was entirely by reason of her own default; she wilfully deprived herself of the opportunity open to her at that stage. Rule 63 shows that where a claim of this character has been preferred, the party against whom the order has been made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order is conclusive. It has been contended, however, on behalf of the opposite party, on the authority of the decision in the case of *Kunj Behari Lal* v. *Kaudh Prashad Narain Singh* (1), that as there was no investigation on the merits, she is in the same position as if she had never made an application under rule 58. We are of opinion that this position cannot be supported. No doubt, in relation to the question of limitation applicable to a suit of the description mentioned in rule 63, it has been held that Article 11 of the second Schedule of the Limitation Act does not apply if the application has been refused without an investigation on the merits. [*Kallar Singh* v. *Toril Mahton* (2)]. Upon this point, however, there is a divergence of judicial opinion and there is weighty authority in support of the view that where an application has been dismissed, with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order. *Gooroo Das* v. *Sona Monee* (3), *Sreemunto Hajrah* v. *Tajoodeen* (4), *Tripoora Soonduri Debia* v. *Ijjutoonnissa* (5), *Sadut Ali* v. *Ramdhone* (6). But it is not necessary for our present purpose to express any opinion upon this question. It is sufficient to hold that, on the face of rule 63, the order of refusal is plainly final till a regular suit has been instituted and successfully prosecuted. Consequently, the objector cannot now be allowed topractically re-iterate theclaim which she preferred on the 10th December 1909, and which was disallowed without investigation by reason of her own default. The petition of objection filed on the 13th January 1912, in this view, ought not to have been entertained. This conclusion is supported by the decision in *Sankar Nath Pandit* v. *Modan Mohan Das* (7).

The result is that the Rule is made absolute and the order of the Court below set aside. That Court is directed to place the auction-purchasers in actual possession of the property and to render such assistance to the peon as may be necessary to carry out the order of the Court. The petitioners are entitled to their costs in this Court. We assess the hearing-fee at three gold *mohurs*.

Rule made absolute.

(1) 6 C. L. J. 362.

(2) 1 C. W. N. 24.
(3) 20 W. R. 345.
(4) 21 W. R. 409.
(5) 24 W. R. 411.
(6) 12 C. L. R. 43.
(7) 11 C. L. J. 61; 14 C. W. N. 298; 5 Ind. Cas. 298.

TARIFAN v. FATEH DIN.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 211 OF 1912.
June 22, 1912.
Present:—Mr. Justice Chamier.
Musammat TARIFAN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
FATEH DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901*)*, *ss.* 111, 233 (*k*)—*Partition—Proprietary title*—Res judicata—*Person not recorded as co-sharer at the time of partition.*

A., a Muhammadan, died leaving three heirs, *B.*, *C.* and *D.* *B.*'s name alone was recorded in the revenue papers in place of *A.* Subsequently, there was a partition proceeding in which *B.* raised certain objections as to proprietary title which were overruled by the partition officer:

Held, that in a subsequent civil suit, *C.* and *D.*, whose names had not been recorded, were also precluded from raising any question as to the proprietary title.

Khasay v. *Jugla*, 28 A. 432, A. W. N. (1906) 79; 3 A. L. J. 99, distinguished.

Second appeal from the decision of the Additional Judge of Saharanpur, dated 18th December 1911.

Mr. *Nihal Chand*, for the Appellant.

Mr. *Hamilton*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage alleged to have been made by one Imam Baksh in 1859. The plaintiffs are the grand-children and great-grand-children of Imam Baksh. Defendants Nos. 1 to 5 are the sons and grandsons of one of the three original mortgagees and defendants Nos. 6 and 7 are the other two original mortgagees. Defendants Nos. 8 to 11 are purchasers of the equity of redemption in two-thirds of the mortgaged property, who, according to the plaintiffs, declined to join in the suit.

The suit has been thrown out by the Courts below on the ground that it is barred by section 233 (*k*) of the Land Revenue Act, 1901.

The facts have not been ascertained but they must, for the purposes of this appeal, be assumed to be as follows. Imam Bukhsh was recorded at the Settlement of 1872 as the owner of 80 *bighas*, 9 *biswas* of land, the correct area of which, according to the settlement of 1890, was 77 *bighas*, 17 *biswas*. He mortgaged the land to defendants Nos. 6 and 7 and the ancestor of defendants Nos. 1 to 5. Previous to a partition, which took place in 1312 *Fasli*, the defendants had ceased to be recorded as mortgagees of the land. Defendants Nos. 1 to 3 were recorded as owners of one-third of the land and the plaintiffs, other than the present appellants, were recorded as the owners of the remaining two-thirds. They, the plaintiffs who were recorded as owners, objected to the partition but their objections were overruled, the partition proceeded and part of the land which had been included in the mortgage was assigned to defendants Nos. 1 to 3. The plaintiffs laid no claim to the land purchased by defendants Nos. 8 to 11 and conceded that if they are entitled to maintain this suit, it must be as owners of the land which was assigned at the partition to defendants Nos. 1 to 3. So far as the plaintiffs other than the present appellants are concerned, it is clear that the suit cannot be maintained for they were recorded proprietors, their objections were heard and were over-ruled, and the question of their title is as held by the Courts below *res judicata* against them [see *Muhammad Sidiq* v. *Lute Ram*(1)]. When a Muhammadan landowner dies, it often happens that the names of his sons are entered on the records and the names of his widow, and daughters are not recorded though they may be entitled to shares in the property. This is what seems to have happened in the present case. It is conceded on behalf of the appellants that the case is in terms covered by section 233 (*k*) of the Land Revenue Act, 1901, but it is urged that the case is governed by the ruling in *Khasay* v. *Jugla* (2), that the prohibition contained in section 233 (*k*) applies only to suits with respect to partitions in which the plaintiff has had an opportunity of having his objections considered under section 111 of the Act and has not availed himself of it. There is a clear distinction between that case and the case before me. In that case, the plaintiffs were recorded proprietors and it was the failure of the Assistant Collector to follow the procedure prescribed, which deprived them of an opportunity of urging their objections. In the present case it is not suggested that the procedure of the Revenue Court was irregular and we know that the relations of the appellants did have an opportunity of urging their objections. The appellants not being recorded proprietors were not entitled to be heard. But it was their fault and not the fault

(1) 23 A. 201; A. W. N. (1901) 86.
(2) 28 A. 432; A. W. N. (1906) 79; 3 A. L. J. 99.

of the Revenue Court that their names were not on the record. When the inheritance devolved upon them, it was their business, if they obtained possession of their shares, to make a report to the Revenue Authorities and ask to have their names entered on the village records and if they did not obtain possession of their shares, they should have sued for possession. The ruling in *Khasay* v. *Jugla*(2) has engrafted an exception on to the prohibition contained in section 233 of the Land Revenue Act which has far reaching consequences. It does not cover the present case and in the absence of authority, I feel bound to hold that the present case is covered by the prohibition.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 3, 14, 15 AND 16 OF 1910.

June 21, 1912.

Present:—Mr. Justice Chitty and Mr. Justice Teunon.

LAKHI NARAIN SHAW—OPPOSITE PARTY—APPELLANT

versus

IN NO. 3.

DHANADA KUMAR GHOSE,

IN NO. 14.

KASI KANTA SAHA AND OTHERS,

IN NO. 15.

HARADHAN KUNDU,

IN NO. 16.

MULTAN CHAND DOGA—APPLICANTS—RESPONDENTS.

Probate and Administration Act (*V of* 1881), *ss.* 50, 69, 86—*Will disinheriting son—Son's creditor if has* locus standi *to oppose grant—Order of Judge holding he has right to oppose—Appeal—If order appealable.*

An order of a District Judge holding that a certain party has a *locus standi* to contest a Will, is merely an interlocutory order and is not appealable.

A judgment-creditor who, but for a Will, would, in execution of his decree, have a right to seize the property which would descend to his judgment-debtor, and who alleges that the Will is a forgery set up for the purpose of defrauding the creditors, has a *locus standi* to make an application for the revocation of the Probate of the Will.

Nilmoni Singh v. *Umanath Mookerjee*, 10 I. A. 80; 10 C. 19; 13 C. L. R. 314 and *Kishen Dai* v. *Satyendra Nath Dutt*, 28 C. 441, followed.

Appeals from the decrees of the District Judge of 24-Pergannahs, dated December 14th, 1909.

In No. 3

Mr. *B. Chakravarti*, Counsel, Babus *Baidya Nath Dutt*, *Bipin Bihary Ghosh* (Senior) and *Jadu Nath Mandal*, for the Appellant.

In Nos. 14, 15 and 16

Babu *Bipin Bihary Ghosh* (Senior), for the Appellant.

In No. 16

Babus *Sarat Chandra Roy Chowdhury* and *Charu Chandra Bhattacharyya*, for the Respondents.

JUDGMENT.

REGULAR CIVIL APPEAL NO. 16.

This appeal arises out of an application by the respondents for the revocation of the grant of Letters of Administration, with a copy of the Will annexed, to the estate of Behari Lal Shaha. Behari Lal Shaha died on 17th March 1901, leaving three sons, Sakhi Lal, Lakshmi Narain and Hari Narain, a widow and two daughters. Sakhi Lal had attained majority at the date of his father's death, while the other two sons were minors. Hari Narain died a minor and unmarried. Sakhi Lal carried on his father's business and became very heavily involved in debts. The respondents, whose firm name is Multan Chand Doga, obtained a decree against him on the original side of this Court for Rs. 5,270 and costs, and applied for execution. It does not appear that any property has been actually attached. On 27th March 1909, the appellant Lakshmi Narain alleging that he had recently come of age applied for Letters of Administration to the estate of his deceased father, and propounded a Will said to have been executed by Behari Lal Shaha on 15th March 1901, two days before he died. That Will, if genuine, would have the effect of depriving Sakhi Lal of a very large share of his inheritance. A grant of Letters of Administration with a copy of the Will annexed was made to the appellant on 26th June 1909, and on 20th September 1909, the respondents applied for a revocation of that grant on the ground that the appellant was still a minor when it was made, and that the Will was a forgery, put forward solely to defraud the creditors of Sakhi Lal. On 14th December 1909 the District Judge held that the respondents had a *locus standi*

to contest the Will, and against that order, this appeal is preferred. A preliminary objection was taken that no appeal lies against such an order, which is merely interlocutory. We are inclined to think that that objection is well founded. Section 86 of the Probate and Administration Act, V of 1881, provides that: "Every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals." Had the decision been the other way, it would have amounted to a dismissal of the respondents' petition and would have been equivalent to a decree, in which case an appeal would lie [see *Sheikh Azim* v. *Chandra Nath Namdas* (1)]. In *Abhiram Dass* v. *Gopal Dass* (2), it was held that an appeal would lie under section 588 (2) of the Civil Procedure Code, 1882, against an order admitting a person as caveator under section 69 of the Probate and Administration Act. But section 588 (2) has not been re-produced in the Civil Procedure Code of 1908, and we cannot find any provision for an appeal which would meet this case. It is, however, unnecessary to discuss the question further as we are of opinion that the appeal must fail on other grounds. In *Nilmoni Singh Deo* v. *Uma Nath Mukhejee* (3), their Lordships of the Judicial Committee, after commenting on the earlier cases, remarked, at page 27: "Assuming that a purchaser (from the heir) can oppose the grant of Probate or apply to have it revoked (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the Probate has been obtained in fraud of creditors." That is precisely the ground on which the respondents base their present application, as it was in the cases of *Sheikh Azim* v. *Chandra Nath Namdas* (1) above cited, and *Kishen Dai* v. *Satyendra Nath Dutt* (4). This last case was very similar in its facts to the one before us, but here we have the additional circumstance that the alleged Will was not put forward until eight years after the death of the appellant's father. It is only right that the creditors of Sakhi Lal should be heard in the matter of this grant, as their interests are so largely affected by it. We accordingly dismiss this appeal. The respondents must have their costs. We assess the hearing fee at five gold *mohurs*. The record should be sent down at once, in order that the proceedings before the District Judge should be continued without further delay.

This judgment will govern Appeals Nos. 3, 14 and 15 of 1910, which are also dismissed, but as the respondents in these appeals have not appeared, it is unnecessary to make any order as to costs.

Appeals dismissed.

(1) 8 C. W. N. 748.
(2) 17 C. 48.
(3) 10 C. 19; 13 C. L. R. 314; 10 I. A. 80.
(4) 28 C. 441.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 29 OF 1912.

June 19, 1912.

Present:—Mr. Justice Chamier.

MUMTAZ-UD-DIN—PLAINTIFF—APPELLANT

versus

Musammat SAIDUNNISSA—DEFENDANT—RESPONDENT.

Muhammadan Law—Dower—Widow in possession of property left by her husband—Her title to retain possession until dower is paid.

Where a Muhammadan widow obtains possession of her husband's property peacefully and quietly, she is entitled to retain such possession until her dower-debt is paid.

Ali Baksh v. *Allah Dad Khan*, 7 A. L. J. 567; 6 Ind. Cas. 376; 32 A. 551; *Ramzan Ali* v. *Asghari Begum*, 7 A. L. J. 614; 6 Ind. Cas. 405; 32 A. 583, referred to.

Second appeal from the decision of the Subordinate Judge of Shahjahanpur, dated 11th May 1911.

Mr. *Muhammad Ishaq*, for the Appellant.

Mr. *Ibn i-Ahmad*, for the Respondent.

JUDGMENT.—This was a suit by the appellant for recovery of his share in the property of one Masitullah Khan who died in January 1902. One of the defendants to the suit was the respondent Saidunnisa. Her defence was that the property had been transferred to her by Masitullah in lieu of her dower-debt. The Munsif held that the alleged transfer of the property amounted to a sale and inasmuch as the value of the property exceeds Rs. 100, the transfer could not be effected except by a registered instru-

ment. Accordingly, he decreed the claim. The present respondent appealed to the lower Appellate Court challenging the decision of the Munsif with regard to the validity of the transfer and pleading also that the appellant was not entitled to possession of his share in the estate of Masitullah until the dower-debt due to the respondent was paid. The Subordinate Judge held that the transfer was valid and that even if it was invalid, the respondent was in possession of the property and was entitled to retain it until her dower debt was paid. On the question of the validity of the transfer the Subordinate Judge has referred to a decision of this Court in *Ram Bakhsh* v. *Mughlani Khanam* (1). If it were necessary in the present appeal to decide the question of the validity of the transfer to the respondent, I should have referred this appeal to a Bench of two Judges, for I doubt whether this Court intended to hold in the case which I have mentioned that a transfer of the kind now in question is not governed by section 54 of the Transfer of Property Act. The Calcutta High Court has held that such a transfer is governed by section 54 of the Transfer of Property Act [see *Abbas Ali Shikdar* v. *Karim Baksh Shikdar*(2)]. But it seems to me that the Subordinate Judge was clearly right in holding that the respondent is entitled to retain possession of the property until her dower-debt is paid. She got into possession of the property peacefully and quietly and it must be taken that her dower-debt has not been paid if the transfer of the property to her is held to be invalid. It seems to me that the decisions of this Court in *Ali Baksh* v. *Allah Dad Khan* (3) and in *Ramzan Ali Khan* v. *Asghari Begum* (4) show that the respondent is entitled, in the circumstances of the present case, to retain possession of the property until her dower-debt is paid. I, therefore, dismiss this appeal with costs.

After I had delivered judgment, Mr. Muhammad Ishaq suggested that I should send the case back in order that the amount of dower may be determined. I declined to recall my judgment. The suggestion now made should have been made in the lower Appellate Court or at the latest during the arguments in this Court. If the appellant is really anxious to pay off the dower-debt, which I doubt, it would appear that not only must the amount of the dower-debt be determined but the amount of rents and profits received by the respondent since she has been in possession. In the circumstances, the appellant should be left to bring another suit.

Appeal dismissed.

(1) 26 A. 266; A. W. N. (1904) 8.
(2) 13 C. W. N. 160; 4 Ind. Cas. 466.
(3) 7 A. L. J. 567; 6 Ind. Cas. 376; 32 A. 551.
(4) 7 A. L. J. 614; 6 Ind. Cas. 405; 32 A. 563.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 811 OF 1910.

March 27, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sadasiva Aiyar.

SHANMUGAM PILLAI—PLAINTIFF—APPELLANT

versus

SURYANARAYANA PILLAI AND OTHERS DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Family necessity—Sale—Discharge of family debts—Provision for adjusting shares in partition.

Where a sale of family property is effected mostly for raising money to discharge family debts, a comparatively small balance being required to conveniently adjust the shares in a contemplated family partition, the latter object also comes under family necessity and the sale is valid.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 244 of 1907, presented against that of the Court of the Additional District Munsif of Tinnevelly, in O. S. No. 84 of 1906.

Mr. *A. Krishnasawmi Aiyar*, for the Appellant.

Mr. *T. Narasimha Aiyangar*, for the Respondent.

JUDGMENT.—We think that the facts found by the lower Court are that the sale in dispute was effected mostly for raising money to discharge family debts, the comparatively small balance being required to conveniently adjust the shares in a contemplated family partition which took place two days afterwards. We think that, in this state of the facts, the latter object was also come under the expression "family necessity" which would justify a sale by the managing member.

We think the lower Appellate Court's conclusion is, therefore, correct and we dismiss the second appeal with costs.

Appeal dismissed.

SURNAMAN SINGH *v.* SHAM CHARAN OHDAR.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL No. 258 OF 1910.
April 16, 1912.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
SURNAMAN SINGH AND ANOTHER—DECREE-HOLDERS—APPELLANTS
versus
SHAM CHARAN OHDAR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), s. 178 sub-ss. (2), (3)—Enlargement of time—Application made after execution—Power of Court to grant time.

Certain landlords obtained a decree against their tenant in accordance with the provisions of sub-section (2) of section 178 of the Chota Nagpur Tenancy Act, 1908. The tenants made default in the payment of the decretal amount within the time fixed by the decree, and the decree-holders applied for execution by way of ejectment. The judgment-debtors then applied for extension of time under sub-section (3). That application was granted and the decretal amount as directed by the Court was deposited:

Held, (1) that the Court executing the decree, being the Court which had tried the suit and made the decree, had power to grant an extension of time and thus in a manner alter the decree:

(2) that it was competent to the Court to entertain an application for enlargement of time under sub-section (3) of section 178 of the Act, even after the expiry of the period prescribed in the decree in conformity with sub-section (2) and even after the decree-holder had applied for execution

Rajab Ali v. *Amir Hossein*, 17 C. 1; *Budri Narain* v. *Sheo Koer*, 17 C. 512; *Golab Chand* v. *Bihuria Ram Murat Koer*, 10 Ind. Cas. 268; 13 C. L. J. 432, relied upon.

Appeal from the order of the Judicial Commissioner of Chota Nagpur, dated February 23rd, 1910, affirming that of the Munsif of Hazaribagh, dated August 3rd, 1909.

Babu *Lalit Mohan Mukherjee*, for the Appellants.

JUDGMENT.—The question of law raised in this appeal depends for its solution upon the true construction of sub-sections (2) and (3) of section 178 of the Chota Nagpur Tenancy Act, 1908. Sub section (2) provides that in all cases of suits for the ejectment of a non-occupancy *ryot* for non-payment of arrears of rent or for the cancelment of a lease for non-payment of arrears of rent, the decree shall specify the amount of the arrears and if such amount together with interest and costs of the suit be paid into Court within thirty days from the date of the final decree, the decree shall not be executed. Sub-section (3) provides that the Deputy Commissioner may, for special reasons to be recorded in writing, extend the period of thirty days mentioned in sub-section (2). The appellants, who were the plaintiffs landlords in the Court below, obtained a decree against the respondents on the 14th May 1909, which was drawn up in accordance with the provisions of sub-section 2 of section 178. The tenants made default in the payment of the decretal amount and the result was that on the 29th June 1909, the decree-holders applied for execution by way of ejectment. On the 3rd August following, the judgment-debtors applied for extension of time under sub-section (3). That application was granted and the decretal amount as directed by the Court was deposited. The amount was subsequently received by the decree-holders under protest. On behalf of the appellants the validity of the order has been challenged on three grounds, namely, *first*, that the application for extension of time could not be entertained by the Court executing the decree; *secondly*, that it could not be entertained after the expiry of the time prescribed by the decree for payment of the arrears; in any event it could not be entertained after the application for execution had been made by the decree-holder, and, *thirdly*, that time was extended by the Court for reasons not sufficient in law.

With reference to the first ground, it has been urged that a Court executing a decree is bound to execute it as it stands and can in no way alter or interfere with its terms. In support of this proposition, reliance has been placed upon the cases of *Ishwaragar* v. *Chudasama* (1), *Patloji* v. *Ganu* (2); *Bhagwandas* v. *Abu Ahmed* (3) and *Mahapershad Singh* v. *Surendra Mohan Singh* (4). This contention is clearly well founded, and the proposition admits of no dispute that a Court of execution cannot alter the terms of the decree. In fact, this view was adopted by this Court in the case of *Sunkur Singh* v. *Huree Mohun* (5), which turned upon the construction of section 52 of Act VIII of 1869 (B. C.) corresponding to section 173 of the Chota Nagpur Tenancy Act, 1908. But although the argument is well founded,

(1) 13 B. 105.
(2) 15 B. 370.
(3) 16 B. 263.
(4) 9 C. L. J. 288; 4 Ind. Cas. 56.
(5) 22 W. R. 469.

it is, in our opinion, wholly unsubstantial. The Court executing the decree was the Court which had tried the suit and made the decree. It has not been disputed, and in view of the provisions of sub-section 3 of section 178 of the Chota Nagpur Tenancy Act, 1908, it cannot be disputed, that the application could have been entertained by this very Judicial officer if it had been described as an application in the suit. It would, therefore, serve no useful purpose to hold that the application was improperly entertained and it would be an idle formality to send back the case for consideration by the same officer in the course of the suit he had tried. The decision in *Thakur Madan Mohan Nath Sahi Deo* v. *Bhikhar Sahu* (6) is distinguishable, as there the decree was altered in execution by a Court of appeal by consent of some of the parties and in the absence of other parties prejudiced by the variation. No doubt, as pointed out by this Court in the cases of *Rao Bineeram* v. *Ram Nath Shaha* (7) and *Pureshnath Ghose* v. *Krishto Lall Dutt* (8); a matter of this description ought to be considered by the Court which has tried the suit, because whether or not the order for extension of time should be made in favour of the tenant depends upon the circumstances of the litigation, that is, upon the circumstances disclosed at the original trial and the events subsequent. It is thus fairly obvious that the order can be made only by the Trial Court. But, as a matter of fact, in the case before us, the order has been made by that Court; only, it has been recorded in the order sheet not of the original suit but of the execution case. We are, therefore, of opinion that effect ought not to be given to the first contention of the appellants.

With reference to the second ground, it has been argued that an application for extension of time under sub-section (3) of section 178 must be made before the time has expired, and, in any event, before an application for execution has been presented. The learned Vakil for the appellants, who has addressed to the Court a very able and forcible argument on this part of the case, has contended that upon the expiry of the time prescribed by the decree, the tenancy is forfeited and a valuable right accrues to the landlord to re-enter upon the premises. That right, it has been suggested, ought not to be taken away for the benefit of the defendant who has failed to carry out the order of the Court and has not been diligent enough to make an application for extension before expiry of the prescribed time. But we are of opinion that a narrow construction ought not to be placed upon the terms of sub-section 3 of section 178. It may be observed that the sub-section does not specifically prescribe the limit of time within which an application for extension of time may be made, in fact, the sub-section authorizes the Deputy Commissioner to extend the time even without an application As was explained by Mr. Justice Banerji in the case of *Bodh Narain* v. *Mahomed Moosa* (9), where a question arose as to the interpretation of section 66 of the Bengal Tenancy Act, which corresponds to section 178 of the Chota Nagpur Tenancy Act, 1908, as ejectment for non-payment of rent is in the nature of a penalty of forfeiture, the provision for extension of time for payment to avoid the penalty of forfeiture is a remedial provision and should be construed liberally so as not to restrict the remedy and make it inapplicable to cases to which it ought obviously to extend. It was further pointed out by the same learned Judge that the section authorises the Court for special reasons to extend the period, and there is no reason why we should interpolate words so as to limit the power of the Court to make an order for enlargement of time. It is, indeed, conceivable that needless hardship may be caused to litigants if the contention of the appellant were to prevail. For instance, if the defendant, by reason of accidental circumstances over which he has no control, finds it impossible, in spite of his diligence, to deposit the decretal amount on the last day of the prescribed period, he may be driven to make an application for extension of time on the day following by reason of adverse events which he had not foreseen and which made it impossible for him to carry out the direction of the Court. There is no good reason why the section should be narrowly interpreted so as to exclude relief in such a case. We are not prepared to accept the contention of the appellants; and, in the

(6) 15 Ind. Cas. 719 *Infra*
(7) 18 W. R 412; 10 B. L. R. App. 2.
(3) 23 W. R. 50.
(9) 26 C. 639; 3 C. W. N. 628.

view we take, we are supported by the principle which underlies the decisions of their Lordships of the Judicial Committee in *Rajab Ali* v. *Amir Hosssin* (10) and *Budri Narain* v. *Sheo Koer* (11), which were applied by this Court in the case of *Golab Chand* v. *Bahuria Rim Murat Koer* (12). We hold, therefore, that it was competent to the Court to entertain an application for enlargement of time under sub-section 3 of section 173 after the expiry of the period prescribed in the decree in conformity with sub-section 2 and even after the decree-holder had applied for execution. The second contention of the appellants must consequently be overruled.

With regard to the third contention, we are unable to hold that the Court of first instance exercised its judicial discretion improperly. The Court pointed out that the defendant was a permanent tenure-holder and had offered to the Pleader for the decree-holder to pay the money on the 23rd June 1909, some days before the application for execution was made. In view of this circumstance, the Court held that an order for extension might properly be made under sub section (3) and that view has been affirmed by the Judicial Commissioner on appeal. It is impossible for us to hold that there has been such a flagrant abuse of judicial discretion as to justify the interference of this Court, as a Court of Appeal.

The result is that the order of the Court below is affirmed and this appeal dismissed.

Appeal dismissed.

(10) 17 C. 1.
(11) 17 C. 512; 17 I. A. 1.
(12) 13 C. L. J. 432; 10 Ind. Cas. 268.

S. N. DAR, B. A. LL. B.,
Vakil High Court.
SRINAGAR (Kashmir).

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL NO 247 OF 1908.
July 24, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

Munshi KALI SANKAR SAHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharajah PRATAP UDAI NATH SAHI DEO—PLAINTIFF—RESPONDENT.

Title—Evidence—Admission of defendant—Mulki *papers filed by* ekkadars—*Regulation VIII, of* 1800, *para. III—Admissibility of admissions—Road cess returns.*

The plaintiff sued for resumption of certain villages on the allegation that they were held as a maintenance *jagir* for life in joint tenancy by certain ladies and that defendant No. 1 had been holding the villages under a *mokarari* deed from them and had subsequently purchased the right, title and interest of the ladies in a sale under section 124, Act I (B. C.) of 1879.

The defence was that the *jagir* was not one for life for maintenance of the ladies, but an absolute *jagir* granted to the ancestors of their husbands, which the ladies had been holding under the ordinary Hindu Law.

Owing to lapse of time, the plaintiff's evidence as to the grant to the ladies was not very strong, but, such as it was, it was strongly corroborated by the conduct of the ladies themselves and by the admissions of defendant No. 1:

Held, that the question of title need not be positively proved by the plaintiff, but that he could avail himself of the defendant's admissions.

Mulki papers filed by the *ekakdars* under Regulation VIII of 1800, para. III, containing statements made by the plaintiff's predecessor at a time when there was no dispute against his own interest, are admissible in evidence.

Admissions of the ladies made in a road cess return filed by their *muktear* could be used against defendant No. 1. If they were not admissions, they were positive evidence of plaintiff's title.

Appeal from the decree of the Subordinate Judge of Ranchi, dated the 31st of January, 1908.

Mr. *B. Chakravarti*, Babus *Jogesh Chandra Roy*, *Joy Gopal Ghosha*, *Provish Chandra Mitter* and *Girija Prosonna Roy Chowdhuri*, for the Appellants.

Messrs. *Donogh*, *A. Choudhuri* and Babu *Jogesh Chandra Dey*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the Maharaja of Chota Nagpur for resumption of three villages, Koinjara, Dodhra and Kudarkon, on the allegation that the villages were held as a maintenance *jagir* for life in joint tenancy by three ladies Deokali Koer, Badam Koer and Khetrani Koer, of whom the last surviving, Khetrani Koer, died on the 19th August 1901; that the defendant No. 1, Kali Sankar Sahai, had been holding these *mouzas* under a registered *moakarari* deed, dated 18th December 1867, from Badam Koer and Khetrani Koer and on the 19th November 1895 had purchased the right, title and interest of the ladies in a sale under section 124, Act I, B. C., of 1879, in the names of himself and his wife and sons, defendants Nos. 2 to 6. Mesne profits from

1958S. were also claimed. The defence was that the *jagir* of the three villages was not a life *jagir* for maintenance of the three ladies but was an absolute *jagir* granted to the ancestors of their husbands which the ladies had been holding under the ordinary Hindu Law; that even if the tenure was terminable on failure of male issue in the line of the original grantees, as the husbands of these ladies died much more than 12 years ago, the plaintiff's claim is barred by limitation. It was also urged that the plaintiff had, in execution proceedings, through his Karpardaj Basant Lal, described the villages as ancestral *jagir* of the ladies and is, therefore, estopped from asserting the contrary. It was also urged that the plaintiff is not entitled to resume without sanction of Government, and that the suit is barred by limitation against the defendants Nos. 4, 5, 7 and 8 who were made parties more than three years after the order under section 145, Criminal Procedure Code, passed on the 10th February 1902. The Subordinate Judge held that the estate of the ladies was a life-tenure for maintenance carved out of a larger *putra putradi* grant of 12 villages given to their husbands' ancestors and resumable at the death of the last male representative.

He further held that there was no estoppel in the execution proceedings; that what was sold was the right, title and interest of the ladies in their life-tenure; that that tenure came to an end at the death of Khetrani Koer and it was not necessary to set the auction-sale aside. On the point of limitation he held that there was no satisfactory evidence to show that the Maharaja had ever denied the ladies' life-interest or tried to oust them, but even if he had, the relationship of landlord and tenant had never ceased and the ladies had never asserted any adverse rights and had paid in the road cess and filed road-cess returns which was the only act of tenancy they had to perform.

He also found that there was no special limitation in respect of the section 145 (Criminal Procedure Code) proceedings inasmuch as the minor defendants were not parties to the section 145 (Criminal Procedure Code) proceedings and defendants Nos. 7 and 8 were not parties to the auction-sale and defendant No. 8 was made a party within three years of his birth. They were made parties at the request of defendants on 25th February 1905, to avoid future litigation. He further held that the lands not being *lakheraj*, the sanction of Government to the resumption was not necessary.

He, therefore, gave a decree to the plaintiff for all the reliefs he claimed, *i.e.*, for *khas* possession by ejecting the defendants with mesne profits from 1958S. to delivery of possession in execution of the decree, to be determined in execution, with costs and interest at 6 per cent. per annum.

The defendants appeal and their main contention is that the learned Subordinate Judge has overlooked the principal question in this suit, *viz.*, Is the plaintiff entitled to resume and if so when did his right to resume accrue? The plaint is founded on a life-grant and we have to see if the evidence bears this out. If the life-tenancy is proved, the defendants are admittedly out of Court. No question of custom arises and none is alleged in the plaint.

It is strongly urged that the question of title must be positively proved by the plaintiff, that he cannot avail himself of the defendant's admissions. If no life-grant to the ladies is proved, their possession becomes adverse as resumption ought to have been made on the death of Deodhari, the last male incumbent in 1839. The appeal was in effect argued solely on these points, though great efforts were made to whittle away the effect of the admissions made by the ladies and the defendant No. 1 himself.

One minor point was argued, *viz.*, that the suit is barred by section 37 (5), Act I of 1879, because the lease or grant was liable to be cancelled. But we find no such point arises, as there is no document on the record to be set aside and a grant made by *sanad* for life would lapse of its own force by the death of the life-tenant and with it any lease granted by the life-tenants. Besides, section 37 has no application to a title suit of this nature. We have, therefore, to consider only two main questions:—*Firstly*, whether the plaintiff has *prima facie* established his title and the factum of a life-grant to the ladies? *Secondly*, what is the effect of the defendant's admissions and those of the ladies as evidence bearing on the plaintiff's

case? It may be conceded at the outset that owing to lapse of time, the plaintiff's evidence as to the grant to the ladies is not very strong, but such as it is, it is unrebutted except by the affidavit of Basant Lal, Exhibt H, page 110A, and it is strongly corroborated by the conduct of the ladies themselves and by the admissions of the defendant No. 1.

The principal evidence on the side of the plaintiff is that of certain *mulki* papers of the year 1842, copies of which, Exhibits 14 and 15, have been produced from the office of the Deputy Commissioner and Exhibits 40, 41, duplicates apparently from the office of the Commissioner. Now, these documents appear to have been returns filed by the then Maharajah in respect of his *zemindari* in Chota Nagpur under orders of the Court, filed by the *elakadars* under Regulation VIII of 1800, para. III. They are not the registers prepared under that Regulation which would be authenticated by the Collector and have not, therefore, the very high evidential value placed upon them by the learned Subordinate Judge. They require proof of origin and authentication by the Maharajah and this is furnished by the signature of his *mukhtear* Jubraj Lal and by a monogram forming the word "Sahi" which is identified by the record-keeper as being the authentic mark of the former Maharaja found upon all his papers filed in the Government Record Room.

Similar papers were admitted and used as evidence by the High Court in their judgment in R. A. No. 6 of 1880, dated the 24th November 1881, which will be found on page 15 of Paper Book C. It was held that it was a statement made on the requisition of a public officer regarding matters connected with the estate of the Maharajah which were well known to him and long before any adverse claim had been set up, but still it was open to the objection that it is not necessarily the best evidence that was procurable and there is nothing to show the source of the information on which the history of the grant was supplied. Prinsep, J., therefore, said that if the plaintiff's case depended on this evidence, he should not be inclined to accept it as conclusive. Cunningham, J., the other learned Judge, appears to have placed a much higher evidentiary value upon it and to have treated it as a register under the Regulations.

It is strongly criticized here on the ground that in this case it appears that a dispute had already commenced as to the nature of the grant, and that the notes on the nature and history of the grant are in a different handwriting and ink in columns 7 and 13 to the rest of the return. Further, it is stated as regards Kadarkan that a copy of the *sanad* was filed with the return and no such copy is produced though it is contended that such a copy must exist in the Maharajah's *sanad* register. Now it clearly appears from a judgment of the Personal Assistant to the Agent to the Governor-General, Lohardagga, dated 3rd May 1842, that one Panday Ganpat Rao, who had charge of the Maharajah's papers as hereditary Panda, had wrongfully detained them and he was put in the Civil Jail for a month in consequence and is said to have died there. The judgment further shows that the Maharajah had been unable to supply his *mulki* forms on the 2nd February 1842, owing to this man's conduct. From a petition Exhibit 19 on page 44A, it appears that the papers had been ordered to be filed on the 9th December 1839 and that the Maharajah submitted a list (*first*), the very word used in the heading of Exhibits 40 and 41 showing the names of the *elakadars*, the names of the villages and the amount of rent, but was unable to fill in the gross produce and the area of cultivated and uncultivated lands owing to the absence of the tenants. It was ordered that a copy of the forms be sent to the Maharajah on the 28th August 1840 to fill in the form in respect of his *zemindari* within one month under heavy penalties and if the Maharajah be ignorant of the particulars of the *sanads* of *elakadars*, the column in which the specifications of the *sanads* are to be given should be left blank, a remark being made in the remark column to the effect that particulars of the *sanad* are not known. Now this is what appears to have been done and is the explanation of the notes appearing in a different handwriting. We can have no doubt, however, that that handwriting is contemporary and of the same age as the rest of the document. There is no sign of subsequent interpolation and

the other entries which are of a similar character throughout the books are not disputed. There is absolutely no reason to suppose that these entires were not made in 1842 and authenticated by the Maharajah.

The *rubikari* of the Commissioner; on which a judgment of the Assistant Agent in 1843 is based, that these papers are not rulings or documents in respect of civil suits and that they will be of no use in the case, is in no sense a declaration that they have no evidentiary value, for no such declaration could be made by the agent of the Governor-General who had executive charge of them, and in 1858 Colonel Dalton, the Commissioner, ruled that there could be no objection to any party getting copies of them but that the meaning of the Agent in 1843 was that they were books to be bound and carefully preserved as estate records and the Agent could not allow the originals to be used as evidence in any Court. This order which in itself appears to be *ultra vires* is certainly nothing more than an assertion of privilege for the documents on the part of the Agent who held their custody, and adds to rather than detracts from their evidentiary value. This fully explains the *rubakari*, dated 29th January 1844, Exhibit F. F., on which great stress has been laid by the defendants, it being nothing more than a note handing on the orders of the Agent to Assistant Executive Officers for communication to *mukhtears* who are forbidden to use these papers as documents in any matter. It is clear that there was not and could not be any objection to their contents being used as evidence, but the authorities objected to the originals being bandied about in the Courts so as to run the risk of being tampered with. The original order of the Agent states that they had not then been bound and asks for their immediate return for that purpose. All this goes to show that they were very carefully kept and it is not at all likely that any interpolations were made. We have seen that Colonel Dalton found them intact in 1858, and from 1862 onwards we have the sworn testimony of the old retired Record-keeper, Baikantha Nath Ray, that they were in his custody and he had them re-bound and labelled. It is sought to show that this witness was on bad terms with Mewa Lal and Kali Sankar, but that was at a later date than 1862, and both Mewa Lal and Kali Sankar had made admissions consistent with the entries in these papers and there is no suggestion nor on the face of the papers is there any possibility that the notes were added after 1862. They are, as we have said, clearly contemporaneous with the filling up of the forms in 1842.

Then as to the copy of the *sanad* said to have been filed in regard to Kodarkan, there seems to be no reason why such a copy should not have been filed but the *sanad* book is shown to have been removed by Ganpat Rao. The original *sanad* must have been with the ladies and the plaintiff cannot be said on any evidence to be holding back any copy of the *sanad* now in his hands.

As regards the contention that the dispute about this tenure had already begun in 1842, there is not a particle of evidence to show that there was any dispute. The contention rests on an assumption that the ladies were holding on as Hindu widows after the death of Deodhar and claimed an absolute estate. There is nothing to show this and if the story of the *sanad* be true, it was obviously granted before 1842.

We find the *mulki* papers of 1842 authentic, sufficiently proved, and to contain statements made by the Maharajah at a time when there was no dispute against his own proprietary interest. The Maharjah's case clearly is that the ladies' husbands had 12 villages in *putra putradik* tenure and it is proved that this is the customary form of tenure in the Raj and in the absence of any evidence whatever of a permanent grant, the statement of the ladies themselves clearly made in 1889 must be accepted. Exhibit 4 is a Road-Cess Return filed by the *mukhtears* of the ladies, Ramdhari Pershad, on the 9th November 1859. It recites the whole history of the *taluk* and is undoubtedly genuine. On page 60 (Paper Book A), *Musammat* Badam Koer admitted the signatures on oath. She gives the usual lame explanation of blank papers being given. But to whom were they given? To the defendant No. 1 himself who was her nephew, son of her brother and Vakil and himself holding a *mokarari* of the villages under her, which it would be to his interest to show

was a *mokarari* of a permanent and not of a resumable tenure. The genuineness of the singnature is clearly shown by the fact that Badam Koer swears to her signature on the *vakalatnama* given to Mewa Lal to file the Road-Cess Return of 1882, Exhibit 9; while the signatures of the ladies appearing on the document itself are obviously in the handwriting of a scribe and not of the ladies. We have satisfied ourselves that the signatures of Badam Koer on the *vaklatnama* of 1882, and on the Road-Cess Return of 1889, Exhibit 4, are of the same person and that person a lady of only moderate penmanship. That this Exhibit 4 is the work of Kali Sankar, defendant No. 1, himself is shown by the fact that Part I of the return, of which Exhibit 4 is Part III, was filed by Kali Sankar himself, (Exhibit 22, page 47A) as *mokararidar* of the ladies. When he intervened in the rent suits in 1891, he filed copies of these returns of 1882 and 1889 in Court, and he admits that he filed Part III of the return for 1899 himself as *mokararidar*. Against these papers, it is conterded that the history of the tenure set out in the preamble is surplusage and unnecessary. We find it is the universal practice in all Road-Cess Returns filed in this case and as far as we can gather in all cases.

Then it is said that the admissions of the ladies cannot be used against the defendant No. 1 as he is now claiming as auction-purchaser at a sale for arrears of road-cess and not as their *mokararidar*. But the very fact that the ladies had to pay road-cess shows that they were still tenants of the Maharajah and not holding adversely to him and his own evidence shows that the statements made are his own statements entered, as Badam Koer says, on blank papers signed by her and given to him. The writing of the return Exhibit 4 is proved by the writer Iswar Dayal P. W. No. 4 and he says he wrote at the request of the ladies. He proves that Ramdhari Pershad was the *mukhtear* and he gave him the *mukhtearnama* signed by the ladies. The ladies were living in Kali Sankar's house and were then on good terms with him. He himself had been a servant of Kali Sankar Sahai. Ramdhari Pershad, the *mukhtear*, himself proves the return Exhibit 4 and the due execution of his *mukhtearnama*. He acted as *mukhtear* for defendant No. 1 and is P. W. No. 6.

If the statements are not admissions, we think they are positive evidence of the plaintiff's title coming from the ladies themselves and authenticated on oath. No better evidence for the plaintiff could be imagined and it is futile to contend that the plaintiff cannot use them as evidence of his title but only as admissions after he has proved his title affirmatively.

Both Exhibit 4 and Exhibit 9 were used by Kali Sankar in litigation for his own purposes and he is bound by them.

Accepting these documents as evidence, the plaintiff's case is proved up to the hilt. But there are a long series of admissions by Kali Sankar himself. Among these, we may mention Exhibits 17, 16, 44, 46, 10, 11, 13 and 20.

Exhibit 17 is a petition filed by Kali Sankar in the Maharajah's office on the 24th May 1890. It is dated 29th March 1890, but it is proved that it was filed on the later date by an entry made at the time in the Maharajah's petition register where it is numbered 2592, which number appears on the face of the document. In this, he applies for registration in the landlord's *sherista* as *mokararidar* of the ladies *khorposhdars*, as long as their right and title will be enforceable.

Madho Prakas, *mohurrir* of the Maharajah since 1889, proves the filing and entry in the petition register. He fixes the date but could not be said to establish affirmatively that Kali Sankar himself filed it. This, however, is established by Lal Iswar Nath Sah Deo, a respectable *talukdar* and a relative of the Maharajah, who was Naib Manager for him in 1890.

He is clear as to the presence of Kali Sankar and that the order on it was written by him and initialled by Mr. Peppe, now deceased, on the very same day. The initial is undoubtedly that of Mr. A. Peppe which cannot be mistaken. In addition to this Kali Sankar's own *mohurrir* who wrote the petition at his orders deposes to it though he says this is the only paper of Kali Sankar's that he knows of that does not bear his seal and signature. That Mr. Peppe or Lal Iswar Nath Sah Deo forged this document, as they must have done on 24th May 1890, there is

no possible reason to imagine. Nothing then turned on it.

Exhibit 16 is the *mokarari pattah* to Mewa Lal which both Mewa Lal and Kali Sankar acted upon. It clearly recites that the tenure is *khorposhi*.

Defendant No. 1 now asserts that this was a colourable document as he discovered after his father's death, and was only given to enable Mewa Lal the better to manage the property for his sisters. But Kali Sankar's own conduct puts him out of Court on this point. It is true that Mewa Lal was always good to the ladies and appears never to have stinted them for money, but Kali Sankar acting on this *pattah* confined them strictly to the Rs. 24 rent due under it and used the property as his own. This is proved by his intervention in the rent suit brought by the ladies in 1891 against some tenants in which he claimed absolute *mokarari* right as vested in his father and himself and denied their right to collect rent. This is Exhibit 10, dated 19th January 1891. Exhibit 11 is a petition of objection, dated 17th March 1892, in pursuance of this intervention and may be read with it as emphasizing the previous petition. Exhibit 20 is a petition by Mewa on behalf of his sisters, dated 13th June 1884, in which they clearly admit the *khorposh* grant. The *takalatnama*, Exhibit No. 21, dated 6th June 1884, to Mewa Lal by the ladies was admittedly signed by them.

It is urged that Mewa Lal was a servant and friend of the Maharajah and deliberately gave the ladies away in this transaction. When a defendant has to make such criminal aspersions on the memory of his own father against whom nothing appears on the record, his case must be indeed a bad one.

Exhibit 46 is a petition of Kali Sankar, dated 15th August 1893, which by comparison of handwriting clearly appears to be entirely in his hand and is proved to have been personally filed by him. The handwriting is proved by a Pleader, Dinesh Prasad, P. W. No. 13, who was engaged in most of his cases and against whom nothing is shown; also by Lal Iswar Nath Sah Deo who knew his handwriting well. Kali Sankar denies this document on oath but he admits Exhibit 44 which clearly shows his handwriting as well as other colourless documents referring to the same matters but not containing admissions. It is clear that Kali Sankar did make a petition on 15th August, though in Exhibit 44 he gives the date 14th August, and Exhibit 46 is that petition. It is said that the word "orally" is not in accordance with facts but there is nothing on the record to show this.

Exhibits 12 and 13, dated 10th July 1889 and the 20th February 1892, respectively, clearly show that Kali Sankar filed copies of Exhibits 4 and 9 in Court as documents in support of his case and got them returned. There are numerous other admissions but they were not of such importance. We confess that we are unable to understand the contention that these documents which are filed and proved by the plaintiff and are part of his case are of no avail to him in discharging the onus of proof of title which lies upon him.

Surely, if the defendant goes into the witness-box and admits plaintiff's title, there is no further onus upon him to prove it as against such defendant. The proved dealings of the defendant No. 1 and his father with the property are as much positive evidence of plaintiff's title as sworn testimony thereto would be.

In the lower Court the contention was that these admissions were used as secondary evidence of a restricted grant to the ladies without sufficient foundation for not producing primary evidence of the grant. The Subordinate Judge has fully dealt with this technical question which was not pressed before us. It is sufficient for us to say that if they were only to be treated as secondary evidence, it is clearly shown that the original *sanad* could not be with the Maharajah and that his *sanad* book had been stolen. The existence of a casual copy of one *sanad* in his office would not throw any further burden upon him especially as that copy is shown to have been filed in the Deputy Commissioner's office.

The documents are direct evidence of the nature of the ladies' tenure which is the point in issue and if, as is contended, the existence of a *sanad* is not proved, they would be unanswerable evidence of plaintiff's

title. On the other hand, the defendants have completely failed to adduce any evidence whatever of a permanent grant to the ancestors of the ladies' husbands and the plaintiff's case stands unrebutted.

The only point they make is in regard to an affidavit of one Basant Lal in 1895 in execution proceedings stating that the villages were the *putra putradik jagir* of *Musammats* Badam Koer and Khetrani Koer. This was affirmed on the 8th July 1895.

But this witness had sworn on the 30th March 1895, Exhibit P. P., that the ladies were *jagirdars* and it is in this indefinite form that the decree and sale certificate are drawn up. The Maharajah did not go to sale on this specific allegation. He went to sale on the allegation that it was his *milkiyat* and gave the value of that *milkiyat* as the basis for the valuation in execution which was for arrears of Road-cess. What is important is what was sold, and we do not think that this affidavit is any evidence of that.

If the sale was under section 124, Act I of 1879, B. C., what passed was the right, title and interest of the judgment-debtors. If it was not, the sale was either under the general law by virtue of section 129 of the Act or it was no sale at all and the defendants acquired nothing. If it was under the general law, the same right, title and interest would pass. We have never heard that an error of fact in an affidavit, which was never acted upon and which could not affect the character of the property sold, confers a right on the purchaser which he could not obtain by the actual sale. Basant Lal deposes that he filed the affidavit as a routine matter without personal knowledge, but the plaint in the suit signed by the manager described the property in suit as life-tenure for maintenance and the decree could not and did not go beyond the prayer in the plaint.

The decision in *Mookhya Hurnckraj Joshee* v. *Ram Lal Gomastha* (1), with which we entirely agree, does not touch this case. The authority of Basant Lal is not shown and we do not find the Maharajah bound by his statement. As regards the alleged attempts by the Maharajah to dispossess the ladies, which are urged as a ground for holding that their possession was adverse, we cannot find that the Maharajah was in any way responsible for the acts of Bhuka Singh or Kapil Nath Lal, while Mewa Lal's conduct as brother and Pleader of the ladies certainly cannot be saddled on him. The non-production of the registers of leases granted by the Maharajah has been made much of. But the order-sheet, though not so precise as it ought to be, seems to show that the Maharajah made full disclosure of all papers he had in the office. See order 69, dated 6th January 1908. The Subordinate Judge was right not to issue further process on Bhuka Singh; *vide* order No 84, dated 10th January 1908. We have looked at the Road-cess papers filed in 1889 by the manager wherein an interpolation appears against the ladies' names "in wrongful possession" and we find that these papers are full of subsequent additions and interpolations, many being made in pencil.

The entry in question is obviously in different ink of a later date, and in the same hand as numerous other emendations apparently made by clerks in the Road-cess office. The returns in their present state are worthless as evidence of anything. On all other minor issues, which are not pressed before us, we agree with the Subordinate Judge. The defendants have elected to stand or fall on the proved nature of the grant and we find that it was a maintenance life-grant to the ladies. On this footing, no question of limitation arises. As regards the remarks of Jenkins, C. J., in *Lakhamgauda* v. *Keshav Annaji* (2), we may say we fully agree with them but they have no bearing on this case in which the evidence appears to be ample and one-sided and in which there is no combination of circumstances to be proved but a simple fact which is in itself probable and consistent with the history of the tenture, namely, that the ladies held a life-grant.

We find that the decision of the lower Court is correct and the appeal is dismissed with costs.

Appeal dismissed.

(1) 14 W. R. 435.

(2) 28 B. 305 at p. 309; 6 Bom. L. R. 364.

RAHIMJAN BIBI *v.* IMANJAN BIBI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 146 OF 1910.
December 20, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

RAHIMJAN BIBI, AND ON HER DEATH, OSMAN TALUQDAR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
IMANJAN BIBI—DEFENDANT—RESPONDENT.

Burden of proof—Hiba-bil-iwaz—*Proof of payment of consideration*—*Document*—*Recital*—*Evidence against stranger*—*Muhammadan Law*—*Deed of gift*—*Registration*—*Delivery of possession*—*Occupancy-holding*—*Non-transferability*—*Objection to be taken by landlord.*

The burden of proving the payment of consideration for a *hiba-bil-iwaz*, is upon the person who relies upon it as the foundation of his title.

Khajooroonissa v. *Rowshan Jehan*, 2 C. 184: 3 I. A. 291; 26 W. R. 36 and *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*, 28 A. 439; 4 C. L. J. 295; 10 C. W. N. 706; 3 A. L. J. 495; 8 Bom. L. R. 387; 9 O. C. 106; 1 M. L. T. 106; 33 I. A. 68, relied upon.

A recital in a document is not evidence as against a stranger to it.

Brajeshware v. *Budhanuddi*, 6 C. 268: 7 C. L. R. 6 and *Bisheswar* v. *Harbans*, 6 C. L. J. 659; 3 M. L. T. 38, relied upon.

Kaleepershad Tewaree v. *Rajah Sahib Pershad Sein*, 12 M. I. A. 282; 2 B. L. R. 111 (P. C.); 12 W. R. 6 (P. C.) and *Ali Khan Bahadur* v. *Indar Pershad*, 23 C. 950; 23 I. A. 92, distinguished.

Mere registration of a deed of gift by a Muhammadan is not equivalent to possession. It is essential that the donor should give either actual or constructive possession of the property to the donee.

Ismal v. *Ramji*, 23 B. 682, relied upon.

Where two parties claim an occupancy-holding under the original owner, the plaintiff by right of inheritance and the defendant under a deed of transfer, it is not open to the plaintiff to contend that the deed did not take effect in respect of the occupancy-holding because it was not transferable by custom. That is a question which only the landlord or his representative-in-interest is competent to raise.

Appeal from the decree of the first Sub-Judge of Backergunj, dated September 8th, 1909, modifying that of the first Munsif of Barisal, dated July 2nd, 1908.

Babu *Ganoda Charan Sen*, for the Appellants.

Moulvi *Syed Shamsul Huda* and Babu *Rajendra Prosad*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for declaration of title to immoveable property and for recovery of possession thereof. The properties in dispute admittedly belonged to one Dapu, the father of the plaintiff and of the defendant. On the 7th September 1907, Dapu executed a *hiba-bil-iwaz* in favour of the defendant and had the document registered seven days later. He died shortly after on the 23rd November 907. The case for the plaintiff is that this *hiba-bil-iwaz* is inoperative and did not create any valid title in the defendant. The validity of the instrument was attacked explicitly on the ground that it had been obtained by undue influence; it was also described somewhat vaguely as illegal and inoperative.

In this Court, as in the Courts below, the document has been assailed on two grounds, namely, *first*, that, as there is no proof of payment of the consideration mentioned in the deed, it cannot take effect as a *hiba-bil-iwaz*, and *secondly*, that if it be treated as a deed of gift without consideration, it cannot take effect, as there is no evidence that the properties covered thereby were delivered to the donee. The Courts below have found concurrently that the case of undue influence has completely failed: but upon the two other grounds upon which the deed is assailed, the Courts below have taken divergent views. The primary Court held that as there was no proof of payment of the consideration mentioned in the deed, it was inoperative as a *hiba-bil-iwaz*, nor could it take effect as a deed of gift as there was no evidence of delivery of possession to the donee. The Subordinate Judge, on the one hand, has held that those questions ought not to be allowed to be raised inasmuch as they are not explicitly mentioned in the pleadings and are not covered by any of the issues as framed. He has, however, discussed both the questions and has held with regard to the *first* that the burden of proof was upon the plaintiff to establish that there was no consideration for the *hiba-bil-iwaz*; and with regard to the *second*, that as the defendant is now in possession of the properties covered by the instrument and was also practically in possession thereof during the life-time of his father, the gift was operative under the provisions of the Muhammadan Law.

On behalf of the plaintiff, the decision of the Subordinate Judge has been challenged principally on two grounds, *first*, that the burden of proof of the payment of consideration for the *hiba-bil-iwaz* was upon the defendant who relies upon it as the foundation of

his title and that as he has failed to prove that the consideration passed as alleged, the deed ought to be deemed inoperative; and *secondly*, that treated as a deed of gift without consideration, it is equally ineffectual, because there is no proof that there was any delivery either of the title-deeds or of the property to the donee. The decision of the Subordinate Judge has been assailed also on two subordinate grounds; namely, *first*, that even if the *hiba-bil-iwaz* be treated as a valid document, it did not vest in the donee a good title; and *secondly*, that it was not effectual to vest any title in the *raiyati*-holdings which are not transferable by custom or local usage. These subordinate questions require consideration only if the substantial points in the appeal are decided against the appellant, for if the deed is found to be inoperative, it does not take effect as to any of the properties covered by the instrument, inclusive of the huts and the holding.

In so far as the first ground, upon which the *hiba-bil-iwaz* is attacked, is concerned, it is urged that payment of the consideration mentioned in the deed has not been proved. In our opinion, there is no room for controversy, in view of the decisions of their Lordships of the Judicial Committee in the cases of *Khajoorooniss* v. *Roushan Jahan* (1) and *Choudhri Mehdi Hasan* v. *Muhammad Hasan* (2), that the burden of proof was clearly upon the defendant to establish that the consideration for the *hiba-bil iwaz* was paid as described in the instrument. In the case last mentioned, their Lordships observed that by the Muhammadan Law, a holder of property may in his life-time give away the whole or a part of his property, if he complies with certain forms; but it is incumbent upon those, who seek to set up such a transaction, to show very clearly that those forms have been complied with. It may be by a deed of gift simply or by a deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. The learned Vakil for the respondent has argued that the deed in question ought not to be treated as a *hiba-bil-iwaz* but as a deed of sale, and that, consequently, notwithstanding the provisions of section 129 of the Transfer of Property Act, the validity of the instrument ought to be tested with reference to the provisions of section 54 of the Transfer of Property Act which provides that there may be a valid sale by delivery of the property. In our opinion, there is no force in this contention. The document in this case cannot be treated as a deed of sale. The case of *Abbas Ali Shikdar* v. *Karim Baksh Shikdar* (3), where the transfer was for a substantial consideration, was a case of sale. Here the transaction was intended to be a gift for consideration. If it were treated as a sale for consideration, the question would at once arise, in view of the assertion of the plaintiff that the transaction was obtained by undue influence, whether the consideration was adequate. In fact, the inadequacy of the consideration, if the instrument is treated as a deed of sale, would be a very important element affecting its validity. We must, therefore, treat the document as a *hiba-bil-iwaz*; in fact, regard it as an instrument clothed with the character it professes. The burden, therefore, was upon the defendant to prove the payment of consideration mentioned in the deed. The first ground upon which the validity of the deed is assailed must, in this view, succeed.

We may add that it has been faintly suggested by the learned Vakil for the respondent that the recital of the payment of consideration in the deed was good evidence against the plaintiff, and that the burden was thus thrown upon the plaintiff to prove that the recital was false. In support of this view, reliance has been placed upon the decision of the Judicial Committee in the case of *Kaleepershad Tewaree* v. *Rajah Sahib Pershad Seth* (4). That case, however, as also the subsequent decision of the Judicial Committee in the case of *Ali Khan Bahadur* v. *Indur Pershad* (5), is clearly distinguish-

(1) 2 C. 184; 3 I. A. 291; 26 W. R. 36.

(2) 28 A. 439; 4 C. L. J. 295; 10 C. W. N. 703; 3 A. L. J. 405. 8 Bom. L. R. 397; 9 O. C. 106; 1 M.L.T. 196; 33 I. A. 68.

(3) 13 C. W. N. 160; 4 Ind. Cas. 486.

(4) 12 M. I. A. 282; 2 B. L. R. 111 (P. C.); 12 W. R. 6 (P. C.)

(5) 23 C. 950; 23 I. A. 92.

able because in each of those cases, the accuracy of the recital was challenged by the maker of the deed and the burden was rightly thrown upon him to explain how that false recital came to be inserted in the document executed by him. On the other hand, the decisions in the cases of *Brajeshware* v. *Budhanuddi* (6) and *Bisheswar* v. *Harbans* (7) show that the recital is not evidence as against a stranger to the document. The burden, therefore, must be thrown on the defendant to establish strictly that the consideration was paid as mentioned in the deed.

In so far as the second ground is concerned, it has been argued by the learned Vakil for the respondent, upon the authority of the cases of *Shaik Ibrahim* v. *Shaik Suleman* (8); *Bibi Khaver* v. *Bibi Rukhia* (9); *Humera Bibi* v. *Nojmunnissa Bibi*(10) *Danoo Dariee* v. *Momtajaddi Bhuiya* (11), that there was sufficient delivery of possession, inasmuch as the deed was registered and delivered to the donee. Reference has also been made to the cases of *Alubi Koya* v. *Mussa Koya*(12), *Hassarat Bibi* v. *Golam Jaffar*(13) and *Kandath* v. *Musaliam* (14) to show that registration has sometimes been regarded as equivalent to delivery. But, as pointed out in *Ismal* v. *Ramji* (15), mere registration is not equivalent to possession. It is essential that the donor should give either actual or constructive possession of the property to the donee. As observed by Baillie in his Treatise on the Muhammadan Law (page 514) "being enabled to take possession is like taking it and that if the donee has been placed in a position which enables him to take effective possession of the property, the gift must be treated as valid". [See also the authorities mentioned in *Jahed-unnessa Bibi* v. *Najibul Islam*(16)]. Here, however, the facts found do not show that the deed was delivered to the donee. It is clear from the endorsements on the deed that up to the time of presentation for registration, it was in the custody of the donor. There is no evidence to show when it came into the possession of the donee. It has been suggested that possession of the deed was obtained by him immediately after the registration On the other hand, possession might possibly have been obtained by the defendant after the death of his father. No evidence has been directed to this point, and in view of this fact, it is impossible for us to hold that there was sufficent delivery either of the deed or of the properties covered by the deed to the donee so as to effectuate the transfer. The second ground on which the deed is assailed must, therefore, succeed.

The question next arises, what course should be pursued at this stage. The learned Vakil for the appellant asks that the deed of gift should be treated as inoperative and the decree of the primary Court restored. But we are of opinion that the ends of justice require that the case should be further investigated. No doubt, the fourth issue was framed in very general terms; but it is clear from the proceedings in the Court of first instance that its scope was narrowed down by the allegations in the fourth paragraph of the plaint. We are satisfied that the question of the invalidity of the deed on the two grounds mentioned in this Court was not considered at the trial in the primary Court; it was possibly raised for the first time in the course of argument in that Court; it was plainly considered by the lower Appellate Court. Under these circumstances, we are of opinion that this appeal should be allowed, the decree of the Court below set aside and the case remitted to the Court of first instance in order that the question of the invalidity of the deed on the two grounds mentioned may be considered on evidence to be adduced by the parties. The parties will be at liberty to adduce evidence to show when and how the defendant obtained possession of the deed and of the properties covered thereby. If it is held upon the evidence that the deed is inoperative either as a *hiba-bil-iwaz* or as a deed of gift, the two subordinate questions argued on behalf of the appellant will require consideration. The first of these, as we have already explained, relates to huts with regard to which it has been

(6) 6 C. 268; 7 C. L. R. 6.
(7) 6 C. L. J. 659; 3 M. L. T. 58.
(8) 9 B. 146.
(9) 29 B. 468; 7 Bom. L. R. 443.
(10) 28 A. 147, A. W. N. (1905) 222; 2 A. L. J. 778.
(11) 2 Ind. Cas. 846.
(12) 24 M. 513; 11 M. L. J. 227.
(13) 3 C. W. N. 57.
(14) 30 M. 305; 2 M. L. T. 180.
(15) 23 B. 682.
(16) 15 C. W. N. 328; 8 Ind. Cas. 58.

contended that, even if the deed be treated as operative, the title thereto was not transfered to the donee. The Subordinate Judge has decided this point in favour of the plaintiff; but he has not referred to any specific clause in the deed to support his conclusion. We are, therefore, of opinion that this question must be left open for consideration after the main point has been decided. As regards the second subordinate point, we are of opinion that there is no substance in the contention of the appellant. The appellant as well as the respondent both claim under the original owner, one by right of inheritance, the other under a deed of transfer. It is not open to the plaintiff to contend that if the deed was operative in law, it did not take effect in respect of the occupancy-holdings because they were not transferable by custom. That is a question which the landlord or his representative-in-interest is competent to raise.

The costs of this litigation incurred up to the present stage will abide the result.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 121 OF 1911.

April 18, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

RUTNESSUR SEN—PLAINTIFF—APPELLANT

versus

KALI KUMAR BIDYABHUSAN—DEFENDANT—RESPONDENT.

Onus—*Suit for possession by purchaser at revenue sale—Defence—Protected interest—Revenue Sale Law (Act XI of 1859), s. 37.*

In a suit for recovery of possession of an undivided half share of certain land on the allegation that the share was included within a *taluq* which the plaintiff purchased at a revenue sale, the defence was that the land fell within a certain *howla* which was a protected interest.

The lower Appellate Court came to the conclusion that the defendants had failed to prove that the disputed land appertained to the *howla*, and gave a decree to the plaintiff.

On appeal, Coxe, J., held that it was incumbent upon the plaintiff to show that the lands in dispute were not in the *howla*, and remanded the suit:

Held, that there was a finding of fact by the lower Appellate Court vitiated by no error of law and that the case was concluded by that finding.

Judgment of Cox. J. reversed.

Appeal from the judgment and decree of Mr. Justice Coxe, dated May 25th, 1911, passed in Second Appeal No. 2416 of 1909 from the decree of the Sub-Judge of Dacca, dated August 9, 1909, reversing that of the Munsif of Munshigunge, dated March 20th, 1909.

The judgment of Mr. Justice Coxe was as follows:—

COXE, J.—This was a suit for recovery of possession of an undivided half share of certain land, on the ground that this share was included within the *taluk*, Ram Ram Sen, of which the plaintiff was a purchaser at a revenue sale.

The defence was that the land fell within a certain *howla*, named Ram Mohan De, which was a protected interest.

The lower Appellate Court held, *firstly*, that it was incumbent on the defendants to prove that the land in suit lay within their *howla*; and, *secondly*, that even if it did lie within the *howla*, the defendants had no title to it and could not successfully resist the plaintiff's suit.

It appears to me that the decision of the learned Subordinate Judge cannot be sustained on either of these points.

It has been found that the *howla* Ram Mohan De is a protected interest and the only question that arose was, whether the land in suit fell within that *howla* or not. That being so, the burden of proof rested upon the plaintiff in accordance with the law as explained in the case of *Rajendra Kumar Bose* v. *Mohun Chandra Ghosh* (1). No doubt, when the defendants plead that they have a protected tenure and the question is whether they have or have not such a tenure within an estate, the burden of proof rests on them, but when it is found that they have such a tenure, and the only question is one of parcel or no parcel, the burden rests on the plaintiff. It does not appear to me that the terms of section 37 of the Revenue Sale Act, 1859, make any difference so far as this question of the burden of proof is concerned, as the learned Vakil for the respondents has argued.

(1) 3 C. W. N. 763.

On the second point, the learned Subordinate Judge finds that the defendants are not entitled to this land because in his opinion, the *howla* Ram Mohan Da was partitioned between two persons, named Sadhu Ram and Ramuttam: and the lands which fell to Sadhu Ram were included within the *taluk* Ram Ram Sen of which the plaintiff is now owner, and the land attached to Ramuttan fell within the *taluk* Bisseswar Sen. The defendants are the ultimate successors-in-interest of Ramuttam: and, therefore, they cannot, according to the learned Subordinate Judge, have any right or title to the lands included in the *taluk* of Ram Ram Sen, which fell on partition to Sadhu Ram. On the facts found, this argument appears to me to be perfectly logical; and it would ordinarily dispose of the defendants' case. But the learned Subordinate Judge has overlooked the fact that this theory of the partition of the lands of the *howla* between Sadhu Ram and Ramuttam is entirely opposed to the plaint. According to the plaint, the lands are still joint and the plaintiff sues only for an undivided half share. That being so, it was not open to the learned Subordinate Judge to hold that, as a matter of fact, the lands had been partitioned and that separate land had been assigned to the two *taluks*, Ram Ram Sen and Bisseswar Sen.

It has been argued by the learned Pleader for the respondent that the Subordinate Judge did not intend to find that the *howla* had been partitioned, but merely that there had been so much of a division between Sadhu Ram and Ramuttam as amounted to a separate collection of rent from their joint tenants. But this view is not supported by a single word in the judgment of the learned Subordinate Judge, and, in my opinion, is entirely opposed to the whole purport of that judgment. I may observe that the Subordinate Judge, in coming to this decision in respect of partition, relies on the evidence of the witness, Kaly Prosanna Sarkar, which is to the effect that the lands were not only partitioned but separated. It appears to me, therefore, that on the first point the learned Subordinate Judge was wrong in laying the burden of proof on the defendants and that on the second point his decision is not *secundum allegata*.

I think, therefore, that the case must go back for re-hearing. The learned Subordinate Judge will dispose of the case on decision of the point, whether the plaintiff has succeeded in proving that these lands are not included within the *howla* Ram Mohan Da. If he succeeds in proving this, he will, of course, be entitled to a decree: if not, the case must be dismissed as against the appellants: and it will be for the learned Subordinate Judge to decide to what relief, if any, the plaintiff may be entitled as against the defendants who have not appealed. The materials before me at present are not sufficient to enable me to come to any decision on that point

The costs will abide the result.

The plaintiff appealed.

Babus *Jogesh Chandra Roy* and *Gunoda Charan Sen*, for the Appellant.

Babu *Jogendra Chandra Ghosh*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—In my opinion, we must set aside the judgment of Mr. Justice Coxe and restore the decree of the lower Appellate Court. The suit is one for the recovery of possession of an undivided half share of certain land, on the allegation that this share was included within a *taluk* Ram Ram Sen, of which the plaintiff was a purchaser at a revenue sale. The defence of the defendants was that as they were in possession, they were entitled to retain that possession by virtue of a permanent tenure created by a certain *howla*. The lower Appellate Court has come to the conclusion that the defendants have failed to prove that the disputed land appertains to this particular *howla*. On appeal, however, Mr. Justice Coxe did not think that he was bound by that finding of fact, for it appeared to him that there had been an erroneous decision by the learned Judge as to the incidence of the onus of proof. He considered that it was incumbent upon the plaintiff to show that the lands in dispute were not in the *howla*. The authority for this view is said to be found in *Rajendro Kumar* v. *Mohun Chandra* (1). That case does not profess to lay down any new law. The Judges make it clear that they only proposed to follow the decision of this Court in *Rhidoy Kristo* v. *Nobin Chunder* (2). An examination of that case makes it clear that all that the Court

(2) 12 C. L. R. 457.

said or determined was that a plaintiff must prove his allegations. In that case, the plaintiff sued his tenant for *khas* possession. He admitted the tenants' holding but he alleged that the land in dispute was an encroachment beyond the proper boundaries of the holding and, therefore, it appeared to the Court that it was for the landlord to prove the encroachment. That was because the encroachment was the case made by the landlord in his plaint. That this is so is made abundantly clear by the contrast drawn in the judgment between these cases where the burden of proof lies upon the defendant and where it lies upon the plaintiff, in circumstances which have a superficial resemblance, one to the other, but which differ by reason of the particular allegations made by the plaintiff in each case, and by reason of that which it is necessary for the plaintiff to allege and prove. This is so apparent from the judgment itself, that I need say no more than refer to the decision of Mr. Justice Banerjee in *Sheodeni Roy* v. *Chatoorbhuj Roy* (3) as giving the sanction of his high authority to this view. In my opinion, therefore, in the circumstances of this case, there is a finding of fact by the Subordinate Judge vitiated by no error of law, and by that finding this case is concluded. I do not overlook the ingenious argument advanced by Mr. Jogendra Chandra Ghosh, based upon a reference to long possession, but I cannot find that adverse possession or even length of possession, as distinct from possession under the *howla*, was ever the defendant's case: and. so far as limitation goes, it is apparent from the judgment of the Munsif that this was abandoned in the Court of first instance. Moreover, the judgment of Mr. Justice Coxe, as well as that of the Subordinate Judge, indicate in the clearest manner the lines within which this case proceeded. We cannot, therefore, give effect to this argument, and we must accordingly set aside the judgment of Mr. Justice Coxe, restore the decree of the Subordinate Judge, and direct that the respondents do pay to the appellant the costs incurred in the High Court.

N. CHATTERJEA, J —I agree.

Appeal allowed.

(3) 12 C. L. J. 376; 8 Ind. Cas. 785.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 112 OF 1911.

July 5, 1912.

Present:—Mr. Justice Sharfuddin and Mr. Justice Richardson.

MAHABBAT ALI CHOWDHURY—OPPOSITE PARTY—APPELLANT

versus

SHAMSHER ALI CHOWDHURY AND ANOTHER—PETITIONERS—RESPONDENTS.

Guardian and Ward—Appointment of guardian supported by mother of minor—Appointment of joint guardian—Joint guardian appointed sole guardian for other guardian's inability to give security—Appointment without mother's approval—Order injudicious.

A guardian who was supported by the mother of a minor was appointed along with another person as joint guardian. As he was unable to furnish security, the joint guardian was appointed the sole manager of the minor's property. No opportunity was given to the mother to state her views before this appointment was made:

Held, that the order was injudicious and made without due consideration and ought to be set aside.

Appeal from the order of the District Judge of Chittagong, dated Jauuary 4th, 1911.

Babu *Ambika Charan Das*, for the Appellant.

Babu *Shiba Prosonna Bhattacharya*, for the Respondents.

JUDGMENT.—This is an appeal from the original order of the District Judge of Chittagong, dated the 4th January 1911, appointing one Makbul Ahmad Chowdhury, a joint manager of the property of two minors. It appears that the original application was made by one Shamsher Ali, who is a grand-uncle of the minors, and that there was a petition of objection put in by another grand-uncle of the minors, Mohabbat Ali Chowdhury. This petition was supported by another petition of objection filed by Nasima Khatun, the mother of the minors. The learned District Judge appointed Mahabbat Ali Chowdhury the objector, as guardian of the minors' property on the ground that he was equally related to the minors and that he had been managing the minors' property and paying their revenue. But the District Judge also thought it better to appoint another man as joint guardian with Mahabbat Ali. One Jan Ali was selected for this purpose but he refused to act as a guardian, on which on the 4th of January 1911 Makbul Ahmad Chowdhury was appointed

manager of the minor's property, jointly with Mahabbat Ali already appointed. On being called upon to give the necessary security, Mahabbat Ali failed to do so, upon which this Makbul Ahmad Chowdhury was appointed sole manager of the property of the minors. In our opinion, the order was at the least injudicious and made without due consideration. Makbul Ahmad is the son of Shamsher Ali and apparently he was appointed without any opportunity being given to the mother to state her views.

In the above circumstances, we set aside the order of the District Judge, dated the 4th January 1911. If the matter comes up again before the District Judge, that is, if a further application be made to him, and if he thinks it necessary to appoint a guardian of the property, he should proceed according to law under Chapter II of the Act.

We assess the hearing fee at one gold *mohur*.

Order set aside.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 611 OF 1911.

May 22, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Tudball.

NAND KISHORE SINGH—PLAINTIFF—APPELLANT

versus

RAM BIRICH RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Co-sharer—Partition, effect of.

The sale in respect of which the present pre-emption suit was instituted took place on the 22nd of July 1909.

On the 21st June previously, partition had been made and confirmed with effect from the 1st of July 1909. Under the partition the plaintiff and the vendor were co-sharers in the same *mahal* and the vendee ceased to be co-sharer with the vendor. The *Wajib-ul arz*, which was prepared after the partition, was verified on the 2nd of August 1909:

Held, that the plaintiff had a right to sue for pre-emption.

Second appeal from the decision of the District Judge of Ghazipur, dated the 31st of March 1911.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Govind Prasad*, (with him Mr. *Sital Prasad Ghose*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The sale took place on the 22nd of July 1909. On the 21st of June previously, partition had been made and confirmed with effect from the 1st of July. Under the partition, the plaintiff and the vendor were co-sharers in one *mahal*. The defendant has ceased to be a co-sharer with the vendor altogether. His property is in a separate *mahal*. On the 2nd of August 1909, the *wajib-ul-arz* was verified for the new *mahal*. There was also given in evidence the *wajib-ul-arz* of 1865. They are practically the same except that in 1865 the village evidently consisted of a single *mahal*. In the former *wajib-ul-arz*, there was a second class of co-sharers called "near co-sharers." After the partition, that class was designated as "near co-sharers in the *mahal*". Both the Courts below decided against the plaintiff on the ground that the new *wajib-ul-arz* was not in existence on the 22nd of July 1909, the date of the sale. They thought that under the old *wajib-ul-arz* the defendant had an equal right with the plaintiff. We think that the Courts below were wrong. Assuming that the rights of the parties were regulated by the custom set forth in the earlier *wajib-ul-arz* on the date of the sale, the defendant had ceased to be a co-sharer with the vendor and, therefore, he had no rights at all. Admittedly, he had no rights against the plaintiff if the rights of the parties were regulated by the *wajib-ul-arz* of the 2nd of August 1909. It is true that the *wajib-ul-arz* was not verified until the 2nd of August 1909, but if we look at the case from the point of view of contract as evidenced by the recent *wajib-ul-arz*, it is pretty clear that the arrangements amongst the parties must have been come to long prior to the verification of the *wajib-ul-arz*, in all probability before the time when the partition was completed, that is to say, on the 21st of June. In any event, it is clear that the contract which is recorded in the *wajib ul-arz* was to regulate the rights of the parties from the date of the partition, that is, from the 1st of July 1909. We think, therefore, that on the basis of contract, the plaintiff was entitled to succeed. If all along a custom has existed and the custom is as in the earlier *wajib-ul-arz*, then the defendant, in the events that have happened, has no right of pre-emption while the plaintiff has. In any event, therefore, the plain-

tiff is entitled to succeed. We allow the appeal, set aside the decrees of both the Courts below and decree the plaintiff's claim conditional upon his paying the sum of Rs. 1,000 into Court within three months from this date. If he pays in the money, he will receive his costs in all Courts. In default of payment, the suit will stand dismissed with costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2304 OF 1909.
July 16, 1912.
Present:—Mr. Justice Sharfuddin and
Mr. Justice Coxe.
NABIN CHANDRA PAL AND OTHERS—
DEFENDANTS—APPELLANTS
versus
BANGA CHANDRA CHOWDHURY AND
ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 22 cl. (2), 49—Eastern Bengal and Assam Act (I of 1903), s. 10 cl. (b)—Acquisition of occupancy-right by co-sharer tenure-holder—Destruction of occupancy-right—Existence of raiyati—*Tenant under* raiyat *to be under-*raiyat *under co-sharer tenure-holder—Amending Act—Retrospective effect.*

The Eastern Bengal and Assam Act I of 1908, section 10, clause (*b*), which amends section 22, clause (2) of the Bengal Tenancy Act, has no retrospective operation.

Therefore, if a co-sharer tenure-holder purchased an occupancy-holding under the tenure, before the amending Act came into operation, he acquired the rights of a *raiyat* though not those of an occupancy-*raiyat*.

And he can bring a suit to eject a tenant of the holding who is an under-*raiyat*, under section 49 clause (*b*) of the Bengal Tenancy Act, after the amending Act came into force.

Appeal from the decree of the District Judge of Noakhali, dated July 13th, 1909, reversing that of the Munsif of Lakhimpore, dated March 1st, 1909.

FACTS.—This is a suit for ejectment under section 49, clause (*b*), of the Bengal Tenancy Act. The plaintiffs are co-sharer tenure holders and they purchased an occupancy-holding under the tenure. They allege that they are *raiyats* and that the defendants are under-*raiyats* and liable to be ejected. The defendants contend that the plaintiffs who are themselves the co-sharer-tenure-holders having purchased the holding, they held it as a tenure-holder and not as a *raiyat*, under section 10 clause (*b*) of the Eastern Bengal and Assam Act I of 1908, and that, therefore, the defendents were *raiyats* under the plaintiffs and not under-*raiyats* and, therefore, not liable to be ejected.

The first Court dismissed the suit, holding that the *raiyati* with its occupancy-right acquired by the plaintiffs had merged into their superior tenure, and that the plaintiffs were tenure-holders and the defendants *raiyats* under them and not under-*raiyats*. The learned Munsif also held that section 10 of the Eastern Bengal and Assam Tenancy (Amendment) Act I of 1908 governed the present case, and under that, the plaintiffs had no right to hold the land in suit as *raiyats* but as tenure-holders. The learned Munsif observed:—

"It is admitted that the plaintiffs are the co-sharer *maliks* of the superior *taluq*, and the acquisition by purchase of the occupancy-right was subsequent. Under the circumstances, the occupancy-right has ceased to exist under section 22, clause (2), of the Bengal Tenancy Act. In the case of *Jawad-ul Haq* v. *Ram Das Saha* (1), it is held that in such cases the occupancy right only, which is an incident to the holding, shall cease to exist, but the holding shall continue though divested of the right of occupancy, which attached to it. This view was affirmed by the Full Bench case of *Ram Mohun* v. *Sheik Kachu* (2). But the law appears to have been changed by the amendment of this section by the Eastern Bengal and Assam Act I of 1908. Section 10 clause (*b*) of this Act amends section 22 clause (2) of the Bengal Tenancy Act, and it is clearly laid down in the amended clause that 'such person shall have no right to hold the land as a *raiyat*, but shall hold it as a proprietor, &c.' It is clear that the intention of this amendment is to prevent or discharge the acquisition of the occupancy rights by landlords. Sub-section (*b*) of the Bengal Tenancy Act does not clearly extinguish the tenancy or holding and leaves the *status* of the purchasing co-sharer landlord uncertain;

(1) 24 C. 143; 1 C. W. N. 166.
(2) 32 C. 383; 1 C. L. J. 1; 9 C. W. N. 249.

the amendent made it clear that the possession of such co-sharer landlord shall be the exclusive possession of the co-sharer proprietor or tenure-holder, as the case may be. Under the circumstances, if the amended Act is applicable in this case, the plaintiffs are evidently tenure holders with respect to this land, and the defendants, who are cultivating tenants of this land, are *raiyats* in respect of this holding, and thus section 49 clause (*b*) of the Bengal Tenancy Act does not apply to the present case. The learned Pleader for the plaintiffs contended that the amended Act (Eastern Bengal and Assam Act I of 1908) cannot govern this case, as the purchase of the occupancy-right in question was made before the amendment came into force. I do not consider that this contention is sound, for the present suit has been instituted after the amendment came into force and the law of the land that was in force at the time when the suit was brought must govern the suit in question. * * I, therefore, hold that the present case is covered by section 22 clause (2) of the Bengal Tenancy Act as amended by section 10 clause (*b*) of Act I of 1908 (Eastern Bengal and Assam). I accordingly hold that the defendants are not under *raiyats* of this holding and are not liable to be ejected."

On appeal, the learned District Judge reversed the decision of the learned Munsif with the following remarks:—

"With regard to the application of the provisions of the Amendment Act, it has been urged before me by the learned Pleader for the appellants that there is nothing in the Act to show that it is retrospective in its effect. In my opinion, there is force in this contention. The learned Munsif thinks that because this suit was brought after the passing of the Amendment Act, it must be governed by the provisions thereof. In the absence, however, of any mention, in the Act itself, of its provisions being retrospective, they must be held to govern such transactions only as may take place after the passing of the Act. * * Then, again, the Bengal Tenancy Act, and consequently its Amending Act are in the shape of adjective law, the provisions of which are not retrospective unless they are made so by the Legislature specifically. * * I must hold that as the purchase of the occupancy-holding, as well as all the other transactions in suit, took place before the passing of the Amendment Act; section 10 thereof does not govern the present suit."

The learned Judge held that the plaintiffs were *raiyats* in respect of the holding in suit and the defendants under-*raiyats*. He, therefore, decreed the suit.

The defendants appealed to the High Court.

Babu *Kritanta Kumar Bose*, for the Appellants.

Babu *Surendra Nath Guha*, for Dr. *Sarat Chandra Basak*, and Babu *Bipin Chandra Bose*, for the Respondents.

JUDGMENT.—This was a suit for ejectment on the ground that the defendants were under-*raiyats* and had received proper notice to quit. The suit was dismissed by the Court of first instance on the ground that the plaintiffs held the land as proprietors or tenure-holders by virtue of section 22 sub-section (2) of the Bengal Tenancy Act, as amended by the Eastern Bengal and Assam Tenancy (Amendment) Act, 1903, and that, therefore, the defendants were no longer under *raiyats* but *raiyats*. The learned District Judge in appeal took the opposite view and decreed the suit. The defendants appeal.

It is conceded by their learned Vakil that the appeal cannot succeed on the main point unless it is held that the amending Act, so far as section 22 is concerned, is held to have retrospective operation. He had referred to the statement of objects and reasons as showing that it was the intention of the Legislature to stop the acquisition of tenancy interests by landlords. But that statement does not show that the Legislature intended to interfere with rights already acquired. Under the Act, as it stood before amendment, the plaintiffs had certainly acquired the rights of a *raiyat* in the land, though not apparently those of an occupancy-*raiyat*. Those rights cannot be taken away by an amending Act unless the intention to take them away is clearly set out. That intention is certainly not set out in clear terms or in any terms in the amending Act, quoted above, and accordingly we must hold that the decision of the learned District Judge on the point is correct,

It is argued that the defendants were entitled to a decision on the 6th and 7th issues. But it is clear that they did not press the contention embodied in those issues or lay any materials for a decision upon them before the Courts.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1594 OF 1909.

July 11, 1912.

Present:—Mr. Justice Brett and Mr. Justice Chapman.

AMRITA LAL BAGCHI—DEFENDANT No. 1—APPELLANT

versus

JOGENDRA LAL CHOWDHURY—PLAINTIFF—RESPONDENT.

Limitation—Sale in execution—Deposit of money by auction-purchaser—Application by judgment-debtor to set aside sale—Success in first Court—Surplus sale-proceeds taken away by another decree-holder of judgment-debtor—Subsequent reversal of sale—Suit by auction-purchaser for refund of money against second decree-holder—Limitation Act (XV of 1877), Sch. II, Arts. 62, 97, 120.

A suit brought by an auction-purchaser to recover money from the defendant who had, after the sale and the deposit of the money in Court and before the sale was set aside on appeal, attached that sum in execution of his decree against the judgment-debtor as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, is governed by Article 120 of the second Schedule to the old Limitation Act, 1877, that is to say, the period of limitation is six years from the date when the sale was set aside by the Appellate Court.

Articles 62 and 97 contemplate a suit brought by one of the contracting parties against the other to recover the money which has been paid at the sale which owing to the default on part of the vendor has become infructuous.

Hanuman Kamat v. *Hanuman Mandar*, 18 I. A. 158; 19 C. 123 and *Ram Kumar Shaha Poddar* v. *Ram Gour Shaha Chowdhri*, 13 C. W. N. 1080; 2 Ind. Cas. 559; 10 C. L. J. 558; 37 C. 61, distinguished.

Nilakanta v. *Imamsahib*, 16 M. 361, followed.

Appeal from the decree of the District Judge of 24-Pergannahs, dated June 1st, 1909, modifying that of the Sub-Judge of that district, dated February 15th, 1909.

FACTS:—On the 8th February 1899, the plaintiff purchased at auction-sale in execution of a decree against defendant No. 3 certain property for Rs. 2,100. The defendant No. 3 took proceedings for the setting aside of this sale and on the 20th September 1901, those proceedings were decided against him in the first Court. They terminated in his favour in the Court of Appeal and the sale was set aside on the 23rd May 1902. A second appeal to the High Court was dismissed on the 30th August 1903. In the meantime, defendant No. 1, holding a decree in another suit against the defendant No. 3, attached the money deposited by the plaintiff in favour of defendant No. 3 and on the 22nd August 1899, withdrew Rs. 1,600 of that money. The plaintiff now sues to recover this Rs. 1,600 from the defendant No. 1. The defendant No. 2 is the decree-holder against defendant No. 3.

Both the Courts below gave the plaintiff a decree. The defendant No. 1 appealed to the High Court.

Babus *Ram Chandra Majumdar*, *Nagendra Nath Ghosh* and *Bijoy Kumar Bhattacharyya*, for the Appellant.

Babus *Harendra Narain Mitra* and *Satish Chandra Bhattacharyya*, for the Respondent.

JUDGMENT.—The only question which has been raised in support of this appeal is whether the District Judge was correct in the view which he took that the limitation applicable to the present suit was that provided by Article 120 of the second Schedule of the old Limitation Act, that is to say, six years. The suit was brought by the auction purchaser to recover the sum of Rs. 1,600 from the defendant No. 1, who had, after the sale and the deposit of the money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder. There can, in our opinion, be no doubt that the present plaintiff would be entitled to recover the money from the present appellant who was the defendant No. 1 in the lower Courts either by an application made under Order XXI, rule 93, Civil Procedure Code, or, as he has done in the present case, by a suit. For the purposes of the suit, it would be necessary for him to make parties to it the judgment-debtor and the decree-holder.

In support of the present appeal, it has

been argued that the proper Article of limitation applicable to the present suit is Article 97 of Schedule II of the old Limitation Act. In support of this view, the decision of the Privy Council in the case of *Hanuman Kamat* v. *Hanuman Mandur* (1) has been relied on as also the case of *Ram Kumar Shaha Pooddar* v. *Ram Gour Shaha Chowdhuri* (2). Both of these cases are, in our opinion, distinguishable from the present case. The former is a case in which a member of a joint family attempted to sell certain properties and his other co-sharers objected. The purchaser then sued for the return of the purchase-money and their Lordships of the Privy Council held that the case must fall either under Article 62 or Article 97 of Schedule II of the Limitation Act. That, however, was a suit between the original contracting parties to the sale, whereas, in the present case, it is impossible to contend that the person whose property was sold was, in fact, a willing party to the transaction or that the present suit is one between the two original contracting parties. In fact, the sale was brought about at the instance of the decree-holder and the property sold was the property of the judgment-debtor and the present suit is brought against a third person who attached some of the sale-proceeds as being the property of the judgment-debtor. This certainly cannot be regarded as a suit between the two contracting parties to the sale. In the same way, in the case of *Ram Kumar Shaha Fodder* v. *Ram Gour Shaha Chowdhri* (2), the decree-holder had sold as the property of his debtor property which belonged to a third person and, in that case, it was held that a suit would lie by the purchaser against the original decree-holder and that the limitation applicable would be that provided by Article 62 of the second Schedule of the Limitation Act. In our opinion, both those two Articles comtemplate a suit brought by one of the contracting parties against the other to recover the money which has been paid at the sale which owing to the default on the part of the vendor has become infructuous. The present case is not, however, of the same nature at all and we think that the District Judge was quite right in holding that it did not fall within the provisions of either Article 62 or Article 97 of Schedule II of the Limitation Act. The learned Judge has relied on a case of the Madras High Court in *Nilakanta* v. *Imamsahib* (3). That decision appears to be applicable to the facts of the present case and, agreeing with it we hold that the only limitation applicable to the present suit must be that provided by Article 120 of Schedule II of the old Limitation Act. As the present suit was instituted within six years from the date when the sale was declared by this Court to be invalid, we think that the learned Judge was quite right in holding that the suit was not barred by limitation. No other points have been taken in support of the appeal. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 18 I. A. 158; 19 C. 123.

(2) 13 C. W. N. 1080; 2 Ind. Cas. 559; 10 C. L. J. 558; 37 C. 61.

(3) 16 M. 361.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1076 OF 1909.

May 27, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Chevis.

KARAM CHAND—PLAINTIFF—APPELLANT

versus

LEHNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Abatement—Sufficient cause—Delay due to ignorance of law—Cross-objections—Appeal abating—Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 9 (2).

An appeal was filed in March 1909. The sole appellant died on 4th October 1909 but no application to bring his representatives on the record was made till 27th May 1912. The only explanation of the extraordinary delay was that the appellant's representatives were ignorant of law. The appeal was admitted on 4th June 1910 long after the appellant's death but nothing more was done for over a year owing to omission to pay process-fee till 6th August 1911:

Held, that appeal had abated and that no special circumstances existed to justify any concession to the appellant's representatives.

Ghulam Shah v. *Mallik Muzaffar Khan*, 81 P. R. 1886, explained and distinguished.

Cross-objections filed by a respondent cannot be heard, where an appeal abates and there is no appellant on the record.

Second appeal from the order of the Divisional Judge, Lahore, dated 5th December 1908, modifying that of the Subordinate Judge, first class, Lahore, dated 6th July 1905, dismissing plaintiff's claim in part,

Mr. *Festonji Dadabhoy*, for the Appellant.

Mr. *Gobind Ram*, for the Respondent.

JUDGMENT.—This appeal was filed in March 1909. The sole plaintiff died on the 4th October 1909, but an application has only been made to-day to bring his sons on the record as his representatives.

The appeal has by law long abated under Order XXII, rule 3, Civil Procedure Code, and defendants' Counsel presses his objection. There is no explanation of the extraordinary delay except that plaintiff's sons are said to have been ignorant of the law.

Plaintiff's Counsel asks us to accept ignorance of the law as a sufficient excuse on the authority of *Ghulam Shah* v. *Mallik Muzaffar Khan* (1). We do not understand the Full Bench to have ruled anything more than that under special circumstances ignorance of law may be accepted as a sufficient cause within the meaning of rule 9 (2) under Order XXII. There are, in our opinion, no special circumstances in the present case to justify concession to plaintiff's sons. Failure to apply the letter of the law in such a gross case of negligence would be tantamount to refusal to follow the law and would involve severe hardship to the defendants, against whom plaintiff has already succeeded to the extent of about two-thirds of his claim.

We observe also that this is not the only act of negligence on appellant's part. The appeal was admitted on the 4th June 1910, long after plaintiff's death, but nothing more was done for over a year owing to omission to pay process-fee till 6th August 1911. During all this time the defendants have been allowed to suppose that no appeal had been presented by plaintiff from the lower Appellate Court's decree of 5th December 1908. There is a limit to the extent to which negligence of this sort by an appellant can be properly overlooked.

We hold that the appeal abates. The defendants have filed cross-objections but these cannot be heard as there is no appellant on the record. We allow costs of the appeal to defendants, fixing Counsel's fee at Rs. 50 to be recovered from the estate of the deceased plaintiff, under Order XXII, rule 3 (2).

Appeal dismissed.

(1) 81 P. R. 1886.

CALCUTTA HIGH COURT.

CIVIL RULE No. 5210 OF 1910.

April 16, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

UPENDRA CHANDRA SINGH—DEFENDANT—PETITIONER

versus

SAKHI CHAND—PLAINTIFF—OPPOSITE PARTY.

Mesne profits, application for assessment of—Application in suit—Dismissal of application for default—Fresh application, if may be made—Application for restoration—Proper course to follow.

An application for assessment of mesne profits, is an application in the suit, although section 244, clauses (*a* and (*b*) of the Civil Procedure Code of 1882, directs that an application of this kind when made should be entertained by the Court in its execution department.

Puran Chand v. *Roy Radha Kishen*, 19 C. 132 (F. B.), *Harmanoje Narain Singh* v. *Ram Prashad Singh*, 6 C. L. J. 462 and *Debendra Nath* v. *Khirode Chandra*, 5 Ind. Cas. 272, relied upon:

Therefore, such an application cannot be entertained as one for execution of the decree where a similar application previously made had been dismissed for the default of the plaintiff.

But the plaintiff is entitled to make an application for the restoration of the application which was dismissed for default.

Rule against the judgment of the Sub-Judge of Bhagalpore, dated May 4th, 1910, and also an order of the District Judge of Bhagalpore, made on appeal on August 19th, 1910, dismissing the appeal preferred from the order of the Sub-Judge.

Babus *Basanta Kumar Bose* and *Sailendra Nath Palit*, for the Petitioner.

Babu *Naresh Chandra Sinha*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order of the Subordinate Judge, directing that an application for assessment of mesne profits be registered as an application for execution of a decree, notwithstanding the dismissal of a similar application previously made. It appears that the suit in which the plaintiff claimed to recover possession and mesne profits was decreed on the 28th March 1898. Possession was delivered in due course. An application subsequently made for assessment of the mesne profits as directed in the decree, was dismissed for default on the 25th January 1904. On the 13th April following, a fresh application was presented for assessment of mesne profits which was dismissed for default on the 9th May 1905. Upon appeal, the order of the primary

Court was reversed by the District Judge on the 2nd January 1906. That order was confirmed on appeal to this Court on the 7th March 1907 [*Upendra Chandra* v. *Sakhi Chand* (1)]. The result was that the primary Court was directed to proceed with the application for assessment of mesne profits. The application, however, was ultimately dismissed for default on the 7th January 1910, by the Subordinate Judge as his order for the payment of fees to the Commissioner has not been carried out. Six days later, on the 13th January 1910, the decree-holder presented two applications, one for restoration of the application of the 13th April 1904 and the other a fresh application for assessment of mesne profits. On the 12th March 1910, the decree-holder apparently elected to proceed with the application for assessment of mesne profits and abandoned the application for restoration. The result was that the application for restoration was dismissed on that date and on the 4th May 1910, the application for assessment of mesne profits was directed to be registered as an execution case. This latter order is now assailed on the ground that it was made without jurisdiction inasmuch as the dismissal of the application of the 13th April 1904 on the 7th January 1910 was equivalent to a dismissal of the claim for mesne profits. In our opinion, there is no room for controversy that this contention is well founded and must prevail.

As was pointed out in the case of *Rimkishore Ghose* v. *Gopi Kant Shaha* (2), an application for assessment of mesne profits has been commonly treated as an application for execution of decree, it is nevertheless clear, upon the decision of a Full Bench of this Court in *Puran Chand* v. *Roy Radha Kishen* (3), that an application in this behalf is an application in the suit, although section 244, clauses (*a*) and (*b*), directs that an application of the kind when made should be entertained by the Court in its execution department. The same view was taken in the cases of *Harmanoje Narain Singh* v. *Ram Prosad Narain Singh* (4) and *Debendra Nath* v. *Khirode Chandra* (5). The true position in the present case, therefore, was that on the 13th April 1904, the decree-holder invited the Court to proceed to a determination of the amount of mesne profits recoverable under the decree. The Court proceeded to hold an investigation and a Commissioner was appointed for the purpose. Indeed, without previous ascertainment by a Commissioner upon evidence taken for the purpose, it would hardly be practicable for the Court to determine the matter in controversy. But the Commissioner was unable to submit his report in time because the order for payment of his fees had not been carried out by the plaintiff decree-holder. The result was that on the 6th January 1910, the Court recorded an order to the effect that the Commissioner be directed to return the commission and that the case be dismissed for default on behalf of the plaintiff. Now, what was the "case" thus dismissed? Clearly, it was the claim of the plaintiff for recovery of mesne profits from the defendants. As that case was dismissed on the 7th January 1910, it was obviously not open to the plaintiff to make a fresh application on the 13th January 1910 because there was no pending suit wherein that application could be deemed to have been made. The view, we take, is supported by the decision in *Kewal Kishan Singh* v. *Sookhari* (6). The case of *Rankishore Singh* v. *Gopi Kant Shaha* (2) is clearly distinguishable. In that case, an application had been made for the recovery of costs allowed by the decree and in that application a prayer had been inserted to the effect that the mesne profits recoverable under the decree might also be ascertained. When the application came to be considered by the Court, an order was made for recovery of the costs, but the prayer for assessment of mesne profits was apparently overlooked; when the costs had been realised, the application was accordingly treated to have terminated. Subsequently, in answer to a fresh application by the decree-holder for assessment of mesne profits, it was urged by the judgment-debtor that the dismissal of the previous application which embodied a prayer for assessment of mesne profits was equivalent to a dismissal of the claim for mesne profits. This was overruled by this Court and the course adopted appears to be supported by the observations in *Pryag Singh* v. *Raju Singh* (7), though the reasons assigned were not quite consistent with the principle of the decision in *Puran Chand* v.

(1) 12 C. W. N. 3; 7 C. L. J. 301.
(2) 28 C. 242.
(3) 19 C. 132.
(4) 6 C. L. J. 462.
(5) 5 Ind. Cas. 272.
(6) 24 C. 173; 1 C. W. N. 243.
(7) 25 C. 203.

Roy Radha Kishen (3). The case of *Ram Krishna Ghose* v. *Gopi Kanth Saha* (2) plainly is of no assistance to the decree-holder in the case before us; but if it lays down any rule of law inconsistent with the decision of the Full Bench in *Puran Chand* v. *Roy Radha Kishen* (3), it cannot be treated as a binding authority. In the case before us, the Court had been invited to adjudicate upon the question of amount of mesne profits recoverable by the plaintiff from the defendant. The Court took steps to ascertain the amount, but could not determine the sum because of laches of the plaintiff. Under these circumstances, we are of opinion that the dismissal of the case on the 7th January, 1910 was equivalent to a dismissal of the claim for the mesne profits, and a fresh application in the same matter was not admissible. The order of the 4th May 1910 must consequently be discharged as made without jurisdiction.

The question next arises what further direction, if any, should be given in this matter. It is clear that the application for restoration to which we have referred was abandoned because the plaintiff erroneously believed that the proper procedure to follow was to make a fresh application for assessment of mesne profits. That application, as we have just held, cannot be entertained. Consequently, in the interests of justice, the order of the 12th March 1910 by which the application for restoration was dismissed should also be cancelled.

The result is, that the Rule is made absolute. The orders of the 12th March and the 1st May 1910 are both discharged; the application of the 13th January 1910 for assessment of mesne profits will stand dismissed; but the application of the same date for restoration will stand revived and the Court will now proceed to consider that application on the merits. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1009 OF 1909.

April 15, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MEENAKSHI SUNDARA NACHIAR—APPELLANT

versus

SA. RM. CH. CHIDAMBARAM CHETTY AND OTHERS—RESPONDENTS.

Landlord and tenant—Lease—Landlord's obstruction to tenant's peaceful enjoyment—Right of tenant to withhold rent—Right of defendant to plead as set-off damages sustained in action for rent—Apportionment—Constructive eviction—Abandonment by tenant—Transfer of Property Act (IV of 1882), ss. 108 (b) & (c), 111, 114.

The Transfer of Property Act, (IV of 1882), does not deal with the question of the lessee's right to withold payment of the whole or part of the rent, where his possession of the premises has been seriously obstructed by the landlord. Section 108 does not deal with the defence to an action for rent. It enacts that the iessor is bound, on the lessee's request, to put him in possession of property, but does not say that, if he does dot do so, the lessee is not bound to pay the rent.

The Transfer of Property Act has made no change in the rule that non-delivery of possession of the premises is a good answer to a suit for rent.

Under clause (*c*) of section 108 of the Transfer of Property Act, the actual prior payment of rent is not a condition for the lessee's right to enjoyment without interruption. The clause does not purport to confer any right or cast any liability on the lessor or lessee as a matter of law, but to state that a certain contract shall be taken to have been entered into between the parties. If the clause is to be read as importing a condition, it can only be so read in cases where the lessee claims actually to enforce his right to damages for breach of the covenant for quiet enjoyment.

The method of obstructing the tenant's enjoyment without actually evicting or turning him out is known as constructive eviction, *i.e.*, where the landlord commits wrongful and unlawful acts which deprive the tenant of the beneficial use and enjoyment of the property. In such cases of constructive eviction, the tenant enjoys immunity from the payment of rent until the landlord again permits him to have quiet enjoyment.

Dhanput Singh v. *Mahomed Kazim Ispahani*, 24 C. 296: *Harro Kunwari Chowdhurani* v. *Purna Chandra Sarbogya*, 28 C. 188: *Rai Charan Sar Mazumdar* v. *The Administrator-General of Bengal*, 36 C. 856; 13 C. W. N 853; 9 C. L. J. 578; 2 Ind. Cas. 169; *Mahomed Zeaulia Meah* v. *Sukliannessa Bibi*, 14 C. W. N. 446; 5 Ind Cas. 352; 11 C. L. J. 606; *Purna Chandra Sarbajna* v. *Rasik Chandra Chakrabarti*, 13 C. L. J. 119; 9 Ind. Cas. 568; *Zemindar of Vizianagaram* v. *Behara Suryanarayana Patrulu*, 25 M. 587; 12 M. L. J. 249; *Dawson* v. *Dyer*, 110 E. R. 996; 2 N. M. 559; 5 B. & Ad. 584; *Edge* v. *Boileau*, 16 Q. B. D. 117; 55 L. J. Q. B. 590; 53 L. T. 907; 34 W. R. 103; and *Obhoya Charan Bhooria* v. *Koilash Chunder Dey*, 14 C. 751, relied upon.

The tenant, however, is not entitled to withhold payment of the entire rent due to the landlord, where the obstruction caused by the latter has entailed on the tenant damages in a lesser amount than the amount of rent due by him.

If the landlord does not put the lessee in possession of the whole of the premises leased, the latter is not bound to pay any portion of the rent. If the landlord is unable to do so, the tenant may be entitled to rescind the lease, but he cannot insist on keeping possession of a part of the premises and yet refuse to pay rent for that part. If, after putting the tenant in possession of the property leased, the landlord obstructs his enjoyment of a portion thereof, it is open to the tenant to say that he is not willing to enjoy a portion of the premises, paying proportionate rent, but would treat the whole lease as rescinded during the period of such obstruction, but, in that case, it is his duty to restore to the landlord the part of the premises still remaining in his occupation and not retain possession of it until he is again put in possession of the whole of the leased property.

Where a tenant remains in aportion of the premises leased after obstruction by the landlord, the landlord is entitled to rent for that portion either on the contract of lease or as compensation for use and occupation and in such cases the tenant is estopped from pleading that he is not liable for the rent of that portion. His right in law is to damages, while he is liable to pay the rent and it is only a rule of convenience that he should be allowed to enforce his right for damages by setting them off in the landlord's action for rent.

Sarip Jan v. *Aftab-ud-Din*, 13 C. L. J. 115; 8 Ind. Cas. 30, dissented from.

Neale v. *Mackenzie*, 1 M. & W. 747; 2 Gale, 174; 6 L. J. Ex. 263; *Imambandi Begum* v. *Kamleswari Pershad*, 21 C. 1005; 21 I. A. 118; *Gopanund Jha* v. *Lalla Gobind Pershad*, 12 W. R. 109; *Rasseswari* v. *Sourendra Mohan*, 11 C. L. J. 601; 5 Ind. Cas. 105; *Rai Charan Sar Mazumdar* v. *Administrator-General of Bengal*, 36 C. 856: 13 C. W. N. 853; 9 C. L. J. 578; 2 Ind. Cas. 169; *Annada Prosad Mukhopadhya* v. *Mathura Nath Nag Mazumdar*, 13 C. W. N. 702; 9 C. L. J. 585; 2 Ind. Cas. 122; *Kali Prasanna Khasnabish* v. *Mathure Nath Sen*, 34 C. 191 and *Dhunput Singh* v. *Mahomad Kazim Ispahain*, 24 C. 296, referred to.

Second appeal against the decree of the District Court of Madura, in A. S. No. 524 of 1908, presented against the decree of the Subordinate Judge of Madura (East) in O. S. No. 27 of 1908.

Messrs. *P. R. Srinivasa Aiyangar*, *T. Rangachariar* and *N. T. Shamanna*, for the Appellant.

Mr. *C. V. Anantakrishna Iyer*, for the Respondents.

JUDGMENT.—The question for decision in this second appeal is, whether the plaintiffs are entitled to recover from the defendant the rent of two villages for *Fasli* 1315. The defence to the claim is that the plaintiffs lessors seriously obstructed the enjoyment of the villages by the defendant in that year, by which she sustained loss to the extent of Rs. 1,300 and that the plaintiffs are, therefore, not entitled to claim any rent for that year. The amount of rent due for the year, according to the contract of lease, was Rs. 1,245-12 3. The plaintiffs are alleged to have obstructed the lessee's enjoyment, both of certain *Karavalu* trees and the paddy lands. With regard to the former, both the lower Courts have found that the obstruction was not of a substantial character. With respect to the paddy land, both Courts have concurred in finding that the plaintiffs, having brought the villages to sale for arrears of rent for previous *faslis* in November 1905 and purchased them at the auction sale, took steps to exercise their rights as purchasers and sent an order to the Curnam, Exhibit X-a, dated the 26th November 1905, directing him to conduct all operations in the villages under their order, as they had become the owners. They then moved the Magistrate to restrain the defendant from interfering with their enjoyment of the villages, allegirg that they were in possession as purchasers. The Magistrate took steps in consequence to preserve the peace and the defendant, while she denied the plaintiff's possession of the villages, consented to the produce on the lands being harvested under the supervision of a Village Munsif. The Curnam refused to send the usual accounts to the defendant. On account of the delay in the harvesting of the crops in consequence of the obstruction and on account of rains, the defendant sustained some damage. We may note that the rent sale was subsequently set aside as irregular and illegal. The Subordinate Judge does not find what loss the defendant sustained. He says that the delay was only for about three weeks, and that the plaintiffs themselves did not collect any portion of the rent from the *ryots* in possession; and he concludes:—"I find it impossible to hold that the defendant's enjoyment was so materially interfered with by any permanent act of the plaintiffs or their men as to lead to the conclusion that the defendant was not able to have peaceable enjoyment in 1315 and that the plaintiffs' acts amount to such an obstruction to enjoyment as to suspend the plaintiffs' claim for rent for that year."

He was of opinion that the defendant's proper course, if she sustained any damage, was to take independent steps for recovering it. He held that the defendant would be entitled to suspension of rent for the period when there is substantial and material obstruction to her enjoyment by the landlord.

The District Judge observes that the defendant has not shown that she sustained a larger damage than a sum between Rs. 500 and 900 and says:—"I do not consider that the plaintiffs' interference can be regarded as a substantial interference of defendant's enjoyment of the village, and it appears at most to have been a temporary obstruction which was soon removed and for which she may obtain damages." We are unable to agree that, if the plaintiffs' obstruction caused a loss of Rs. 900 or thereabouts, the obstruction would not be of a substantial character, the total income of the village being about Rs. 2,200. The learned Judge apparently did not think it necessary to record a definite finding on the question of the amount of the loss sustained by the defendant, because, according to the view he took of the interpretation to be placed on section 108 of the Transfer of Property Act, even if there was substantial obstruction of the defendant's enjoyment by the plaintiffs, that would be no answer to this suit for rent. Clause (*c*) of that section enacts that "the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption." Clause (*l*) provides "the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf." Taking the two clauses together he held that "in order that a lessee might claim the benefit of an implied covenant for uninterruped enjoyment of the leased property, it is necessary, as a condition precedent, that he should comply with the provisions of section 108 (*b*), *viz.*, that he should pay or tender at the proper time and place the rent payable by him. At the same time, he thinks that the lessee might sue for damages caused by the obstruction. We can hardly suppose that the Judge means that the tenant should first pay the rent, and then claim re-payment of it, in virtue of the covenant for quiet enjoyment. Probably, what he means is, that the tenant, after paying the rent, may claim against the landlord damages for the breach of the covenant for quiet enjoyment. If clause (*c*) must be construed to require that the contract between the lessor and lessee should be taken to be that the prior payment of rent is a condition precedent for the tenant's right of quiet enjoyment, we have no doubt that this condition can apply only where the tenant attempts to enforce the covenant for quiet enjoyment by a claim for damages. It may not be unreasonable to say that, before the tenant actively asserts his claim to damages, he must perform his own obligation to pay or tender the rent due to the landlord, though it is difficult to see the necessity for doing so, especially, where the damage sustained exceeds the rent reserved. We are not convinced that, on the right construction of clause (*c*), the actual prior payment of rent is intended to be a condition for the right to enjoy without interruption. The clause does not purport to confer any right or cast any liability on the lessor or lessee as a matter of law, but to state that a certain contract shall be taken to have been entered into between the parties. Now, suppose an instrument of lease says 'if you pay the rent and perform your covenants, you may hold the property for 20 years.' This need not necessarily mean anything more than that if the lessee is unwilling to pay the rent reserved or to perform his other covenants, *i.e.*, obligations under the lease, he would have no right of quiet enjoyment. We can hardly think of any good reason for enacting a provision that the failure to pay a single instalment of rent should deprive a lessee of the right to continue in enjoyment of the leased property. It is hardly necessary to say that such is not the English law. The right to re-enter on non-payment of rent is confined, according to that law, to cases where there is an express covenant for re-entry. Section 111 clause (*g*) shows that the law is the same in this country. Section 114 goes further and provides in such cases for granting relief to the lessee against forfeiture for non-payment of rent; the usual clause in in-

struments of lease in England was paying the rent, etc., 'you shall be entitled to hold, etc.' The Courts have not construed this to mean that actual payment of the rent is a condition for the right to hold for the stipulated term. See *Dawson* v. *Dyer* (1) and *Edge* v. *Boileau* (2). No doubt, where an unusual privilege, such as a right to a renewal of the lease, is granted, if the lessee pay the rent in time, the Court may be inclined to continue the observance of the covenant as a condition to be satisfied to entitle the lessee to the privilege. See *Bastin* v. *Bidwell* (3). We think there are good grounds for holding that, notwithstanding the conditional form of the clause in clause (*c*) of section 108, it was not intended to make the right to the benefit of the covenant for quiet enjoyment conditional on the actual payment of the rent. At any rate, we are clearly of opinion that, if the clause is to be read as importing a condition, it can only be so read in case where the lessee claims actually to enforce his right to damages for breach of the covenant for quiet enjoyment.

The Transfer of Property Act does not in reality deal with the question of the lessee's right to withhold payment of the whole or part of the rent where his possession of the premises has been seriously obstructed by the landlord. Section 108 does not deal with the defence to an action for rent. It enacts that the lessor is bound, on the lessee's request, to put him in possession of property, but does not say that, if he does not do so, the lessee is not bound to pay the rent. But there can be no doubt that the Transfer of Property Act has made no change in the rule that non-delivery of possession of the premises is a good answer to a suit for rent. See the *Zemindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (4).

The basis of the defence, where the lessor has obstructed the lessee's enjoyment, is that in cases of continuous relationships involving mutual rights and obligations, a party who repudiates and acts in violation of his obligations cannot claim to enforce his own rights against the other party. Hence, a lessee who abandons his lease is not entitled to complain of dispossession by his landlord. See *Obhoya Charan Bhooia* v. *Koilash Chunder Dey* (5). To use the language of Mr. Adam in his Landlord and Tenant, a rent service is something given by way of retribution to the lessor for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this that the land demised is enjoyed by the tenant during the term included in the contract, for the tenant can make no return for the thing he has not. If, therefore, the tenant be deprived of the thing, the obligation to pay the rent ceases, because such obligation had its force only from the consideration which was the enjoyment of the thing demised. In England the defence is raised in the form that the tenant has been evicted from the premises and is, therefore, entitled to suspension of the rent during the period of eviction. See Woodfall's Landlord and Tenant, page 476; For on Landlord and Tenant, page 134. But eviction has been found not to be an appropriate word and the Courts hold that there is constructive eviction where the landlord, without turning the tenant out of possession, commits unlawful and wrongful acts which deprive the tenant of the beneficial enjoyment and use of the property; such wrongful acts amount in law to constructive eviction, and the tenant enjoys immunity from the payment of rent until the landlord again permits him to have quiet enjoyment. This principle has been enunciated in a series of cases. See *Lhunput Singh* v. *Mahomed Kazim Ispahain* (6); *Harro Kumari Chowdhrani* v. *Purna Chandra Sarbogya* (7); *Rai Charan Sar Mazumdar* v. *Administrator-General of Bengal* (8); *Mahomed Zeaulla Miah* v. *Sukliannessa Bibi* (9); *Purna Chandra Sarbajna* v. *Rasik Chandra Chakrabarti* (10). We are clearly of opinion that the Transfer of Property Act has made no modification of the law in this respect. The learned Vakil for the respond-

(1) 110 E. R. 996; 2 N. & M. 559; 5 B. and Ad. 584.
(2) 16 Q. B. D. 117; 55 L. J. Q. B. 590; 53 L. T. 997; 34 W. R. 103.
(3) 18 Ch. D. 238; 44 L. T. 742.
(4) 25 M. 587; 12 M. L. J. 249.
(5) 14 C. 751.
(6) 24 C. 296.
(7) 28 C. 188.
(8) 36 C. 856; 13 C. W. N. 853; 9 C. L. J. 578; 2 Ind. Cas. 169.
(9) 14 C.W.N. 446; 5 Ind. Cas. 352; 11 C. L. J. 606.
(10) 13 C. L. J. 119; 9 Ind. Cas. 568.

ents contends that, as the obstruction in this case was only for a short time and the tenant obtained possession of the villages afterwards and was in enjoyment during the remainder of the *fasli*, she is not entitled to withhold payment of the whole of the rent. We do not deal with this contention at present, because, before disposing of the case finally, we consider it desirable to request the District Judge to submit a clear finding on the question, what damage did the defendant sustain in *fasli* 1315 in consequence of the plaintiffs' obstruction of her enjoyment and we accordingly do so.

Mr. Anantakrishna Iyer further contends that, as the defendant consented to the harvesting of the crops by the village Munsif, she cannot now complain of obstruction by the plaintiffs, but the obstruction commenced several weeks before the defendant's consent referred to and the consent can be construed only as a forced abandonment of the premises for a time in consequence of the obstruction. According to some authorities, abandonment is even necessary to enable a tenant to claim immunity from rent. See Mr. Adam on Landlord and Tenant, page 1293. The finding will be submitted within one month from the date of the receipt of this order. Seven days will be allowed for filing objections. Fresh evidence may be adduced on both sides.

In compliance with the above judgment, the District Judge of Madura submitted the following

FINDING.

A finding has been called for on the question, what damage did defendant sustain in *Fasli* 1315 in consequence of the plaintiffs' obstruction of her enjoyment.

There is not much material for an answer to this question. Defendant's Vakil claims Rs. 1,422 or 158 *kalams* at Rs. 9 a *kalam*. I do not think it is of much use attempting to estimate the loss in *kalams* at a certain rate per *kalam*. Exhibit C supplies a safe foundation for an estimate. It shows that the average income of the village was taken at Rs. 2,878-10-1. Now the evidence of the Village Munsif, who harvested the crops, (D. W. No. 2) is that half of the village was harvested without loss and that the loss on the remainder was 50 per cent. This makes the total loss 25 per cent. On the basis of an average income of Rs. 2,878, this would represent in round figures Rs. 720.

I would, therefore, find that defendant's loss was Rs. 720. That such loss was due to the obstruction of the other party is, I think, obvious. The harvest was delayed from 1st to 19th March and not finished till considerably later, and the damage may be attributed entirely to the delay.

This appeal coming on for final hearing on Monday the 1st April 1912, after the return of the finding of the lower Appellate Court upon the issue referred to it by this Court for trial and, having stood over for consideration till this day, the Court delivered the following

JUDGMENT:—The District Court has submitted a finding that the loss sustained by the defendant in consequence of the obstruction to the enjoyment caused by the plaintiffs was Rs. 720. It is contended for the defendant that, as there was material obstruction to her enjoyment of the leased premises during *Fasli* 1315, she is entitled to an entire suspension of rent for the year and the plaintiffs are not entitled to recover any amount. This contention was urged before our order of remand, but we reserved the consideration of the question until the return of the finding. As already pointed out in our remand order, the Transfer of Property Act does not deal with the question of the lessee's right to withhold payment of the whole or part of the rent when his possession has been obstructed by the landlord. For the appellant, several decisions of the Calcutta High Court have been cited in support of the contention, that she is not bound to pay any portion of the rent. The question does not seem to have been definitely decided by this Court in any previous case nor apparently by the High Courts of Bombay and Allahabad. As observed in the remand order, rent is paid by the tenant in consideration of her enjoyment of the land demised to her, and *vice versa* it must be held that the payment of the rent is the consideration which the tenant is bound to render to the landlord in lieu of her enjoyment of the land. *Prima facie*, therefore, it appears to be reasonable, that, where the tenant continues in the occupation of the land demised to him and receives the income thereof, he should be bound to pay rent to the landlord even though his income may have suffered some diminution in consequence of the landlord's obstruction. But, it is argued, that we

should follow the decisions of the Courts in England which, it is said, have laid down that, where there has been such material obstruction by the landlord of the tenant's enjoyment as would be regarded as tantamount to eviction, the landlord should not be entitled to recover any portion of the rent. It cannot be contended that those decisions are binding on the Courts in India, and, before we adopt them, it is our duty to consider whether they are based on general principles applicable to this country. If the tenant's enjoyment is obstructed, he is, no doubt, entitled to damages for such obstruction; but it does not appear to follow from that, while in enjoyment of his landlord's premises, he should be entitled to withhold altogether the consideration due to the landlord for such enjoyment. Where rights *in rem* over property are created by contract of parties, ordinarily each party is entitled to enforce his rights as against the other and neither party can refuse to perform his obligation on the ground that the other party has not performed his. Such is, undoubtedly, the law in the case of a contract of sale and also in the case of mortgages, except, perhaps, in one respect that, where the mortgagee has failed to advance the whole amount secured by the instrument of the mortgage, the mortgagor cannot be compelled to re-pay more than the amount advanced.

In the case of a lease, which involves a relationship giving rise to recurring obligations between the lessor and lessee, the law applicable to covenants has been applied to so as to modify that applicable to rights *in rem*. The ordinary rule obtaining with regard to obligations arising from covenants is, no doubt, that one of the parties to contract cannot demand of the other party the performance of his obligations unless he has himself performed all his own obligations or is prepared to do so and the repudiation of his obligations by one party may, in some cases, entitle the other to rescind the contract. Applying this rule, it may be held that if the landlord does not put the tenant in possession of the whole of the premises leased, the latter is not bound to pay any portion of the rent. If the landlord is unable to do so, the tenant may be entitled to rescind the lease, but it does not follow that he would be entitled to insist on keeping possession of a part of the premises and yet refuse to pay rent for that part. When the landlord has already put the tenant in possession of the property leased, his initial obligation to the tenant has been performed; but, as the relationship is continuous, it will be a breach of his obligations arising from the relationship of lessor to deprive his tenant subsequently of the possession of any portion of the leased premises. But if he does so, what is the resulting right of the lessee? It may be open to him to say that he is not willing to enjoy only a portion of the premises paying proportinate rent and that, until the landlord restores possession of what he has wrongfully taken, he is not willing to perform the obligations of a lessee at all but would treat it as rescinded during such time. But, in that case, it seems to be clear that it should be his duty to restore to the landlord the part of the premises still remaining in his occupation and not to retain possession of them until he is put in possession again of the whole of the leased property. It must be admitted that this is not the manner in which the law has developed in England.

It would seem that the reason for the rule adopted in England was originally connected with the feudal system which once prevailed in that country. In Bacon's Abridgment, Vol. VII, page 62, it is stated that no man may be encouraged to injure or disturb his tenant in his possession whom by the policy of the feudal law he ought to protect and defend. Other reasons were subsequently given in support of the rule.

Thus the Chief Justice Haine says in *Hodgkins* v. *Robson* (11):—"If the lessor enters into a part by wrong, this would suspend the whole rent, for, in such a case, he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." Baron Gilbert in his Treatise on Rents gives a third reason. He says (page 178):—"Because by the demise every part of the land was equally chargeable with the whole rent, therefore, the lessor shall not, by his own act, discharge any part from the burden during the continuance of such contract. It will thus be seen that the original reason for the rule in England based on the obligation of a lord to his tenant according to feudal principles is not

(11)1 Ven. 276.

applicable in this country. The later reason hardly met the injustice of the tenant keeping possession of the landlord's land and still refusing to pay any rent for it. It need hardly be said that there is no general principle of law against the apportionment of rent. It is allowed where either the reversion or the tenancy has become severed so that different persons are in possession of portions thereof and the severance may take place either by law or by the act of the parties. See Halsbury's Laws of England, Vol. XVIII, page 484. The disallowance of it, where the landlord has deprived the tenant of a portion of the premises and the tenant, without giving up possession of the remainder retains it, is apparently due to historical causes which affected the devolopment of the English law. A different rule is adopted in America. In Mr. Adam's Landlord and Tenant, page 1293, the law is stated thus: "It is an elementary rule in regard to constructive eviction that the tenant must abandon the possession of the premises to the landlord for he cannot claim that he has been forced to go out while he remains in." In American Cyclopædia of Law and Procedure, Vol. XXIV, page 1130, it is observed: "There can be no constructive eviction without the surrender of possession of the premises by the tenant." Even in England it does not seem to be absolutely settled that the landlord would not be entitled to any portion of the rent where the tenant has not been deprived of possession of the whole of the land. Lord Esher preferred to express no opinion on it in *Baynton* v. *Morgan* (12).

Foa in his work on 'Landlord and Tenant' says that the question was not really decided in the earlier English cases, *Neale* v. *Mackenzie* (13) and *Reeve* v. *Bird* (14) and he cites the case of *Stokes* v. *Cooper* (15) as an authority for the opposite view. Again, apportionment of rent is allowed where the eviction of the tenant is not the result of a wrongful act of the landlord but of a person holding by title paramount. In *Imambandi Begum* v. *Kanleswari Pershad* (16), the Judicial Committee of the Privy Council apparently did not consider that there was any such rule applicable in this country. The case was decided on the footing that the tenant was evicted from a portion of the premises and the landlord was held entitled to a decree for rent for the portion of which the tenant was in possession although the question now under discussion was not definitely raised and decided. In *Gopanund Jha* v. *Lalla Gobind Pershad* (17), the tenant was evicted from the part of the land by title paramount. Sir Barnes Peacock held that the landlord was entitled to rent for the remainder, following the English rule. The Calcutta High Court has also held that apportionment might be allowed where a tenant's loss of possession is due to the wrong of a third party or to an act of nature, as for example, by diluvion. See *Rasseswari* v. *Surendra Mohun* (18). The Calcutta cases generally lay down that, where there has been an eviction from even a part of the premises, the whole rent is suspended. See *Surip Jan Bibi* v. *Aftabuddin Miah* (19) and earlier cases cited therein. But it can hardly be said that the rule has been settled in that Court. In *Rai Charan Sar Mazumdar* v. *Administrator-General of Bengal* (8), Harington, J., abstained from expressing any opinion on the question. In *Annada Prasad Mukhopadhya* v. *Mathura Nath Nag Mazumdar* (20), Chitty and Vincent, JJ., were of opinion that the English rule was not applicable to the country. After referring to the earlier cases, Chitty, J., observes: "I do not propose to enter upon an elaborate discussion of the English cases. It may be questioned how far the technicalities to be found in the English law should be allowed to affect the relations of landlord and tenant in this country. In one respect, the principle underlying the English decisions appears to be inapplicable to the present case. Eviction is regarded as a wrong done by the landlord to his tenant for which the former is to be penalised." Justice Vincent took the same view. In *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (21), where a tenant

(12) (1889) 22 Q. B. D. 74; 53 L. J. Q. B. 139; 37 W. R. 148; 53 J. P. 166.
(13) 1 M. and W. 747; 2 Gale 174; 6 L. J. Ex. 263.
(14) 1 C. M. & R. 31; 4 Tyr. 612; 3 L. J. Ex. 282.
(15) 3 Camp. 513n.
(16) 21 C. 1005; 21 I. A. 118.
(17) 12 W. R. 100.
(18) 11 C. L. J. 601; 5 Ind. Cas. 105.
(19) 13 C. L. J. 115; 8 Ind. Cas. 30.
(20) 13 C. W. N. 702; 9 C. L. J. 585; 2 Ind. Cas. 123.
(21) 34 C. 191.

was deprived of the possession of a portion of the holding by other tenants of the landlord whose leases were made subsequent to his own but remained in possession of the remainder, Brett and Sharfuddin, JJ. held that he was bound to pay rent for that portion. In *Dhumpat Singh* v. *Mahomed Kazim Ispahain* (6), Ghose and Hill, JJ, allowed apportionment where the rent had been separately fixed on the portion from which the tenant was evicted and the portion of which he retained possession although the covenant for rent was entire. In our opinion, it is difficult to hold on principle, that the landlord is not entitled to any portion of the rent if the tenant remains in possession of a portion of the land let. He must be held entitled to it on the contract of lease, since the tenant prefers not to throw up the lease during the period of eviction or as compensation for use and occupation and it would, in our opinion, be reasonable to hold that the tenant, where he retains possession of a portion of the land, must be estopped from pleading that he is not liable for the rent of that portion. Strictly speaking, where the tenant has once been let into occupation of the premises leased to him, his right in law, where he is deprived of possession of a part thereof is only to damages while he is liable to pay the rent; and it is only a rule of convenience that he should be allowed to enforce his right to damages by setting them off in the landlord's action for rent. We, therefore, hold that, deducting the amount of Rs. 720, the damages found to have been sustained by defendant, the plaintiff is entitled to rent claimed for *Fasli* 1315. The decrees of the lower Courts will be modified accordingly. The plaintiffs and defendant will pay and receive proportionate costs in all the Courts.

Decrees modified.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 21 OF 1910.

December 22, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

TULSI SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Thakur DAYAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Title—Priority—Purchase of holding—Plaintiff's purchase at mortgage decree sale—Defendant's purchase at co-sharer landlord's rent decree sale—Question of transferability of holding, if can be raised by defendant—Defendant, representative-in-interest of judgment-debtor—Estoppel—Defendant bound by same estoppel as judgment-debtor.

The plaintiffs purchased a holding in execution of a decree on a mortgage held by them against the admitted tenant. The defendants subsequently purchased the same holding in execution of a decree for rent held by a co-sharer landlord:

Held, (1) that the title of the plaintiffs was superior to that of the defendants who, as purchasers at a sale in execution of a decree for rent by a co-sharer landlord, were in the same position as a purchaser at a sale held in execution of a decree for money;

(2) that the question of transferability of the holding could not be raised at the instance of the defendants who were the representatives-in-interest of the tenant and were bound by the same estoppel as the judgment-debtor whose right, title and interest had been purchased by them.

Ayen-ud-din v. *Srish Chandra Banerjee*, 11 C. W. N. 76; *Haro Chandra Poddar* v. *Umes Chandra Bhattacharjee*, 5 Ind. Cas. 39; 14 C. W. N. 71; 11 C. L. J. 20 and *Shyama Charan* v. *Mokhoda*, 10 Ind. Cas. 49; 13 C. L. J. 481; 15 C. W. N. 703, relied upon.

Asmatunnessa Khatun v. *Harendra Lal Biswas*, 12 C. W. N. 721; 8 C. L. J. 29; 35 C. 904 and *Achamulla* v. *Cholamunnessa*, 10 Ind. Cas. 928; 13 C. L. J. 479, distinguished.

Appeal from the decree of the District Judge of Saran, dated September 2nd, 1909, affirming that of the fourth Munsif at Chapra, dated May, 21st 1909.

Babu *Sailendra Nath Palit*, for the Appellants.

Babu *Ramakanta Bhattacharya*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in a suit for declaration of title to immoveable property and for recovery of possession thereof. The case for the plaintiffs is that on the 25th January 1905, they purchased this property in execution of a decree on a mortgage held by them against the admitted tenant and that although they obtained delivery of possession through Court, they were subsequently ousted by the defendants. The

case for the defendants is that they purchased the property in March 1906 in execution of a decree for rent held by a co-sharer landlord and are entitled to hold possession thereof. It is clear that the title of the plaintiffs is superior to that of the defendants, who, as purchaser at a sale in execution of a decree for rent by a co-sharer landlord, are in the same position as a purchaser at a sale held in execution of a decree for money. But the Courts below have dismissed the suit on the ground that the holding in question was not shown to be transferable either by custom or by local usage. It was contended in the Courts below, and the contention has been repeated in this Court on behalf of the appellant, that the question of transferability could not be raised at the instance of the defendants. It has been pointed out, in the first place, that as between the tenant mortgagor and his mortgagees no question of transferability can arise. [*Bhagirath Changa* v. *Hafiz-ul-din* (1)]. This position has not been and cannot be disputed. It has next been argued that the defendants are the representatives-in-interest of the tenant and are bound by the same estoppel as the judgment-debtor whose right, title and interest have been purchased by them. This position is supported by the decision of this Court in the cases of *Ayen ud-din* v. *Srish Chandra Banerjee* (2)]; *Haro Chandra Poddar* v. *Umesh Chandra Bhattacharjee* (3) and *Shyama Charan* v. *Mokhoda Sundari Debi* (4). The case of *Asmatnunnessa Khatun* v. *Harendra Lal Biswas* (5), upon which the learned District Judge relied in support of his view, is clearly distinguishable. There the question of transferability was raised by the entire body of landlords, while in the case before us the question is sought to be raised by the purchasers at a sale held in execution of a decree of a co-sharer landlord. The decision in *Achamulla* v. *Cholamunnessa Bibi* (6) is also distinguishable. There no question was raised as to the estoppel which might bind the purchaser at a sale held in execution of a decree for arrears of rent obtained by a co-sharer landlord. What was argued was that as such purchaser had taken the property he had induced the plaintiff to believe that the property was transferable; for that contention, there was no foundation, because the purchase by the plaintiff had been made long before the purchase by the co-sharer landlord. Again, as pointed out in the case of *Shyama Charan* v. *Mokhoda* (4), the decision in *Achamulla* v. *Cholamunnessa* (6) rests on the doubtful ground that the execution purchaser is not bound by the same estoppel as the judgment-debtor. In our opinion, there is no room for controversy that the question of transferability cannot be raised at the instance of the defendants.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit decreed with costs throughout.

Appeal allowed.

(1) 4 C. W. N. 679.
(2) 11 C. W. N. 76.
(3) 5 Ind. Cas. 30; 14 C. W. N. 71; 11 C. L. J. 20.
(4) 10 Ind. Cas. 49; 13 C. L. J. 481; 15 C. W. N. 703.
(5) 12 C. W. N. 721; 8 C. L. J. 29; 35 C. 904.
(6) 10 Ind. Cas. 928; 13 C. L. J. 479.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 415 OF 1910.

April 15, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff

Thakur MADAN MOHAN NATH SAHI DEO—JUDGMENT-DEBTOR—APPELLANT

versus

BHIKHAR SHAHU—DECREE-HOLDER—RESPONDENT.

Execution of decree—Amendment of decree by executing Court, if to be allowed—Where Judge executing decree is same who made it—Whether such Judge can amend decree in execution proceedings.

An execution Court must execute the decree as it stands; it cannot alter, vary, or add to the terms of the decree; the propriety or validity of the decree cannot be discussed in execution proceedings.

Girish Chunder v. *Shoshi Sikhareswar*, 27 C. 951 at p. 967; 27 I.A. 110; 4 C.W.N. 631, *Udwant* v. *Tokhan Singh*; 28 C. 353; 28 I. A. 57; 3 Bom.L.R. 318, *Forester* v. *Secretary of State*, 3 C. 161; 4 I. A 137; *Hurro Durga* v. *Surut Sundari*, 8 C. 332; 9 I. A. 1, relied upon.

Even if the Judge who has to deal with an application for execution of a decree be the Judge who made the decree, he is not competent to amend it in execution proceedings.

Appeal from the order of the Sub-Judge of Ranchi, dated May 21st, 1910.

MADAN MOHAN NATH v. BHIKHAR SHAHU.

Mr. *Sinha* and Babu *Bipin Chandra Mallik*, for the Appellant.

Babu *Bipin Bihari Ghose* (Junior), for the Respondent.

JUDGMENT.—This appeal is directed against an order which purports to have been made in proceedings in execution of a mortgage-decree, but which really amends the original decree. The mortgage-decree made in favour of the present respondent on the 15th December 1904 against three defendants, directed the sale of the mortgaged properties; the first defendant alone, however, was made liable for the costs of the suit. An application was made for execution of this decree on the 8th January 1909, and after the objection of the judgment-debtors had been overruled on the 21st January, execution was directed to proceed. Two of the judgment-debtors, the second and third, then appealed to this Court and they joined as parties respondents to their appeal the decree-holder and the first judgment-debtor. At the hearing of the appeal, the first judgment-debtor respondent was not represented; but by consent of the two judgment-debtors appellants and the decree-holder respondent, it was directed by this Court that the decree of the lower Court and the application for execution be amended by striking out both the names of the second and third defendants, that as prayed by them execution do proceed against the first defendant alone, and, finally, that their rights, in the property, if any, be not affected by the sale. Whether an order of this description, whereby the decree was materially varied, could have been validly made on an appeal from an order in proceedings for execution of the original decree, it is not necessary for us to consider. But it is clear that this order does not bind the first defendant as he was not a party thereto. Subsequently on the 4th March 1910, an application was made for execution of the decree against the first defendant alone. The second and third defendants entered appearance and objected to the execution on the ground that the decree had not been amended, at the instance of the decree-holder in the manner directed by this Court by consent of parties and they apprehended that the result of the execution sale, if it took place without a prior amendment of the decree, would be to affect their interest in the property. The Court overruled the objection taken by these two judgment-debtors. The first judgment-debtor then appeared and contended that the previous order of this Court was not binding upon him and that the decree could not be amended except upon a proper application in that behalf, to the Court which had passed the decree. The Subordinate Judge thought that this objection was frivolous and he proceeded to amend the decree. This is the order now assailed before this Court, and there can, in our opinion, be no room for controversy that the order cannot be supported.

Under section 152 of the Code of Civil Procedure of 1903, clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties. It is manifest that an order under this section must be made in the suit itself. But it has been argued for the respondent that as the Subordinate Judge, who had to deal with the application for execution of the decree, was the Judge who had made the original decree, it was competent to him to amend the decree even in execution proceedings. We are not prepared to accept this contention as well founded. It is an elementary principle of law that an execution Court must execute the decree as it stands; it cannot alter, vary, or add to the terms of the decree; its propriety or validity, cannot be discussed in execution proceedings. *Girish Chunder* v. *Shoshi Shikhareswar*(1), *Udwant Singh* v. *Tokhan Singh* (2), *Forester* v. *Secretary of State* (3); *Hurro Durga* v. *Surut Sundari* (4). It would, in our opinion, be fundamentally erroneous to allow an execution Court to amend a decree without notice given to the parties and all the facts upon which amendment is claimed properly set out and investigated. The learned Vakil for the respondent has finally invited us to embark upon an inquiry into the merits of the matter; this necessarily involves an investigation of the merits of the suit and we must decline to accept his invitation to persist in the irregular course hitherto pursued in this litigation.

(1) 27 C. 951; 27 I. A. 110; 4 C. W. W. 631.
(2) 28 C. 353; 28 I. A. 57; 3 Bom. L. R. 318.
(3) 3 C. 161; 4 I. A. 137.
(4) 8 C. 332; 9 I. A. 1.

MANGAL DAS *v.* RALLA RAM.

The result is that this appeal is allowed and the order of the Subordinate Judge discharged as made without jurisdiction. The appellant is entitled to his costs both here and in the Court below. We assess the hearing fee in this Court at five gold *mohurs*.

We desire to add that this order will not prevent the decree-holder from applying to the Subordinate Judge, if he is so advised, for amendment of the decree.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 911 OF 1910.

March 13, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Chevis.

Bawa MANGAL DAS—PLAINTIFF—APPELLANT

versus

RALLA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Religious Institution—Succession to Mahantship—Byragi Thakurdwara *in Banswala Bazar, Amritsar City—Suit by senior* chela *to oust junior with equal right.*

Only a person with a superior right can disturb another in possession of property. So where in a suit for possession of a *Byragi Thakardwara* in Banswala Bazar, Amritsar city, brought by the senior *chela* against the junior, the right of both was found to be equal and the plaintiff failed to prove that as senior *chela* he had a preferential right to succeed, his claim was disallowed on the ground that he was not entitled to oust the defendant.

First appeal from the order of the Subordinate Judge, 1st class, at Amritsar, dated 31st January 1910, dismissing plaintiff's claim.

Bakhshi *Tek Chand*, for the Appellant.

Messrs. *Nand Lal* and *G. L. Maheshwary*, for the Respondents.

JUDGMENT.—This is a suit for possession of a *Byragi Thakurdwara* in Amritsar city. The last *Mahant*, Radhka Das, died on the 9th November 1908, and the plaintiff was then in Benares. Ralla Ram is the principal defendant in the case and will be referred to in this judgment simply as "the defendant", the other defendants being simply tenants of two shops attached to the *Thakurdwara*. Ralla Ram being on the spot took possession. Plaintiff claims that he is the *chela* of Radhka Das and denies that defendant is the *chela*. Defendant claims to be the *chela* and denies that plaintiff is a *chela*. Plaintiff also claims that if both he and defendant are held to be *chelas*, he (plaintiff) is entitled to preference on account of seniority. The lower Court has dismissed the claim holding that the evidence on both sides proves that both plaintiff and defendant were made *chelas* by the late *Mahant* and that plaintiff has failed to prove any thing by reason of which he should be given the preference and allowed to oust the party in possession.

Plaintiff appeals. In ground 2 of the appeal, it is said that plaintiff is admittedly a *chela* of the late *Mahant*, but we cannot find from the record that the defendant ever made any such admission, though the Subordinate Judge, in one part of his judgment, writes:—"there is no doubt that plaintiff is admitted by defendant Ralla Ram himself (in his story) to be senior to him." The evidence as to appointment of *chela* seems to be about equally balanced. Both sides have produced *Mahants* and others. Plaintiff's witnesses swear that plaintiff was appointed a *chela* in their presence; defendant's witnesses say the same for him. Holes can be picked in the evidence on both sides. The lower Court rejects as incredible the story told by defendant's witnesses that when he was appointed a *chela*, the keys were handed over to him. On the other hand, we might equally criticize the evidence of plaintiff's first witness, *Mahant* Reoti Das, who says he was a *chela* himself at the time of plaintiff's appointment and that only small *pujaris* and not big *Mahants* are called when a *chela* is appointed. To criticize the evidence in detail would be useless; it is simply a case of so many witnesses deposing on plaintiff's behalf that some 14 or 15 years ago, *Mahant* Radhka Das appointed the plaintiff as his *chela* and of so many witnesses deposing on defendant's behalf that about two years ago, the late *Mahant* made defendant his *chela*. For the plaintiff, it is urged that the defendant does not use the name of Gokal Das which he alleges was given to him when he was made a *chela* but still conducts a newspaper in his own name. But times are changing and *Byragis* like other people do many things now which

would have been accounted shocking in the good old days. And if the evidence of the four defence witnesses examined on commission at Benares is to be credited, plaintiff's conduct has been still stranger, for according to these witnesses, while pursuing his studies at Benares, the plaintiff has left the *Byragi* sect and become a *Sarsut Brahmin* and become the *chela* of one Rattan Singh and changed his name from Mangu Ram (by which name—not Mangal Das—he seems to be known in Benares) to that of Damodar Singh. This evidence, which seems to have been scarcely noticed by the learned Subordinate Judge, if credited, would disqualify plaintiff altogether from succeeding to the *Mahantship* of a *Byragi* institution, for even plaintiff's witnesses admit that leaving the *panth* is a disqualification. The evidence certainly seems to refer to the plaintiff as in it he is described as Mangu Ram, son of Narain Das of Amritsar. Narain Das is the natural father of the plaintiff but apparently the plaintiff was not at Benares when this evidence was taken and so the witnesses have not identified him as the man of whom they are speaking. According to Rattan Singh's evidence, plaintiff's new *guru*, Rattan Singh, had to turn him out for gambling and playing musical instruments. If the evidence tendered by plaintiff be accepted as good enough to prove that he was appointed a *chela*, we must agree with the lower Court that defendant's evidence as to defendant's appointment is equally good. The lower Court finds that "both parties have produced overwhelming evidence." We prefer to say that the evidence seems about equal. If one has established his appointment as *chela*, so has the other, and beyond the bare assertion of some of plaintiff's witnesses, we can find no proof of the allegation that mere seniority gives any preference. The defendant has set up a Will, but the lower Court has rightly held this Will to be not proved. The *Mahant* was evidently too ill to sign it and the Sub-Registrar very properly refused to register it. So the defendant has failed to show that the *Mahant* nominated him as his successor, but, on the other hand, the plaintiff has failed to prove that the *Mahant* nominated him. As to appointment by the *Bhek*, the evidence is again balanced, so many witnesses supporting each side. Either one set of witnesses or other is lying or else the truth is that the *Bhek* was *divided* and one-half assembled and went through the ceremony of appointing the plaintiff, while at another occasion, the other half assembled and appointed the defendant. That the defendant performed the funeral ceremonies immediately after the death appears certain; but, on the other hand, plaintiff called by telegram from Benares appears to have taken upon himself to perform some of the later ceremonies. What the real test is as to succession with regard to this particular institution has not been proved.

Plaintiff's natural father, Narain Das, seems to have been a *Gurbhai* of the late *Mahant* (*i. e.*, Narain Das and Radhka Das both had the same *guru*). Narain Das was on the spot in Amritsar during Radhka Das' last illness which lasted some days, and it seems to us peculiar that Narain Das did not send a telegram to Benares to call the plaintiff back before Radhka Das' death, instead of waiting till after the death to call his son back.

We agree with the lower Court that the evidence is about equally balanced, and that plaintiff has failed to prove that he has any preferential right to succeed to the *Mahantship*. As to the eighth ground of appeal, Counsel has wisely refrained from addressing us on this point, though we reminded him of this ground and asked him if he wished to support it.

We uphold the decision of the lower Court and dismiss this appeal. We pass no order as to costs in this Court as apparently the defendant has the support of only half of the *Bhek*.

Appeal dismissed.

AUTHI LAKSHMI *v.* ANNASAWMY IYER.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1645, 1072, 1141 AND 1659 OF 1908.

May 2, 1912.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

IN NO. 1645.

AUTHI LAKSHMI AND OTHERS—APPELLANTS

versus

ANNASAWMY IYER—RESPONDENT.

IN NO. 1072.

RAMANADA IYAR AND OTHERS—APPELLANTS

versus

ANNASAMI IYER—RESPONDENT.

IN NO. 1141.

S. APPU SASTRI—APPELLANT

versus

ANNASAMI IYER—RESPONDENT.

IN NO. 1659.

ANNASAWMI IYER—APPELLANT

versus

IBRAMSA ROWTHER AND OTHERS—RESPONDENTS.

Hindu Law—Family settlements, binding nature of—Inquiry into antecedent rights of parties, whether permissible.

In judging of the validity of a compromise, Courts are not entitled to inquire into the rights of parties as they stood before the compromise to see whether the compromise has recognized them; the inquiry should be restricted to the question whether the claims advanced by either side were *bona fide* and whether the compromise really is in settlement of such claims. Every compromise may invoive the giving up of certain claims to which a party may be rightly entitled, and the acquisition of interests to which he may have no claim. But if such compromise is a settlement of disputes advanced *bona fide*, then, *prima facie*, it ought to be upheld. This reason applies with greater force in cases of family settlements where the peace of the family is involved, more especially when the settlements were effected long prior to the date of the dispute between the parties.

Second appeals against the decrees of the Subordinate Judge's Court at Kumbaconam, in Appeal Suits Nos. 151, 176, 195 and 150 of 1908, respectively, presented against the decree of the Court of the District Munsif of Kumbaconam, in Original Suit No. 391 of 1906.

The Hon'ble Mr. *T. V. Seshagiri Aiyer*, for the Appellant in S. A. No. 1645 and for the Respondents in S. A. No. 1659.

Mr. *S. Rajagopala Aiyengar* for Mr. *T. R. Venkatarama Sastri*, for the Appellants in S. A. No. 1072.

Mr. *N. Rajagopalachariar*, for the Appellants in S. A. No. 1141.

Messrs. *K. Srinivasa Aiyengar* and *N. R. K. Thatha Chariar*, for the Respondent in S. A. Nos. 1645, 1072 and 1141, and for the Appellant in S. A. No. 1659.

JUDGMENT.

S. A. No. 1645 of 1908.

The plaintiff is the son of Devaraja Ayier, who died in the year 1850, leaving a widow, named Ponnammal. He had another son, Sivaramier, who predeceased him in 1843 Sivarama Aiyer had a son, Devaraja Aiyer by name, who died in 1851. The plaintiff now claims to recover the property as the reversioner of this Devaraja Aiyer as his brother's son, alleging that the cause of action arose on the death of Devaraja Aiyar's mother, Mangalathammal, who obtained possession of the property on Devaraja Aiyer's death and died in the year 1905. The defendants are the persons who claim under various alienations made by Mangalathammal. One of the questions raised for decision is whether Mangalathammal had become the absolute owner of the properties which are in the possession of these defendants under a compromise, Exhibit VIII, or whether she had only a widow's interest in the estate.

Some years before the plaintiff's father, Devaraja Aiyer's death, there was a partition entered into between him, his son, the plaintiff, and his daughter-in-law, Mangalathammal, acting as the guardian of her minor son, Devaraja Aiyer. Each of them took $\frac{1}{3}$rd share in the family property. The partition-deed also recites that on the death of the plaintiff's father, Devaraja Aiyer, his property was to be divided equally between the plaintiff and his brother's son, Devaraja. Six years afterwards, in 1850, a fresh arrangement was come to by which the arrangement of 1844 was modified. Devaraja Aiyar died in 1850. Disputes arose between the parties immediately after and a suit (Original Suit No. 726 of 1851) was filed by Ponnammal (widow of Devarja Aiyer) in the Diwani Adawlut Court of Kumbaconam against her daughter-in-law, Mangalathammal, and certain others. She set out the partition of 1844 as well as the partition of 1850, and stated that when she came to know of this arrangement

of 1850, she represented that the arrangement was unfair, as it did not provide for the performance of various ceremonies of her son and she alleged in the plaint that when her husband was about to die, he acknowledged in the presence of mediators that the deed of partition executed by him was inequitable and that the properties should, upon her son's attaining the age of majority, be divided into two equal shares. She alleged that these defendants had taken illegal possession of these properties, that the deed of partition was void, that her daughter-in-law was entitled only to maintenance and not entitled to any property and that she was entitled to recover possession of those properties which she was not in possession of. What Mangalathammal's contention in that suit was does not appear. All that the evidence, that is relied on by the plaintiff to prove what her contention was, is Exhibit XXIII, which is a statement filed by Ponnammal in that suit itself in reply to the written statement of Mangalathammal. That statement does not show what Mangalathammal's contentions were. In the course of that suit, a *razinamah*, Exhibit VIII, was put in by the parties. It refers to the death of Devaraja Aiyar after the partition of the 18th July 1850 and it states that Mangalathammal "first defendant herself shall, with rights of every kind and with competency to alienate by way of gift, sale or otherwise, enjoy the properties that fell to the share of the said Devarajan under the said deed of partition and list;" and it gives similar rights to the plaintiff therein on behalf of Annasami Aiyar. By that document, Mangalathammal also undertook to pay to the plaintiff therein through Court Rs. 115 for meeting the marriage expenses of her son, Annasami. The main question in the suit is whether this compromise (Exhibit VIII) gives the properties referred to therein to Mangalathammal absolutely. On behalf of the defendants, it is contended that it was a family arrangement between the members of a Hindu family and that it settled the disputes which had been raised between the parties and it should not now be re-opened at this distance of time. On behalf of the plaintiff, it is contended that the compromise gives Mangalathammal no more than what was given to her by the deed of the 18th July 1850 in the properties, that she took only life-interest in them, (*i. e.*,) the interset of a Hindu widow and that for her acquisition of the absolute interest in the properties, there was really no consideration. As we have already pointed out, it does not appear what Mangalathammal's contentions were in that case. Nor does it appear whether the properties of which she obtained possession were one-half of the properties left by Devaraja Aiyar, the plaintiff's father. It also appears that she paid Rs. 115, which she was not bound to pay, for meeting the expenses of the plaintiff's marriage. If in that suit, she claimed one-half of the properties in dispute and she claimed not only a widow's interest in such properties but an absolute interest with right to alienate by way of gift or sale or in any other form, then, it is difficult to say that the compromise was not in settlement of claims advanced in that suit. In that view, she must have given up a portion of the properties to which she laid claim and paid a sum of Rs. 115 in consideration of Ponnammal recognising her absolute interest in the properties which were finally given to her. It is true that there is no direct evidence in the case of what the scope of the litigation was or what her contentions were; but the deed of compromise itself by recognising in her such rights, is evidence that she claimed those rights. The plaintiff's Pleader contends that the deeds of partition of 1844 and 1850 did not recognise such a claim and that she did not put forward any claim which was not recognised by those partition-deeds. But, in judging of the validity of a compromise, we are not entitled to inquire into the rights of parties as they stood before the compromise to see whether the compromise has recognised them; we are only entitled to inquire whether the claims advanced by either side were *bona fide* and whether the compromise really was in settlement of such claims. Every compromise may involve the giving up of certain claims to which a party may be rightly entitled and the acquisition of interests to which he may have no claim. But if such compromise is a settlement of disputes advanced *bona fide*, then, *prima facie*, it ought to be upheld. And this reason applies with greater force in cases of family settlements

where the peace of the family is involved. Further, taking into consideration that more than 50 years have elapsed after the date of the compromise and Mangalathammal is now dead, we shall not be justified in presuming that the contentions advanced by Mangalathammal did not involve claims justifying such a *razinamah*. We are, therefore, unable to say that the compromise is invalid for that reason.

It is then argued that though the compromise may be valid, Ponnammal had no authority to part with Annasami's right as his guardian. If Annasami himself could have entered into a *razinamah* like this, we fail to see why Ponnammal, acting as his guardian could not have entered into it. It is possible that Ponnammal might have got on his behalf more property than he would have been entitled to get. She certainly got Rs. 115 of which presumably he had the benefit. She has not parted with Annasami's right of inheritance to Devaraja Aiyar as was contended for by the respondent's Pleader. We disallow this contention. We hold accordingly that the *razinamah* (Exhibit VIII) is binding on the plaintiff and that, therefore, he is precluded from contending that the deceased Mangalathammal was not the full owner of the properties therein referred to with power to alienate. She acquired such power under the compromise. The alienations made by her cannot, therefore, be impeached by the plaintiff on the grounds alleged.

The decree is reversed and the suit is dismissed with costs throughout against the appellants, defendants Nos. 7 to 10.

S. A. No. 1072 of 1908.

For the same reasons, the decrees are reversed and the suit is dismissed with costs throughout against the appellants, defendants Nos. 1 and 3.

S. A. No. 1141 of 1908.

For the same reasons, the decrees are reversed and the suit is dismissed against the appellant, the 4th defendant, with costs throughout.

S. A. No. 1659 of 1908.

For the same reasons, the second appeal is dismissed with costs.

Appeals No.—1645, 1072, 1141, *allowed*;
Appeal No. 1659 *dismissed.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 664 OF 1909.

December 6, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

GANDA MAL—DEFENDANT—APPELLANT

versus

PIRAN DITTA—PLAINTIFF—RESPONDENT.

Appeal—Present right of—Construction of Statute—Right in esse *not affected by new Law—General Clauses Act (X of 1897), s. 6—Civil Procedure Code (Act V of 1908), s. 154, O. XLI, r. 23, O. XLIII, r. 1 (u)—Re—Appeal mand order.*

The right of appeal in a pending action is not a matter of procedure and the repeal of a statute, which was in force at the time when the action was instituted and which regulated the course of appeal, does not affect the right of appeal acquired or enjoyed under that Statute unless the repealing Statute expressly or by necessary implication takes away that right.

The words "any present right of appeal" in section 154 of Act V of 1908, mean a right of appeal *in esse* and not *in posse*, *i.e.*, a right of appeal which had actually come into existence and was capable of being exercised by the aggrieved party at the commencement of the new Statute.

Colonial Sugar Refining Company Limited v. *Irving*, (1905) A. C. 560; 71 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513; *Choudhri Narsing Das* v. *Lala Dholan Das*, 12 P. R. 1900, P. L. R. 1900 p. 63, followed.

Where in a suit instituted before the coming into force of the new Civil Procedure Code, an order of remand is passed after the new Code has come into force, the right of appeal against the order is regulated by the new and not by the old Code.

Kalinga Hebbara v. *Narasimha Hebbara*, 21 M. L. J. 631; 9 Ind. Cas. 937; (1911) 2 M. W. N. 143; 9 M. L. T. 359, dissented from.

Second appeal from the order of the Divisional Judge, Sialkot Division, dated 8th January 1909, reversing that of the Munsif, 1st Class, Gujranwala, dated 20th November 1908.

JUDGMENT.—The question of law referred to the Division Bench by the learned Judge in Chambers is stated with sufficient clearness in the order of reference which runs as follows:—

"This is an appeal from an order under rule 23 of Order XLI of the Code of Civil Procedure remanding a case to the lower Court. In such a case an appeal only lies if one would lie from the decree of the Appellate Court, see Order XLIII, rule 1 (*u*).

As the present suit is an unclassed one valued at Rs. 500, no second appeal would lie, and, therefore, *prima facie* no appeal lies from the order of remand.

It is, however, contended by Mr. Sukh

Dial that as the suit was instituted before the present Code of Civil Procedure came into force, the course of appeal is regulated by the former Code which allowed an appeal from such an order in all cases. He relies upon the Full Bench ruling in *Choudhri Narsing Das* v. *Lala Dholan Das* (1).

Exactly the same point was argued before Williams, J., in *Nand Lal* v. *Sohan Mal*, Case No. 452 of 1905 decided on 8th March 1910, in which it was held, having reference to section 154 of the present Code, that no appeal lay, as the right of appeal had not accrued at the time when the Code came into force. I am inclined, as at present advised, to agree with this decision, but as the question is an important one and will affect a great many cases, I refer it to a Division Bench. The question referred is, whether in a case instituted, but not decided, before the present Code of Civil Procedure came into force, the right of appeal is governed in all cases by the provisions of the former Code, being saved by section 6 of the General Clauses Act; or whether, having regard to section 154 of the present Code, section 6 of the General Clauses Act does not apply and the right of appeal is governed by the Code?"

The suit, out of which the present appeal has arisen, was brought on the 19th December 1907, by the plaintiff for pre-emption in respect of the house in dispute, on the ground that the transfer of it by way of mortgage by defendant No. 2 to defendant No. 1 by the registered deed, dated the 21st December 1906, was a colourable transaction, the real intention of the parties being to effect a sale of the house in the guise of a mortgage. The parties joined issue on the question whether the transaction was one of mortgage or of sale; and the Munsif decided on the 20th December 1908, that the transaction was what it purported to be, namely, a mortgage, and on that ground, he dismissed the plaintiff's suit.

On appeal, the learned Divisional Judge held, differing from the Munsif, that the transfer in dispute was really a sale and not a mortgage, and reversing the decree of the Munsif, he remanded the case to his Court by order dated the 22nd April 1909, for decision on the merits.

It is from the Divisional Judge's order of remand, dated the 22nd April 1909, that the present appeal has been preferred to this Court; and it is conceded that an appeal would only lie from the order in question if it were regulated by the provisions of the old Code of Civil Procedure and not by Order XLIII, rule 1 (*u*) of the new Code. In support of his contention that the new Code does not govern the present appeal, Mr. Sukh Dial has cited, in addition to section 6 of the General Clauses Act X of 1897, and *Chowdhri Narsing Das* v *Lala Dholan Das* (1), on which he relied before the learned Judge in Chambers, a recent decision of the Madras High Court, *Kalingi Hebbara* v. *Narasimha Hebbara* (2). In that case, it was held that where a person had filed an appeal under the old Civil Procedure Code of 1882, which gave him a right of second appeal if the decision went against him, the passing of the new Code of 1908, which did not give a right of second appeal in a similar case, did not take away the appellant's right of second appeal. With reference to the contention that section 154 of the new Code had, by necessary intendment, deprived the appellant of the right of second appeal which had not accrued to him at the commencement of that Code, the learned Judges observed that the words "present right of appeal" as used in the said section did not mean anything more than that no right of appeal which has been vested in a litigant shall be affected by the present Code.

We have given our very best consideration to the arguments of Mr. Sukh Dial and to the reasoning on which the decision of the Madras High Court is based, but with all due respect to the learned Judges of that Court, we think that they have not placed a right construction on section 154 of the new Code, and we are not, therefore, prepared to follow their ruling. The general principle which regulates the question whether a repealing statute deprives a litigant of a right of appeal, which he enjoyed under the statute which has been repealed, is authoritatively stated in the Full Bench decision of this Court, in *Chowdhri Narsing Das* v. *Lal Dholan Das* (1), and in the decision of their Lordships of the Privy Council in *Colonial Sugar Refining Company Limited* v. *Irving* (3), which is cited in the

(1) 12 P. R. 1900; P. L. R. 1900, p. 63.

(2) 21 M. L. J. 631; 9 Ind Cas. 937; (1911) 2 M. W. N. 143; 9 M. L. T. 359.

(3) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

Madras case above referred to. It may be taken as now settled that the right of appeal in a pending action is not a matter of procedure: and that the repeal of the Statute, which was in force at the time when the action was instituted and which regulated the course of appeal does not affect the right of appeal acquired or enjoyed under that Statute unless the repealing Statute, expressly or by necessary implication, takes away that right of appeal. This is the principle underlying section 6 of the General Clauses Act, as interpreted by the highest judicial authority in this country, the relevant words of which are as follows: "Where..... .....any Act of the Governor-General in Council.....made after the commencement of this Act, repeals any enactment hitherto made..... .....then, unless a different intenion appears, the repeal shall not .....

(*c*) affect any right, privilege..... .....acquired, accrued..... under any enactment so repealed; or

(*d*).....

(*e*) affect any investgation, legal proceeding or remedy in respect of any such right, privilege .....as aforesaid."

In the above section the words "*unless a different intention appears*" are of special importance, and with reference to those words, the question for decision in the present case is whether the intention of the Legislature, as expressed in section 154, read with Order XLIII, rule 1 (*u*) of the new Civil Procedure Code, was not to take away the right of appeal which the present appellant had under the provisions of section 562 of the old Code, which was in force when the suit was instituted, but which had not actually accrued to him at the time when the new Code came into operation, inasmuch as the order of remand, with reference to which the right of appeal is claimed, was not passed until after the 1st January 1909. In our opinion, the words "any present right of appeal" in section 154 of the new Code mean a right of appeal *in esse* and not *in posse*, a right of appeal which had actually come into existence and was capable of being exercised by the aggrieved party at the commencement of the new Code by reason of the decree or order appealed from having been passed before the 1st of January 1909. We venture to think that the learned Judges of the Madras High Court have not kept in veiw the full significance of the word "*present*" in the phrase "any present right of appeal" contained in the said section, as we are ourselves unble to understand how it could be said, without the language of the section being unduly strained, that the appellant before the Madras High Court or the appellant before us could reasonably claim that a *present* right of appeal had accrued to him at the commencement of the new Code in respect of an order which was not passed by the lower Appellate Court until long after that Code had come into force. Upon the view of the Madras High Court, the word "*present*" in section 154 is redundant, for it is not disputed by Mr. Sukh Dial that if that word were eliminated from the section, the dicision of the said High Court would have been exactly the same as it is now, and it seems to us that the learned Juges would then have expressed themselves with greater certainty as to the correctness of their opinion. They say in their judgment: "We confess the matter is by no means free from doubt"; and we are inclined to think that their doubt was due to the fact that the word "*present*" in the section in question rather indicated the intention of the Legislature only to save a right of appeal which could be exercised *in præsenti* at the commencement of the Code of 1908, and this could only be the case if the order appealed from was passed before January 1909. We would make our meaning clear by a simple illustration. Suppose, in the present case, the order of remand had been passed by the Divisional Judge, not on the 22nd April 1909, but on, say, the 15th December 1908; in other words, on some date before the new Code came into force. In that case, as soon as the Divisional Judge had passed his order of remand under section 562 of the old Civil Procedure Code, a *present* right to appeal from that order under section 588 (28) of the same Code would have accrued to the defendant at the commencement of the new Code, and under section 154 of that Code, the said right of appeal would have remained unaffected by the provisions of Order XLIII, rule 1 (*u*). In other words, notwithstanding the provisions of the new Code restricting the right of appeal from an order of remand, the defendant would have enjoyed an unqualified right to appeal

from that order at any time within the prescribed period of limitation. As soon, however, as the new Code came into force, the provisions of Order XLI, rule 23, and Order XLIII, rule 1 (*u*), became applicable to all orders of remand passed after the commencement of that Code, and no present right of appeal could be said to have accrued to the aggrieved party at its commencement in respect of the orders so passed. We fully agree in the construction which Mr. Justice William had placed on section 154 of the new Code in *Nand Lal* v. *Sohan Mal* (Civil Appeal No. 452 of 1909) and we hold that the right of appeal in respect of the order of remand passed by the Divisional Judge on the 22nd April 1909, is governed by the new Code of Civil Procedure and not by the old Code.

There is yet another reason why an appeal does not lie from the order in question. That order was passed, as it could only be passed, under rule 23, Order XLI of the new Code, and not under section 562 of the old Code, which was no longer in existence at the time when the remand was made. If, then, the case was not remanded, as it obviously could not be remanded, under section 562 aforesaid, no appeal could be preferred under section 588 (28) of the old Code. Both section 5 8 and section 588 (28) of the Code of 1882 have been swept away by the new Code with the result that where after the commencement of the latter Code a case has to be remanded by an Appellate Court after reversal of the decree of the original Court, which has disposed of the suit upon a preliminary point, the remand must be made under Order XLI, rule 23 of the present Code, and an appeal from the order of remand so made *can* only be preferred under Order XLIII, rule 1 (*u*), which allows an appeal only in cases where an appeal would lie from the decree of the Appellate Court. The appeal before us is an appeal from an order passed under rule 23 of Order XLI of the new Code and must be treated as having been preferred under the above mentioned Order and rule; and it is somewhat difficult to see how it can be treated as an appeal under saction 588 (28) of the old Civil Procedure Code, which only allowed an appeal from an order under section 562 of that Code, under which the order of remand, which is now impugned, was never passed.

For the above reasons, our answer to the question referred to us by the learned Judge in Chambers is that the right of appeal in respect of the Divisional Judge's order of remand in this case is governed by the new Code, and we hold that no appeal lies from that order to the Court. The case will now be remitted to the Judge in Chambers for disposal.

Reference disposed of.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 45 OF 1911.

July 8, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

SANT PERSHAD SINGH—PETITIONER—APPELLANT

versus

SHEO NARAYAN SINGH AND OTHERS—OPPOSITE PARTY—RESPONDENT.

Execution of decree—Sale—Application to set aside sale—Irregularities—Inadequacy of price—Value of property equal to decretal amount—Liability of judgment-debtor ceased on ground of limitation—Substantial injury—Civil Procedure Code (Act V of 1908), O. XXI, r. 90, Proviso.

In an application by a judgment-debtor to set aside a sale, it was found that there was a group of irregularities, that the price was inadequate, that this inadequacy was due to the irregularities, but that the value of the properties sold would not exceed the decretal amount and that the judgment-debtor's liability under the decree had ceased on the ground of limitation. It was contended on behalf of the decree-holder that no substantial injury was suffered by the judgment-debtor and that, therefore, the sale should not be set aside:

Held, that the irregularities occasioned a substantial injury to the applicant and the sale should be set aside.

Appeal from the order of the First Sub-Judge of Patna, dated December 21st, 1910.

Babus *Umakali Mukherjee* and *Rajeswar Pershad*, for the Appellant.

Babus *Mohendra Nath Roy* and *Chandra Sekhar Prosad Singh*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This appeal from order arises out of proceedings in execution. The application which initiated the present proceedings was one under Order XXI, rule 90, to set aside a sale on the ground of irregularity. The case has been argued before us on the basis of the judgment of the Subordinate Judge, which has been taken by both sides as a correct presentation of

the facts, but it is maintained that the conclusion of law at which he arrived on those facts is erroneous. The facts found by the Subordinate Judge were succinctly and at the same time clearly placed before us by Mr. Mohendra Nath Roy in the course of his argument. His submission was that six separate facts were found: (1) that the notice required by rule 66 has not been served; (2) that the proclamation had not been published; (3) that an inadequate price was stated in the proclamation; (4) that an inadequate price was in fact realized; (5) that the value of the properties would not exceed the amount under the decree; and (6) that the defendant's liability under the decree had ceased. The position constituted by the first four of these facts, then, is this, that there was a group of irregularities; that there was an inadequacy of price, and, according to the concession made before us, that this inadequacy was to be attributed to irregularities. But it was argued, and argued with very considerable ingenuity, that the fifth and sixth findings of fact saved the position, because they brought into play the saving operation of the proviso to rule 90 That proviso is in these terms: "Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud." It is said that there was no substantial injury, because, in the *first* place, the value of the property would not exceed the amount due under the decree, and *secondly*, because the defendant's liability had ceased. The conjoint operation of this, it is said, is such that it would be impossible to affirm that the applicant had sustained substantial injury. Ingenious as the argument is, I think it cannot be supported. A debtor is entitled to have those steps taken for which provision is made by the Code for the purpose of ensuring that his property will realize an adequate price and so enable him to pay off his debt in money or money's worth. It is no answer to him to say 'it is quite true there have been irregularities and a consequent inadequacy of price which has prevented you from paying off your debt in full, but you have the satisfaction of a shelter behind the statute of limitation.' That is not all that satisfaction an honest debtor desires and I do not think that the argument and the considerations involved in it are sufficient to enable a decree-holder and purchaser in a case like the present to say that substantial injury has not been suffered simply because further remedies may be barred by some technical rule of law.

I, therefore, feel bound to come to the conclusion on the first four findings of fact that there has been, as indeed it is conceded for the purposes of the argument before us, an inadequacy of price resulting from irregularities in the conduct of the sale and that this has occasioned a substantial injury to the applicant which has not been removed. I come to this conclusion not without some regret because the decree-holder purchaser was perfectly willing to allow the sale to be treated as one for a value that would enable the judgment-debtor to say that in fact the debt had been paid off in full. But the judgment debtor did not see his way to accepting this offer made by the decree-holder, and the result is that we must set aside the sale and, the case must go back to the lower Court where the proceedings in execution must be renewed.

The opposite party, respondents, must pay the costs in the Court below and in this appeal. We assess the hearing fee in this appeal at two gold *mohurs*.

N. CHATTERJEA, J.—I agree.

Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 146 OF 1910.

March 21, 1912.

Present:—Sir Henry Griffin, KT., Judge, and Mr. Justice Chamier.

W. BARROW—APPELLANT

versus

GAYA PRASAD—RESPONDENT.

Bengal Court of Wards Act (IX of 1879), *ss.* 10, 644. *—Notice—Presumption—Non-presentation of claim to the Collector, effect of—Interest, loss of.*

The Bengal Court of Wards Act, 1879, does not require a Collector to give notice to the creditors entered in any list, but it does require the issue of a general notice.

If the provisions of clauses *(b)* and *(c)* of section 644 of the Court of Wards Act are complied with in full and those of clause *(a)* are complied with partly, the

Court may presume that all the notices required by the section were published.

If a creditor does not submit his claim after the publication of the notice under the Act, the creditor loses his interest from that date.

First appeal from a decree of the Subordinate Judge of Benares.

Mr. *A. E. Ryves* (with him Mr. *Ghulam Mujtaba*), for the Appellant.

The Hon'ble Dr. *Sundar Lal* (with him the Hon'ble Mr. *Moti Lal Nehru*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the respondent, Gaya Prasad, for the recovery of Rs. 4,618-8 on the basis of a promissory-note said to have been made in his favour by Babu Ram Bahadur Singh, represented in this suit by the Court of Wards, Bengal, on the 11th of September 1906. First appeal No. 336 of 1910 arises out of a suit brought by the same person on three promissory-notes said to have been made in his favour by Ram Bahadur Singh on the 27th of December 1906, 29th of December 1906, and 31st of December 1906. Ram Bahadur Singh was, on his own application, under section 6 (*e*) of the Bengal Court of Wards Act, IX of 1879, declared to be a disqualified proprietor and his estate was taken under the charge of the Court of Wards in March 1907. Both the suits were tried together in the Court below and may be disposed of here by the same judgment. The Court of Wards pleaded that the notes were not made for consideration, and that the ward, Ram Bahadur Singh, had, after his estate was taken under the management of the Court of Wards, made the promissory-notes in favour of the respondent in pursuance of an arrangement that if the amounts of the notes were paid by the Court of Wards, those amounts would be divided between the respondent and the ward. The Court of Wards further pleaded that Ram Bahadur Singh had not mentioned these promissory-notes in the list of debts when his estate was taken under the charge of the Court of Wards, although the claims of other petty creditors were mentioned, that the respondent did not file particulars of his claim before the Collector of Monghyr notwithstanding the publication of a general notice under Bengal Act I of 1906, which amended the Bengal Court of Wards Act of 1879, and that, therefore, no suit could be maintained on the promissory-notes.

The Subordinate Judge fixed three issues; (1) Whether the notes were admissible in evidence; (2) whether the notes were made for consideration and whether they were ante-dated, and (3) whether the plaintiff was entitled to interest. The Subordinate Judge found that the notes were admissible in evidence, that they were made for the consideration mentioned therein and were made on the dates on which they purport to have been made, and that the respondent was entitled to interest. Accordingly, he decreed the claims.

The Court of Wards appeal. In this Court, they repeat the pleas taken in the Court below and suggest that the trial of the case was unsatisfactory and that this Court should order a further inquiry.

[On the question whether the promissory-notes were made on the dates on which they purport to have been made, their Lordships discussed the evidence and proceeded:]

In the face of the direct evidence of the respondent and the ward, we are unable to hold that the notes were ante-dated, and we affirm the decision of the Subordinate Judge that they were made for consideration and were made on the dates on which they purport to have been made.

The next question is, whether the suits are maintainable in view of the provisions of the Bengal Court of Wards Amendment Act No. I of 1906. By section 3 of that Act, several new sections were inserted after section 10 of the Court of Wards Act of 1879. The first of them, section 10A, provides that when the Court of Wards assumes charge of any person or property under section 7 or section 10, it shall publish in the manner provided in section 64A a notice calling upon all creditors, having claims against the ward or his moveable property, to submit the same in writing to the Court at a place to be named in the notice, within six months from the date of the publication of the notice, and every such claim not submitted to the Court shall, with certain exceptions which are not material in this case, cease to carry interest from the date of the expiry of the period aforesaid. Section 10B, sub-section (1), provides that every creditor, submitting his claim in compliance with the provisions of section 10A, shall submit with his written

statement of claim full particulars thereof and shall, within such time as the Court may appoint, produce all documents which are in his possession, power or control, on which he relies to support his claim. Sub-section (3) of the same section provides that if any document, which to the knowledge of the creditor is in his possession, power or control, is not produced by him as is required by sub-section (1), the document will not be admissible in evidence against the ward in any suit brought by the creditor in respect of such claim. By section 10 of the Act of 1906, a new section, *i.e.*, section 64A, was inserted in the Act of 1879 to the effect that any notice required to be published by the provisions of sub section (1) of section 10A shall be published,—

(*a*) In the English and in the vernacular official Gazettes;

(*b*) in at least three issues each of one English and one vernacular newspaper published in Calcutta;

(*c*) in two issues of a newspaper, (if any), published in the district or division in which the ward ordinarily resides or has last resided, and

(*d*) by posting such notice on the notice boards in the offices of the Collector and of the Judge of the district in which the place named in the notice is situate.

The Subordinate Judge seems to have misunderstood these provisions. He says that it was incumbent on the Collector to issue notices to the creditors whose names appeared in the list submitted by the ward, and that such creditors are required to produce the documents in their possession, and that the respondent was never served with any such notice. The Act does not require the Collector to give notice to the creditors entered in any list, but it does require the issue of a general notice. Counsel for the Court of Wards has produced in this Court with our permission a copy of the vernacular official Gazette, issues of Vernacluar and English newspapers published in Calcutta and two issues of a newspaper published in the Division in which the ward resided, which show that the provisions of clauses (*b*) and (*c*) of section 64A were complied with in full and those of clause (*a*) were partly complied with. There is no evidence, and it would probably be difficult to produce evidence at this time, that notices were affixed to the notice board in the offices of the Collector and Judge of the district. In view of the notices to which we have already referred, and the evidence of the Special Manager and in view of the fact that due publication of the notices was not denied in the Court below, we may fairly presume that all the notices required by section 64A were published as required by that section.

It is contended by Pandit Sunder Lal, on behalf of the respondent, that when a creditor does not submit a claim at all, the penal provisions of sub-section (3) of section 10B of the Act are not applicable, and that the only penalty, which such a creditor incurs, is the loss of interest under sub-section (2) of section 10A of the Act. It may be doubted if this result was intended by the framers of the Act, but sub section (3) of section 10B provides that if a document is not produced as required by sub-section (1), the document shall not be admissible in evidence thereafter. Sub section (1) does not oblige the creditor to produce his documents with his claim. He is required to produce his documents within such time as the Court may appoint. There is nothing to show that the Collector appointed any time for any of the creditors of the ward to produce their documents and he could not require the respondent to produce his documents when he was not aware that the respondent had a claim against the ward. It seems to us that the only penalty which the respondent has incurred by not presenting his claim to the Collector is the loss of interest on the promissory-notes after a certain date.

With reference to the suggestion that the case should go back for further inquiry, we need only say that we have examined the record and find that ample time was given to the Court of Wards for the production of evidence. The date fixed for filing the written statement in each case was altered from time to time, and ultimately the 1st of March 1910, was fixed for the filing of the written statements and the 10th March was fixed

for the settlement of issues. On the latter date, the Court of Wards presented a petition in which they asked for further time for the production of evidence, and the Court fixed the 5th May 1910. It is evident that the Court of Wards knew that they had to produce evidence on the 5th of May. They did produce some evidence on that date and a few days before that date they applied for the issue of commissions which were refused on the ground that the evidence to be taken would be irrelevant, and on the 5th of May, the Court of Wards did not ask for any further adjournment. It is impossible to say that they were taken by surprise or that they had not sufficient time to produce evidence. The proceedings in the Court below were certainly somewhat summary, but no definite ground has been made out on which we could order a re-trial, and as we have said above, no objection seems to have been taken to the procedure adopted by the Subordinate Judge. The result is that we hold that the claim for the principal sums of the promissory-notes must be decreed, and we must allow interest in both the cases from the date of the promissory-notes up to the 2nd of October, 1907, that is, the date on which the six months' notice under section 10 expired. The decrees of the Court below are modified accordingly. The parties will pay and receive costs in proportion to failure and success.

Decree varied.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 86 OF 1910.

April 19, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar,

YEMANI CHINNA SESHAYA—APPELLANT

versus

VARANASI PEPAYA AND OTHERS—RESPONDENTS.

Mortgage-decree—Execution application—Limitation—Decree absolute, starting point—Transfer of Property Act (IV of 1882), s. 89—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182.

In an application for execution of a mortgage decree, the date of the order absolute is to be considered as the date of the decree for the purpose of calculating the period of limitation.

Ashfaq Husain v. *Gauri Sahai*, 33 A. 264; 15 C. W. N 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. J. 1140; 9 Ind. Cas. 975, followed.

Civil Miscellaneous second appeal against the order of the Subordinate Judge of Ellore, in A. S. No. 332 of 1909, preferred against the order of the District Munsif of Tanuku, in E. P. No. 332 of 1909 (O. S. No. 52 of 1905), dated 22nd June 1909.

FACTS.—The facts of the case are sufficiently clear from the following judgment of the lower Appellate Court:—

This appeal arose out of an order passed by the District Munsif of Tanuku in the execution petition presented by the plaintiff requesting the Court to pass orders for the sale of the mortgaged property.

2. The defendants contended that the application was barred inasmuch as the notice issued on Execution Petition No. 115 of 1906 was a notice under section 89 of the Transfer of Property Act and not one under section 248 of the old Civil Procedure Code.

3. The District Munsif, upholding the contention of the defendants, dismissed the application. Hence this application.

4. The only point arising for determination in this appeal is whether the application of the appellant was barred or not. The Execution Application No. 115 of 1903, under section 253 of the old Code and section 89 of the Transfer of Property Act, was filed on 3rd February 1906. On 14th idem, notice was ordered to show cause why the decree should not be made absolute. It was served on the defendants on 2nd of April 1903 and the decree was made absolute on 19th idem.

5. But no notice under section 248 of the old Civil Procedure Code was issued at any time on the last execution application, Execution Petition No. 115 of 1906. Therefore, the mere issue of a notice under section 89 of the Transfer of Property Act cannot help the plaintiff nor can it be said that the order making the decree absolute was passed in execution proceedings.

6. It was next contended that the new Limitation Act applied to the present case and that an execution application to issue notice to show cause why a decree should not

be made absolute was in effect an application for the issue of notice to show cause why it should not be executed and, therefore, under Article 182, clause 6, it saved limitation. But I see no force in this contention. The order in question was passed on 14th March 1906, when the old Code was in force and the application is clearly time-barred.

7. The appeal fails and is dismissed with costs.

Mr. *B. Sitaram Row*, for the Appellant.

Mr. *B. Narasimha Row*, for the Respondents.

JUDGMENT.—After the decision of the Privy Council in *Ashfaq Husain* v. *Gauri Sahai* (1), we think we are bound to hold that the date of the order absolute is to be considered as the date of the decree for the purpose of calculating the period of limitation in the case of application for execution of the decree. The present application is, therefore, within time, and we set aside the order of the Court below and direct the Court of first instance to deal with the application for execution according to law.

The appellant will have his costs throughout.

Appeal allowed.

(1) 33 A. 264; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; 9 Ind. Cas. 975.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 803 OF 1911.

April 9, 1912.

Present:—Mr. Justice Banerji.

RAM SINGH—APPELLANT

versus

LALTA PRASAD—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 159, 160—Suit for arrears of revenue payable or paid by lambardar—*Limitation.*

Section 159 of the Agra Tenancy Act contemplates a suit by a *lambardar* for arrears of revenue payable to the Government through the *lambardar* by a co-sharer, whether such revenue has actually been paid or not. The limitation for such a suit is three years from the date when the revenue became payable. Section 160 contemplates a case where arrears of revenue have actually been paid by one co-sharer for another, whether the co-sharer paying the revenue be a *lambardar* or not. The limitation under this section runs from the date of actual payment.

Second appeal from the decision of the District Judge of Bareilly.

Mr. *Sital Prashad Ghose*, for the Appellant.

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.—I think the conclusion at which the Courts below have arrived is correct. The plaintiff is the *lambardar* and he brought the suit, out of which this appeal has arisen, against the defendant, who is a co-sharer, to recover arrears of revenue paid by the plaintiff for the defendant. The amount of the revenue was actually paid on the 3rd of July 1906. The suit was brought on the 30th of June 1909. The question is whether the claim is time barred. The decision of this question depends on whether the suit was in reality a suit under section 159 of the Agra Tenancy Act or under section 160 of that Act. Section 159 contemplates a suit by a *lambardar* for arrears of revenue *payable* to the Government through the *lambardar* by a co-sharer, whether such revenue has actually been paid or not. The limitation for such a suit is three years from the date when the revenue became payable. Section 160 contemplates a case where arrears of revenue have actually been paid by one co-sharer for another. The two sections make a distinction between revenue which is payable and revenue which has actually been paid. Where a person who has paid the revenue happens to be a co-sharer, he can sue his co-sharer, for whom he has paid the revenue, within three years of the date of payment. If he happens to be the *lambardar*, that would, in my opinion, not take the case out of the category of those contemplated by section 160. As I have already said, where the *lambardar* sues to recover arrears of revenue payable by a co-sharer, the suit is one under section 159, and such a suit must be brought within three years from the date when the arrears became payable. In the present case, the arrears were actually paid. Therefore, this was in reality a suit under section 160 and was well within limitation. This is the only point argued. I dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 97 OF 1911.

July 5, 1912.

Present:—Mr. Justice Chevis.

Musammat BHAGI, WIDOW OF JIWAN—PLAINTIFF—APPELLANT

versus

MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 12(a)—Widow's right to pre-empt as heir—Widow, whether heir under Customary Law.

Where a widow has a right to succeed collaterally, she has a right to pre-empt under section 12 (*a*) of the Pre-emption Act. Under section 12*(a)*, the right of pre-emption is not confined to agnates alone.

Obiter—Under the Customary Law, as under the Hindu Law, a widow is an heir of her husband.

Sher Muhammad v. *Phula*, 9 P. R. 1899, referred to.

Second appeal from the order of the Divisional Judge, Jhelum Division, dated the 8th August 1910, affirming that of the Munsif, 1st class, Jhelum, dated the 15th June 1907, dismissing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Messrs. *Nanak Chand* and *Devi Dyal*, for the Respondents.

JUDGMENT.—The dispute is between two rival pre-emptors, *Musammat* Bhagu, widow of Jiwan, (now appellant), and Muhammad (now respondent). The vendor is *Musammat* Jawai, widow of Raja. It may be noted that Jiwan (appellant's husband) is a nearer agnate of Raja than Muhammad is. Therefore, if it be held that a widow is entitled to succeed collaterally in this particular tribe, and that a widow entitled to succeed to possession on an ordinary widow's life-tenure is to be reckoned as included in the persons "entitled to inherit" [see section 12 (*a*) of the Pre-emption Act], the preference must be given to *Musammat* Bhagu.

The first Court dismissed *Musammat* Bhagu's claim, and gave Muhammad a decree, holding that *Musammat* Bhagu had failed to prove that in this tribe widows succeed collaterally. The learned Divisional Judge remanded for further inquiry on two issues, one of which was, whether, according to the custom of the tribe, *Musammat* Bhagu could succeed collaterally. But later on, the Divisional Judge dismissed *Musammat* Bhagu's appeal without deciding the above issue, holding that the phrase in section 12 (*a*) "persons entitled to inherit" only referred to persons entitled to inherit as full owners, and not to persons succeeding to a limited interest such as widows and daughters.

Both Courts held that Muhammad was not estopped by confession from contesting *Musammat* Bhagu's claim and on this part of the case, I agree with the lower Courts. It is true that in the statement of Muhammad recorded by the first Court, we find the sentence, "my right is not greater than *Musammat* Bhagu's", but seeing that in the written pleas, Muhammad had clearly stated that a woman had no rights of pre-emption under section 12 (*a*), I can only conclude that what he meant was, "if *Musammat* Bhagu has a right to pre-empt, I cannot say that my right is superior to hers".

As to the question whether a widow entitled to succeed to a widow's life-tenure is a person "entitled to inherit" within the meaning of section 12 (*a*) of the Pre-emption Act, it is urged on appellant's behalf that there is no difference in such cases between inheriting and succeeding. In Mayne's Hindu Law, 7th Edition, para 605, I find it stated that the typical form of estate *inherited* from a male is the widow's estate. The para. goes on to state that it is wholly incorrect to speak of a widow's estate as one for life only; that Hindu Law measures estates not by duration but by use, and that though restrictions upon the use of an estate *inherited* by a woman are different in degree to those which limit the powers of a male holder, they are similar in kind; that the distinctive feature of the estate is that at the widow's death, the land reverts to the heirs of the last male owner, as the widow never becomes a fresh stock of descent. In the following paragraphs too, I find frequent passages speaking of a widow as *inheriting* from her husband; in fact the Chapter is headed "Woman's Estate in property *inherited* from males"

But for the respondent it is urged that according to Customary Law, a widow is not an heir but only holds the estate in lieu of maintenance. But I fail entirely to see that there is any difference between Customary Law and Hindu Law so far as the present case is concerned. In *Sher Muhammad* v. *Phula* (1), I find it stated by authority, for which I have high respect, that: "There

(1) 9 P. R. 1899.

are strong analogies between the estate of a widow under Customary Law and her estate under Hindu Law; under both laws, she holds for life for the purpose of maintenance with certain powers of disposition necessarily incident to her position" (*vide* page 51). And later on in the same paragraph, I find a remark to the effect that a widow can surrender her estate but can only do so to the *next heir*, which distinctly refers to the widow as the *first* heir to her husband. There seems to me no reason to hold that either under Hindu or Customary Law, a widow is not an heir, and in cases where a widow succeeds collaterally, I take it that the theory is that she inherits from her husband's collateral as heir of her husband.

It has also been argued on respondent's behalf that the intention of the Legislature was to confine the right of pre-emption to agnates. But in some parts of section 12, agnates are specifically referred to, *e. g.*, section 12 (*b*) *secondly*, and if the intention was to confine the right of pre emption under section 12 (*a*) to agnates alone, it would have been quite easy to say so. On this point, Civil Appeal No. 1268 of 1907 may also be referred to. I hold, therefore, that if the appellant has a right to succeed collaterally, she has a right to pre empt under section 12 (*a*). And if she has a right to pre-empt under section 12 (*a*), her right is obviously superior to that of Muhammad. But has she a right to succeed collaterally? That is the real point for inquiry in this case, the other points being merely legal; on this point, no decision has been arrived at by the learned Divisional Judge. The appellant's Counsel wishes me to decide the point, urging that there is sufficient material on the record, but respondents' Counsel asks for a remand, and though I undoubtedly have the power to decide the point, I think it more in accordance with the usual practice of this Court in such cases to remand the case.

I accept the appeal and setting aside the decision of the learned Divisional Judge, I remand the case under Order XLI, rule, 23 for decision in due course on the merits. The decision will, of course, rest on the answer to the question whether in this particular tribe a widow succeeds collaterally.

Stamp on appeal to be refunded. Other costs of appeal to follow the event.

Appeal allowed.

CALCUTTA HIGH COURT.

COURT ORDER No. 20 OF 1912.

June 10, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.

BHIKARI SUKUL AND OTHERS—JUDGMENT-DEBTORS—PETITIONERS

versus

Mohant GADADHAR RAMANUJ DAS—DECREE-HOLDER—OPPOSITE PARTY.

Bengal Rent Act (X of 1859), s. 109, scope of—Single execution creditor and single judgment-debtor—Case of several judgment-debtors—Execution against some of judgment-debtors—Proceeding against immoveable property of some judgment-debtors whose moveables and persons also were proceeded against, though no proceeding taken against other judgment-debtors—Process against moveables on first execution—Proceedings against immoveable property subsequently, though moveables came into judgment-debtor's possession in the meantime—Sale of immoveable property—Onus *of proof—Decree to be self-contained—Execution as decree stands.*

Section 109 of the Bengal Rent Act, 1859, contemplates the case of a single execution-creditor and a single judgment-debtor; it does not specifically refer to the case of a joint and several decree against a number of judgment-debtors, in which case the decree-holder is at liberty to take out execution against any or as many of the judgment-debtors as he may choose. And the requirements of the section are satisfied if, in so far as an individual judgment-debtor is concerned, proceedings have been taken against his person or moveable property before an attempt is made to reach his immoveable property; he has no concern with his fellow judgment-debtors against whom the decree-holder may not proceed at all at his choice. In other words, execution can be taken out of a decree for money under the Bengal Rent Act, 1859, not being money due as arrears of rent of a saleable under-tenure, against the immoveable property of some of the judgment-debtors, whose moveable property and person had been proceeded against previously, although the moveables belonging to the other judgment-debtors have not yet been sold.

Process against moveable property must be taken upon the first application for execution of such a decree; and after moveable property has been exhausted, the decree-holder is free to proceed against immoveable property upon succeeding applications for execution, notwithstanding that other moveable property has come into the possession of the judgment-debtor in the meantime.

An application against the person of the judgment-debtor is not a condition precedent to the maintenance of an application for execution against immoveable property.

Deanutoollah v. *Nawab Nazim Sidhee Nazir Ali Khan*, 10 W. R. 341, 1 B. L. R. 216, referred to.

It is not the true meaning of section 109 that if an application has been made for execution against the immoveable property of the judgment-debtor, it can be defeated by him only if he proves that he has moveable property within the district sufficient for the *complete satisfaction* of the judgment-debt. The decree-holder is not free to ignore the moveable property, even upon the first application for execution

although its value is not sufficient for the full satisfaction of his decree.

A decree must be self-contained and must be executed as it stands.

Grish Chunder v. *Shoshi Shikhareswar*, 27 I. A. 110; 27 C. 951, *Chhoti Narain Singh* v. *Rimeswar Kuar*, 6 C. W. N. 796, *Jai Gobind* v. *Patesri Narain*, A. W. N. (1907) 286, 4 A. L. J. 765, relied upon.

In a suit it was ordered that a decree be passed in accordance with the *solenamah* filed by the parties, but the provision in the *solenamah*, as to the payment of interest in the event of default, was not incorporated in the decree:

Held, that the decree-holder was not entitled to take out execution of interest under the decree as it stood, but he might apply for amendment of the decree.

Application against the order of the Deputy Collector, Bhadrak, dated December 1st 1911.

Babus *Mohendra Nath Roy* and *Khetra Mohan Sen*, for the Petitioners.

Babus *Provas Chandra Mitter* and *Sushil Madhab Mallik*, for the Opposite Party.

JUDGMENT.—We are invited by the petitioners to set aside an order made in execution of a decree for money obtained against them by the opposite party, on the 30th May 1899, under the Bengal Rent Act, (X of 1859). The decree-holder has made successive applications, for execution and realised various sums from time to time. In the application whereby the present proceedings were instituted on the 20th May 1911, the decree holder prayed for sale of the moveable properties of the judgment-debtors, for the arrest of their persons, and, if the decree was not satisfied by these means, for the sale of their immoveable properties. The judgment-debtors took exception to the application on two grounds, *first*, that it was not maintainable under section 109 of the Bengal Rent Act, 1859; and *secondly*, that the claim for interest was not sustainable. The Court below has overruled these objections and directed execution to proceed. In this Court, the objections mentioned have been re-iterated.

In support of the first objection, it has been urged, *first*, that no execution can be taken out against the immoveable properties of some of the judgment-debtors as the moveables belonging to the other judgment-debtors have not yet been sold; and, *secondly*, that execution cannot be sought against the immoveable properties, when, on the face of the application, the decree-holder asserts that there are moveables against which he wishes to proceed. In support of the second objection that the claim for interest is not sustainable, reference has been made to the terms of the decree, which, although referring to a petition of compromise whereon it is based, specifically allows the plaintiff a sum of Rs. 3,500 and the costs of the litigation.

In so far as the first branch of the first ground is concerned, it is plainly unsubstantial. Section 109 of the Bengal Rent Act, 1859, provides that in the execution of any decree for the payment of money under the Act, not being money due as arrears of rent of a saleable under-tenure, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor within the district in which the suit was instituted, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor. This section, it will be observed, clearly contemplates the case of a single execution creditor and a single judgment-debtor; it does not specifically refer to the case of a joint and several decree against a number of judgment-debtors. In the present case, the decree under execution is a joint and several decree, and the decree holder is at liberty to take out execution against any or as many of the judgment-debtors as he may choose. He has apparently not taken out execution against two of the judgment-debtors and has proceeded against the remaining persons. It has been argued, on behalf of the petitioners, that inasmuch as no proceedings have been taken either against the persons or the moveable properties of these two judgment-debtors, the decree-holder is not entitled to apply for execution against the immoveable properties of the other judgment-debtors, although, so far as the latter are concerned, their moveable properties have been already exhausted. In our opinion, this contention is ingenious but unsound. The section obviously contemplates that an application for execution against the immoveable property of a judgment debtor is not to be made till proceedings have been taken against his person or moveable property. The requirements of the law are satisfied, if, in so far as an individual judgment-debtor is concerned, proceedings have been taken against his person or moveable property before an attempt is made to reach his immoveable property; he has no concern with his fellow

judgment-debtors, and, he cannot indirectly restrict the right of the execution-creditor to proceed at his choice against one or some only of the entire body of judgment-debtors. The first branch of the first contention, therefore, cannot be sustained.

In so far as the second branch of the first ground is concerned, it has been argued that before execution can be applied for against immoveable property belonging to the judgment debtor, it must be shown that his moveable properties have been exhausted or that proceedings have been taken against his person; in other words, that an application for execution against immoveable property cannot at all be received and entertained so long as there is any moveable property against which execution may possibly be taken out. This contention is, in our opinion, too broadly formulated. Even if it be assumed that in the initial application for execution, a prayer for process against immoveable property cannot be coupled with a prayer for process against moveable property, the position cannot be maintained in respect of subsequent applications made after the moveable properties have been exhausted on a previous application and proceedings have been taken against immoveable properties. Once the decree-holder has reached the stage when he becomes entitled to proceed against immoveable property, upon a subsequent application for execution, he is free to proceed against immoveable properties, and it is not obligatory upon him to seek out and proceed against moveable properties, such for instance, as may have come into the possession of the judgment-debtor in the interval. Consequently, it is open to him to join in such subsequent application a prayer for process against moveable properties with a prayer for process against immoveable properties. In the case before us, it is not disputed, that, on a previous application for execution, proceedings were taken by the decree-holder against immoveable property, apparently without objection on the part of the judgment-debtors; it is, consequently, open to him to proceed against immoveable properties on the basis of the present application. We may add that, in this connection, it was suggested, though somewhat faintly, that an application against the person is a condition precedent to the maintenance of an application for execution against immoveable property. There is no substance, however, in this contention. The decree-holder is not anxious to arrest the judgment-debtors; he does not believe that the judgment-debt is likely to be satisfied by the arrest of the judgment-debtors; nor, so far as we can gather, are the judgment-debtors themselves anxious to be arrested at the instance of the decree-holder. We must, consequently, hold that the application, as framed, is maintainable under section 109. The view we take is supported by the observations of Sir Barnes Peacock, C. J , in the case of *Deanutoollah* v. *Nawab Nazim Sidhee Nazir Ali Khan* (1), where the learned Chief Justice explained the object of section 109. Section 109 shows clearly that, as a general rule, process of execution for a money-decree under the Bengal Rent Act, 1859, is not to be levied in the first instance by attachment of immoveable property; the Legislature seems to have been anxious to guard against the sale of immoveable property in execution of decrees of the Revenue Courts under that Act, until the moveable property should have been first exhausted. The second branch of the first contention must, consequently, fail. Before we proceed to deal with the second ground, we may refer briefly to two extreme contentions, one by the decree-holder, another by the judgment-debtor,—neither of which can be supported It was argued on behalf of the decree-holder, that if an application has been made for execution against the immoveable property of the judgment debtor, it can be defeated by him only if he proves that he has moveable property within the district sufficient for the *complete satisfaction* of the judgment-debt. That is clearly not the true meaning of section 109. As Sir Barnes Peacock puts it, the decree-holder is bound to proceed against the moveable property and exhaust it in the first instance, even though the proceeds may not be sufficient to satisfy the judgment-debt. It is only after the moveable property has been exhausted, that execution can be taken out against immoveable property for the recovery of the balance. The suggestion of the decree holder that he is free to ignore the moveable property, even upon the first application for execution, if its value is not

(1) 10 W. R. 341; 1 B. L. R. 216.

sufficient for the full satisfaction of his decree, is wholly groundless. Equally unfounded is the argument put forward at one stage by the judgment-debtor that even in the case of successive applications for execution, it is incumbent on the decree-holder at every stage to seek out and proceed against the moveable properties of the judgment debtor before he can attach the immoveable properties. This argument is clearly unsustainable. If the contention were to prevail, the inference would follow that he is bound to proceed not only against moveable properties each time he applies but also against the person of the judgment-debtors on every successive application. This, however, he is not competent to do in view of the provisions of section 94 of the Bengal Rent Recovery Act, 1859. Consequently, process against moveable property must be taken upon the first application for execution: and after the moveable property has been exhausted, the decree-holder is free to proceed against immoveable property upon succeeding applications for execution, notwithstanding that other moveable property may have come into the possession of the judgment debtor in the meantime.

In so far as the second ground is concerned, it has been pointed out that the decree was made by consent of parties and was based on a petition of compromise. The petition stated that the plaintiff was entitled to recover Rs. 3,500, that the sum would be paid in two equal instalments on the 15th October 1899 and the 10th February 1900, and that if the sum was not so paid, interest would run at the prescribed rate. When the decree, however, came to be drawn up, it was ordered that, in accordance with the *solenamah*, a decree be passed in favour of the plaintiff for Rs. 3,500 and for costs of the suit. The provision as to the payment of interest in the event of default was not incorporated in the decree. The reason possibly was that as the agreement for payment of interest was contingent upon future default on the part of the judgment-debtors, it was thought unnecessary to incorporate the terms in the decree. If so, it was clearly a mistake. The decree must be self-contained and must be executed as it stands. *Ghrish Chunder* v. *Soshi Shikhareswar Roy*(2), *Chhoti Narain Singh* v. *Musammat Rameswar Koer* (3); *Jai Gobind* v. *Patesari Narain* (4). There is no question that under the decree, as it stands, the decree-holder is not entitled to take out execution for interest. It will be open, however, to the decree-holder to consider whether he should apply to the Court, which made the decree, for amendment thereof, and to obtain a decree in accordance with the terms of the compromise. All that we now decide is that, under the decree as it stands, the claim for interest cannot be sustained. The second objection must, consequently, prevail.

The result is that the application is granted in part. The order of the Court below, in so far as it allows the decree-holder to realise interest, is set aside, but is confirmed in other respects. As there are no merits in the application and as the substantial ground has failed, while the ground whereupon the petitioners have succeeded in part is of an entirely technical character, they must pay the costs of the opposite party who have appeared on notice. We assess the hearing fee at five gold *mohurs*.

Application partly granted.

(2) 27 I. A. 110; 27 C. 951.
(3) 6 C. W. N. 796.
(4) A. W. N. (1907) 286; 4 A. L. J. 765.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 64 OF 1911.

May 2, 1912.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Maharaja RAJA SREE MAHARAJA SAHIB, MEHARABAN DOSTAN SREE MAHARAJA SRI HON'BLE ROW VENKATA SWETA CHELLAPATHI RANGA ROW BAHADUR, K. C. I. E., MAHARAJA OF BOBBILI—APPELLANT

versus

SREE RAJAH NARASARAJU PEDA BOLIAR SINHULU BAHADUR GARU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 38, 39, 41—Civil Procedure Code (Act XIV of 1882), s. 223—Transmission of decree for execution—Simultaneous or concurrent execution by Court which passed decree and to which it is sent for execution—Application to latter Court for execution—Dismissal of petition—Subsequent application to Court which passed decree—Application to 'proper Court'—Limitation.

MAHARAJA OF BOBBILI *v.* NARASARAJU PEDA.

The Court which passed a decree can order concurrent execution of it simultaneously with execution proceedings initiated by the Court to which it has been sent for execution, but such execution should be allowed only in exceptional circumstances. It is only when such execution is necessary in the interests of the decree-holder, and when it can be carried on without hardship to the judgment-debtor, that it ought to be allowed by the Court which passed the decree.

Saroda Prosad Mullick v. *Luchmeeput Singh Doogur*, 14 M. I. A. 529 at p. 540; 17 W. R 289; 10 B. L. R. 214 and *Kristo Kishore Dutt* v. *Rup Lal Das*, 8 C. 687; 10 C. L. R. 609, referred to.

When a decree is transferred by the Court which passed it to another Court for execution, and an application made to the latter Court is dismissed, a subsequent application for execution made to the Court which passed the decree, while the result of execution has not been certified by the Court to which it was sent for execution, is not an application made to the 'proper Court,' unless there is an order permitting simultaneous execution along with execution proceedings initiated in the Court to which the decree was sent for execution.

Abda Begam v. *Muzaffar Husain*, 20 A. 129, referred to.

Kristo Kishore Dutt v. *Roop Lall Dass*, 8 C. 687, 10 C. L. R. 609, distinguished.

Plaintiff obtained a decree in the District Court of Vizagapatam. It was sent for execution to the Parvatipur Munsif's Court on 5th October 1904. There the petition for execution was dismissed by the Munsif on 10th March 1905. On 13th December 1907, plaintiff applied for execution to the District Court of Vizagapatam, which returned the petition for amendment under section 235, Civil Procedure Code, 1882. The petition was represented without amendment and the District Court simply recorded it. On 21st October 1910, the decree-holder applied to the District Court for execution:

Held, (1) that the application, of 13th October 1907, was a step-in-aid of execution which saved limitation;

Pachiappa Achari v. *Poojali Seenan*, 28 M. 557, followed.

(2) that the application, dated 13th October 1907, was not made to the 'proper Court' as the District Munsif's Court of Parvatipur had seisin of the execution proceedings.

Abda Begam v. *Muzaffar Husain*, 20 A. 129, referred to.

Appeal against the order of the District Court of Vizagapatam, dated 26th October 1910, in E. P. No. 15 of 1910, in O. S. No. 11 of 1903.

The Hon'ble Mr. *L. A. Govindaraghava Iyer*, and Mr. *V. Ramesam*, for the Appellant.

Mr. *B. Narasimhaswara Sarma*, for the Respondents.

JUDGMENT.

SANKARAN NAIR, J.—The question is whether the plaintiff's application is barred by limitation. The plaintiff obtained a decree in O.S. No. 11 of 1903 on the file of the District Court of Vizagapatam. The decree was transferred to the District Munsif's Court of Paravatipur for execution on the 5th October 1904. The decree-holders got certain immoveable properties attached, but the petition was dismissed on the 10th of March 1905 and no further steps were taken in the District Munsif's Court. The decree-holder then applied to the District Court at Vizagapatam on the 13th December 1907 for the sale of the property attached by the District Munsif. The petition was returned for amendment under section 235 of the Code of Civil Procedure of 1882. It was re-presented without amendment and was then recorded without being registered. The decree-holder makes this present application on the 21st April 1910 for notice and for the realisation of the amount by sale of the properties already attached. The question whether this present application is barred by limitation depends on the question whether the application of the 13th December 1907 to the District Court was in accordance with law and to the proper Court.

The application of the 13th of December 1907 prayed for notice under section 248 of the Civil Procedure Code of 1882 and the decision of the District Judge that such application must be treated as a step-in-aid of execution is in accordance with the decision in *Pachiappa Achari* v. *Poojali Seenan*(1). The only question that remains, therefore, for decision, is, whether the application is made to the 'proper Court.' The District Judge decides that the proper Court to which the application should have been made was the District Munsif's Court of Parvatipur, to which the decree had been transferred for execution and that, therefore, the present application is barred. Under section 223 of the Civil Procedure Code of 1882 (section 41 of the present Code), the Munsif's Court of Parvatipur, to which the decree was sent for execution, has to certify to the District Court of Vizagapatam the fact of such execution or, if the Munsif's Court fails to execute the decree, the circumstances attending such failure. Till that is done, the Munsif's Court retains its jurisdiction to execute the decree; See *Abda Begam* v. *Muzaffar Husain Khan* (2).

There is no doubt, therefore, that the Munsif's Court had jurisdiction to entertain a similar application for sale though that

(1) 28 M. 557.
(2) 20 A. 129.

Court had dismissed the application for execution in 1905. This was not denied in argument before us.

The next question is, whether that is the only Court to which this application could be made or, had the District Court also jurisdiction to order the sale of the property. Under section 38 of the Civil Procedure Code of 1908 (section 223 of the Code of Act XIV of 1882), the decree may be executed either by the Court which passed it or to which it is sent for execution. This in itself does not authorise the District Court of Vizagapatam, which passed the decree, to execute it after it had been sent for execution to the Munsif's Court of Parvatipur. Section 39 states the condition under which a decree may be sent to another Court for execution. Under clause (*c*), it may be sent for execution to another Court if the Court directs the sale or delivery of immoveable property situated outside the limits of the jurisdiction of the Court, which passed the decree, and, presumably, within the limits of the jurisdiction of the Court to which it is sent for execution. The reason for the transfer of this case is plain enough. By clause (*a*), it may also be sent to another Court if the judgment-debtor resides there or carries on business or works for gain within the limits of the jurisdiction of that Court. Under clause (*b*), if the judgment-debtor has no property within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree and has property within the limits of the jurisdiction of the Court, to which it is sent, the decree may be sent to that Court for execution. Under clause (*d*) of section 39, if the Court which passed the decree considers for reasons, which shall be recorded in writing, that the decree should be executed by another Court, then also the decree may be sent to another Court for execution. This section does not say that, after the decree has been sent to another Court for execution, the Court passing the decree may not simultaneously carry on execution proceedings but it is plain enough that section 39 intends that it is only for special reasons that the decree should be sent to another Court for execution. Thus, if there is sufficient property by the sale of which the debt may be realised ordinarily, no Court would be justified in sending the decree to another Court for execution. At the same time, it is quite possible that concurrent execution may be necessary. If, for instance, a property within the jurisdiction of the Court which passed the decree is comparatively not of much value and the property within the jurisdiction of the Court to which the decree is sent is also not comparatively of much value, then there can be no injustice to the judgment-debtor in carrying on execution proceedings in both the Courts. If the decrees be sent for execution to two or more Courts to be executed at the same time and the amounts realised in the aggregate may be much higher than the judgment-debt, it would manifestly be an injustice to the judgment-debtor to allow the execution proceedings to go on at the same time. Furthermore, if the full amount of the decree is realised by two or three Courts it is difficult to see how matters can be worked out, which of the sales is to be held valid and on what grounds and what interest would be acquired by the purchasers at those sales. It is true the judgment-debtor may apply for stay of execution proceedings under Order XXI, rule 26, but he is not entitled to get the execution proceedings stayed. While, therefore, these sections may not show that concurrent execution cannot be carried on, they certainly show that such execution should be allowed only in exceptional circumstances. It is only when such execution is necessary in the interests of the decree-holder and when it can be carried on without hardship to the judgment-debtor, that it ought to be allowed by the Court which passed the decree. The other provisions show that such Court apparently retains control over the execution proceedings; when the decree has to be executed against the representative of the judgment-debtor, then, according to section 50, the application has to be made to that Court which passed the decree; when a decree has to be executed at the instance of the assignee of the decree-holder, then also the application has to be made under Order XXI, rule 16, to the same Court. Then, again, power is given to such Court to stay the execution proceedings in the Court to which the decree is sent for execution. When, therefore, concurrent execution is necessary, the Court which passed the decree may order it; but when such order is passed and permission is given to the decree-holder to execute the decree simultaneously in more than one Court, he is not entitled to carry on execution proceedings at the same time. The decision seems to be one of this

view. In *Saroda Prosid Mullick* v. *Luchmeeput Singh Doogur* (3), their Lordships of the Privy Council held that it was open to a Court to send the decree for execution to three Courts at the same time. This decision was passed under the Civil Procedure Code, 1859. It may be pointed out that, under section 286 of that Code, the Court was bound to transmit the decree for execution to another Court unless there be special reasons to the contrary. Under the Codes of 1882 and of 1908, it is optional with the Court to send it to another Court. Under section 234 of the Code of 1859, their Lordships pointed out that when the decree is sent for execution to another Court, conditions may have to be imposed upon the decree-holder. This also shows the necessity of the exercise of judicial discretion. In the case of *Kristo Kishore Dutt* v. *Roop Lall Doss* (4) also, there was an order by the Court which passed the decree for simultaneous execution. These decisions are authorities for the proposition that decree may be executed simultaneously in more than one Court, but in all these cases, there were orders allowing such execution, and the considerations that I have already set out would seem to indicate the necessity of an order, permitting concurrent execution before such execution proceedings can be carried out. In the present case after the decree was transferred for execution to the Paravatipur Munsif's Court, that Court had seisin of the execution proceedings and it was bound to carry them on until execution was obtained or further execution became impossible. There was no order of the District Court of Vizagapatam staying execution in that Court for the purpose of executing the decree in the Vizagapatam Court itself. I am, therefore, of opinion that the Judge is right in holding that the application for sale in 1907 should have been made to the Parvatipur Munsif's Court and that the District Court was not, therefore, the proper Court to entertain such an application. The present application, therefore, is barred. I would confirm the order of the District Court and dismiss this appeal with costs.

AYLING, J.—I agree.

Appeal dismissed.

(3) 14 M. I. A. 529 at p. 540; 17 W. R. 289; 10 B. L. R. 214.

(4) 8 C. 687; 10 C. L. R. 609.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1253 OF 1911.

June 6, 1912.

Present:—Mr. Justice Piggott.

NIDHAI—DEFENDANT—APPELLANT

versus

BIDESI—PLAINTIFF—RESPONDENT.

Registration—Petition of compromise filed in mutation proceeding affecting immoveable property of value less than 100 rupees—Whether admissible in evidence without registration—Whether it confers title.

A petition of compromise relating to immoveable property of value less than Rs. 100 was filed in a Revenue Court in a mutation proceeding and the order of the Revenue Court was passed in accordance with the terms of the compromise. It was not registered:

Held, (1) that a petition of this sort should not be excluded altogether from evidence for want of registration;

Bindesri Naik v. *Ganga Saran Sahu*, 20 A. 171, 25 I. A. 9; 2 C. W. N. 129, followed.

(2) that in view of the fact that the compromise related to property of value less than Rs. 100, it was capable of operating as a document of title, although it was not registered.

Rustam Ali v. *Gaura*, 8 A. L. J. 918, 12 Ind. Cas. 109; 33 A. 723, distinguished.

Second appeal from the decision of the District Judge of Mirzapur, dated 4th July 1911.

Mr. *Sarat Chandra Choudhri*, for the Appellant.

Mr. *Kalindi Prashad*, for the Respondent.

JUDGMENT.—In this case, the plaintiff Bidesi, sued to recover possession of two plots of land, forming part of a fixed-rate tenancy and with a total area of 1 *bigha*, 5 *biswas*. His plaint appears to admit that the land in dispute formed part of a larger holding with a total area of 4 *bighas*, 8 *biswas*, which had formerly stood in the name of Sheopal, father of the defendant Nidhai. The plaintiff says, in the first place, that he is a son of Jangi, brother of Sheopal, and that in Sheopal's life-time, the entire holding belonged to, and was cultivated by, all members of the family jointly. On the death of Sheopal, it is quite clear that there was a dispute between the parties which took the form of a contested application for mutation of names before a Revenue Court. This dispute was settled by a compromise, dated March 16th, 1909, to which the plaintiff Bidesi, and the defendant Nidhai, were parties. The petition of compromise is somewhat curiously worded, and contains certain recitals of fact for which apparently Nidhai alone is responsible and other recitals of fact in which both parties purported to

join. The gist of the petition, however, is quite clear. The parties agreed to divide the holding between them, Bidesi is to take the two plots now in dispute with an area of 1 *bigha*, 5 *biswas*, and Nidhai is to take the remaining 3 *bighas*, 3 *biswas* of the holding. Each is to be separately liable for the rent of the portion of the holding assigned to him. The learned District Judge sent for the record of the mutation proceedings and satisfied himself that the order of the Revenue Court was passed in accordance with the terms of the petition of compromise. There is, therefore, a fair presumption that the terms of the compromise were for the time being actually carried into effect. The written statement filed by the defendant Nidhai is somewhat cautiously worded. He does not deny the relationship claimed by the plaintiff, and must be taken to have admitted it. He states, however, that the plaintiff and his father were altogether separate from the defendant and Sheopal, and that the former never had anything to do with any portion of the fixed-rate holding. As regards the compromise filed in the Revenue Court, he will not admit that there was any compromise on the terms alleged by the plaintiff and in fact pleads that the petition of compromise relied on by the latter is inadmissible in evidence for want of registration but he does admit that there was an agreement between the parties as to the division of the holding. He says that what the parties agreed to was that in the month of *Jeth* 1317 *Fasli*, which would correspond with the month of June 1910, the plaintiff was to pay the defendant Rs. 140 and thereupon the defendant would "in consideration of the plaintiff's near relationship" put him in possession of the two plots of land now in dispute. The Court of first instance seems to have tried the case very carefully. It was of opinion that the petition of compromise of March 16, 1909, was admissible in evidence, and held that on the evidence, as a whole, the plaintiff had made out a good case in favour of his claim to possess, by right of inheritance, some share of interest in the fixed-rate tenancy in question. It further held that this right on the part of the plaintiff to an undivided share in the holding had become, by virtue of the petition of compromise and the actual settlement thereby effected and endorsed by the order of the Revenue Court, a right to the separate possession of the two plots of land now in suit. It accordingly decreed the plaintiff's claim in full. Before the learned District Judge on appeal, the point principally argued was the admissiblity in evidence of the petiton of compromise of March 16th, 1909. Now, I have no doubt that the record of the entire proceeding before the Revenue Court, including the pleadings of the parties, the petition of compromise and the order of the Court, were admissible in evidence as matters bearing upon the various issues in the case. The plaintiff was, undoubtedly, entitled to prove that he had set up a claim to a share in the fixed-rate holding on the death of Sheopal, that this claim had been brought to the notice of, and contested by, the defendant Nidhai, but that in the result Nidhai had entered into an agreement in consequence of which a portion of the holding had passed into the actual possession of the plaintiff. The decision of their Lordships of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu* (1) is sufficient authority for the proposition that a petition of this sort should not be excluded altogether from evidence by reason of the provisions of the Indian Registration Act. There remains, however, the further question of the legal effect of a compromise of this sort taken in connection with the order of the Revenue Court on the same. The whole question was considered by a Bench of this Court, of which I was a member, in *Rustam Ali Khan* v. *Gaura* (2), where a number of rulings on the point are referred to. The Court had to deal in that case with a petition of compromise presented before a Revenue Court which admittedly purported to deal with immoveable property of a value exceeding Rs. 100. It was there pointed out that such a petition of compromise might be relevant fact in the case, and might be admitted in evidence, but yet might be incapable of operating as a document of title so as to transfer title to immovable property of a value exceeding Rs. 100 from one person to another. I am still of the same opinion but it seems to me that the circumstances of the present case are distinguishable. What the plaintiff, Bidesi, actually got under this compromise of March 16th, 1909, was possession over immoveable property, *viz.*, two small plots of land of a value apparently not exceeding Rs. 100.

(1) 20 A. 171; 25 I. A. 9; 2 C. W. N. 129.
(2) 8 A. L. J. 918; 12 Ind. Cas. 109; 33 A. 728.

MOHIB ALI *v.* SURAT SINGH.

The plaintiff valued the property in dispute at Rs. 40 and this valuation was not contested by the defendant but was adopted by him in his memorandum of appeal to the District Judge. It seems to me that, under the circumstances of this case, the entire transaction comprised in the presentation of the petition of compromise, the order thereon by the Revenue Court, and the transfer of possession in accordance with the same, should be regarded as sufficient to confer upon the plaintiff, Bidesi, a title which the defendant cannot now call in question. I take it that Bidesi held as against Nidhai what amounted, at any rate, to a doubtful claim, and this in respect of immoveable property of a value not exceeding Rs. 100. This claim Nidhai settled by putting Bidesi into actual possession of two plots of land and calling upon the Revenue Court to take note of the fact that he had done so and to make the necessary entries in its papers accordingly. I am not satisfied that such transaction in the case of immoveable property of a value less than Rs. 100, would require a registered instrument in order to give it legal validity. Holding this view, I think the learned District Judge was substantially right in declining to go into the question of the validity of Bidesi's claim by right of inheritance, independently of the settlement effected under the compromise of March 16th, 1909. I accordingly dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 327 OF 1912.

June 27, 1912.

Present:—Mr. Justice Chamier.

MOHIB ALI—PLAINTIFF—APPELLANT.

versus

SURAT SINGH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 4 (2), 56, 57, 58, 167—"Agricultural purposes," meaning of—Land for the purposes of grazing—Jurisdiction of Civil or Revenue Court—Suit for ejectment of tenant from pasture land.

The words "agricultural purposes" in section 4 (2) of the Agra Tenancy Act, 1901, must be construed in their ordinary sense; they refer to tilling and cultivation for purposes of raising crops. In their widest sense, the words may include grazing but it is impossible to hold that all land held for grazing purposes is land held for agricultural purposes.

A suit for ejectment of a tenant from pasture land, not held for agricultural purposes, is cognizable by the Civil Court and not by the Revenue Court.

Second appeal from the decision of the District Judge, of Shahjahanpur, dated 22nd December 1911.

Mr. *W. Wallach*, for the Appellant.

Mr. *Benode Behari*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the appellant in a Court of Munsif for the ejectment of the respondent from two plots of land. The suit was resisted on the ground that the parties were landlord and tenant and, therefore, the Civil Court had no jurisdiction. The respondent pleaded that he had been cultivating the plots. But the Courts below have found that he has not cultivated them but has held them only for grazing purposes and that he has been paying Rs. 3 a year for them to the appellant. The Munsif found that the suit was cognizable by a Civil Court and decreed the claim. On appeal, the District Judge held that the suit was barred with reference to the provisions of sections 4, 56 and 167 of the Tenancy Act. The suit as brought was not cognizable by a Revenue Court if, as I am informed, (the plaint is not before me), the appellant alleged that the respondent was a trespasser. That allegation has been negatived by the Courts below, and the question is whether on the facts found, a suit could have been maintained by the appellant for the ejectment of the respondent in a Revenue Court. According to the finding, the respondent was a tenant of the appellant and according to section 4(3) of the Tenancy Act what the respondent paid to the appellant for the grazing was "*rent*". The definition of "*rent*" specifically includes what is paid by a tenant on account of rights of pasturage. The jurisdiction of the Civil Court must be barred, if at all, by some express provision of the Tenancy Act. Section 167 provides that all suits specified in the fourth Schedule of the Act shall be heard and determined by the Revenue Courts and except by way of appeal, no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit might be brought. If a suit for ejectment is maintainable by the appellant against the respondent at all, it must be

either as a suit of the kind described at No. 29 in Group C of the fourth Schedule to the Act, or as a suit of the kind described at No. 39 in Group D of the fourth Schedule. The former is a suit for ejectment of a non-occupancy-tenant on the ground specified in section 58 of the Act and the latter is a suit for ejectment of a tenant on the grounds specified in clause (*a*) of section 57 of the Act. The opening words of section 57 are:—"A tenant, not being a permanent tenure-holder, shall be liable to ejectment from his holding on one or more of the following grounds". Then the grounds are stated. Section 58 provides as follows:—"A non-occupancy-tenant shall be liable to ejecment on one or more of the following grounds in addition to the grounds specified in section 57, namely, (*a*) on the ground that he holds only as a tenant from year to year; (*b*) on the ground that he holds under a lease the term of which has expired or will expire at or before the end of the current agricultural year; (*c*) on the ground that he has refused to accept a lease containing the particulars of his holding for the time being in accordance with the provisions of section 96". Both these sections relate to the ejectment of a tenant from his holding and "holding" is defined in section 4 (9) of the Act as a parcel or parcels of land held under one tenure or one lease or engagement The word "land" is defined in section 4(2) as land which is let or held for agricultural purposes. It appears, therefore, that sections 57 and 58 apply only to suits for the ejectment of a tenant from land as defined in the Act. Thus the question whether the present suit is cognizable by a Civil Court or not, resolves itself into the question whether the land held for grazing purposes is land held for agricultural purposes within the meaning of section 4(2) of the Act. It seems to me that, in its widest possible sense, the expression "agricultural purposes" might include grazing. But it is impossible to hold that all land held for grazing purposes is land held for agricultural purposes. There are enormous areas in these Provinces to which cattle are sent to graze and which certainly have no connection whatever with agricultural purposes in the ordinary sense, and it would be impossible, I think, to hold that these areas are lands held for agricultural purposes within the meaning of the Tenancy Act. In the present case, there is nothing to show that the respondent's occupation of the land in question is in any way connected with agricultural purposes in the ordinary sense, that is to say, with the tilling and cultivation of land, nor, in my opinion, can the question whether land held for grazing purposes is land held for agricultural purposes depend upon the trade or occupation of the person who actually holds the land in question in a suit. It seems to me that the words "agricultural purposes "in section 4 (2) of the Act must be construed in their ordinary sense and that they refer to tilling and cultivation for purposes of raising crops. I was referred to a decision of the Board of Revenue in *Chowdhury Muhammad Mahmood* v. *Ganga Ram* (1). The question, which I have to decide, was raised in that case, but was not decided, the Board being of opinion that a person who has grazing rights over land is not a tenant of the land who can be ejected by a suit under the Tenancy Act. If that decision is correct, the present suit is cognizable by a Civil Court, even if my interpretation of the definition of land is erroneous. I allow this appeal, set aside the decree of the lower Appellate Court and remand the case to that Court in order that it may be restored to the pending file and disposed of according to law. Costs in this Court will be costs in the cause.

I am informed that the plaint was returned by the District Judge to the appellant for presentation to a Court of Revenue. The plaint should now be re-placed on the record.

Case remanded.

(1) Rev. L. J. Vol. III, p. 54.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 81 OF 1912.

June 12, 1912.

Present:—Mr. Justice Lindsay, J. C.

Hon'ble Raja PARTAB BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

NAURANG SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 13—

PARTAB BAHADUR SINGH *v.* NAURANG SINGH.

Misjoinder of parties and causes of action—Objection to be taken at the earliest opportunity—Appeal, objection not allowed to be taken in.

Under the provisions of the Civil Procedure Code, objections as to misjoinder of parties and causes of action should be taken at the earliest possible opportunity, and where no such objection is taken in the written statement, it should not be allowed to be taken for the first time in appeal.

Appeal against an order of the District Judge, Rai Bareli, dated 30th October 1911, reversing that of the Deputy Collector of Partabgarh, dated 1st July 1911.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *Girja Saran Lal*, for the Respondent.

JUDGMENT.—These two appeals arise out of a suit which was brought by the plaintiff appellant in the Court of the Assistant Collector of Partabgarh under the provisions of section 108 (5) of the Oudh Rent Act for profits. The suit was brought against 36 defendants and the profits, which were the subject-matter of the suit, were said to be due in respect of a share belonging to the plaintiff in a *patti* called *Patti* Jiwan Rai. The claim of the plaintiff was resisted on a variety of grounds but the main contention raised on behalf of the defendants was that they were not liable for the claim and that if anything was due from any of them, it was due to the plaintiff separately so that a joint decree could not be passed against all of them. The Assistant Collector, having had a statement of the accounts prepared, gave separate decrees, against nine of the defendants specifying the amount due to the plaintiff from each. Seven of these defendants appealed to the Court of the District Judge. Three of them were parties to one appeal while four of them joined in a separate appeal. Both these appeals have been allowed by the Court below on the ground that the plaintiff-appellant's suit was bad for misjoinder of parties and causes of action. The learned District Judge, having come to this conclusion, set aside the decree of the first Court and remanded the case for re-trial. He also directed that the plaint should be returned to the plaintiff for amendment with a direction to confine his claim to one cause of action against the same defendants. In appeal here, it is contended that this order of the Court below was wrong inasmuch as no plea of misjoinder having been taken by any of the defendants at the earliest possible opportunity, such a plea could not be raised for the first time in appeal. I am of opinion that this contention must prevail. It is true that in the judgment of the lower Court it is stated that these pleas of misjoinder of parties and causes of action were raised in the Court of first instance but after a perusal of the various written statements, filed by some of the defendants (some of the defendants filed no written statement at all), it seems to me clear that no such plea of misjoinder was taken. For example, Zabar Singh, who was one of the defendants, while he stated in his written statement, as if by way of complaint, that all the co-sharers were being sued jointly, nevertheless expressed his willingness to submit to a decree for any such amount as might be found owing from him, that is to say, his plea was really one to the effect that no joint decree could be passed against him. Raghubar, Sripat and Ganga Bakhsh, who are also respondents in these appeals, did not raise any plea of misjoinder whatever; nor did the other respondents Nauring and Bikramjit. I think therefore, it must be taken that the learned Judge was under a misapprehension in dealing with the case. The terms of Order I, rule 13 of the Code of Civil Procedure are perfectly clear and make it necessary that all objections on the ground of misjoinder shall be taken at the earliest possible opportunity. I may also remark that this plea of misjoinder, even assuming it could be raised, does not appear to me to be well taken.

The *Patti* Jiwan Rai, in which the plaintiff has a share in respect of which he was seeking for profits, contains numerous sub divisions for each of which there appears to be a separate account. So far as these respondents are concerned, it appears that Raghubar, Balkaram and Zabar, who are the respondents in Appeal No. 5, hold shares in two *Khatas* Nos. 28 and 29. Ganga Bakhsh, Sripat, Naurang and Bikramjit, on the other hand, are all co-sharers in *Khata* No. 29 alone. It is admitted that the plaintiff has shares in both of these *khatas*. I can see no reason why it should be held that a claim, which affects the *khatas* in which all these parties are concerned, is necessarily bad for misjoinder because it so happens that some of the defendants are concerned only with one *khata* while others, are concerned with two. In the first Court,

there does not appear to have been any difficulty in making out the account of the liabilities of the various defendants and it cannot, I think, be said that on the ground of inconvenience, there was any necessity for a direction to the plaintiff to file separate suits. I set aside the order of remand passed by the lower Appellate Court in each of the cases before it and direct that the appeals be disposed of by the learned Judge according to law. The appellant will get his costs from the respondents in each of the appeals in this Court.

Cases remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 213 OF 1911.

May 22, 1912.

Present:—Mr. Justice Lindsay, J. C.

MATA BADAL SINGH—PLAINTIFF—APPELLANT

versus

JAI SINGH—DEFENDANT—RESPONDENT.

Court-fee—Suit by reversioner for possession and also for redemption—Redemption ordered on payment of particular sum—Appeal—Court-fee payable.

Where a plaintiff sued as a reversioner for possession of property, and in the alternative claimed redemption and the Courts below gave the plaintiff a decree for redemption subject to the payment of a certain sum which the plaintiff disputed in appeal and asked for possession without the payment of any sum:

Held, that the plaintiff must pay *ad valorem* Court-fee on the amount which he was ordered to pay.

Basdeo Ban v. *Sri Krishen Gir* 13 O. C. 62; 5 Ind. Cas. 941, followed.

Ram Phal v. *Deputy Commissioner, Baharaich*, 12 O. C. 130; 2 Ind. Cas. 600, not followed.

Appeal against an order of the Sub-Judge, Partabgarh, dated 5th May 1911, upholding that of the Munsif, Partabgarh, dated 28th February 1911.

Babu *Ishwari Prasad*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The first matter to be dealt with in this appeal is a question of Court-fees. According to the office report, the deficiency, which is recoverable from the plaintiff-appellant, amounts to Rs. 977, that is to say, Rs. 488-8 payable in the lower Appellate Court and a similar amount which is payable in this Court. The facts of the case are that the plaintiff sued to recover possession of a share of certain lands alleging that the property belonged to his uncle, Sital Singh deceased, and that after his death, the property had devolved on his widows and that on the death of the widows, the plaintiff was entitled to succeed to the property as the next reversioner of Sital Singh. On the case as thus set out in the plaint, a Court fee of Rs. 16-8 was paid being the amount leviable on five times the revenue, which was described as coming to Rs. 213-6. The defendant set up the plea that he held the property as mortgagee from the widows of Sital Singh and that these widows were competent to execute these mortgages and that the mortgages were binding upon the plaintiff. The Court of first instance awarded the plaintiff a decree for possession subject to payment of Rs. 10,802, that is, the amount found to be due on the mortgages set up in the written statement. The plaintiff brought an appeal in the Court below which has been dismissed, the order of the first Court being upheld. It appears that the findings of the Courts below are to the effect that the property in dispute had become the absolute property of Sital Singh's widows as *stridhan* and that they were competent to deal with this property as full owners. It was found, however, that the plaintiff was the heir of the widows and entitled to succeed to their *stridhan* property and on this footing, the Courts below gave the plaintiff a decree for redemption. They found him to be the heir of Sital Singh's widows and, therefore, held that as representing the widows, he was entitled to redeem on payment of the sum just mentioned. On these facts and relying upon the case reported as *Basdeo Ban* v. *Sri Krishen Gir* (1), the office has put up its report relating to the deficiency in Court-fees. Mr. Ishwari Prasad who appears for the appellant contests the report. He points out that the amount which he has been directed to pay by the lower Courts before he is entitled to get possession of the property, is far in excess of the value of the property and he claims that as his suit was not one for redemption but one for possession by ejectment of the defendant, he is only liable to pay

(1) 13 O. C. 62; 5 Ind. 941;

Court-fee such as was paid by him in both the Courts below. In *Basdeo Ban* v. *Sri Krishen Gir* (1), it was laid down that where a plaintiff sues for possession of land claiming an unconditional decree or admitting his liability to pay certain sum and the Court requires him to pay a sum which he disputes and he appeals on the ground that he is not liable to pay that sum, he must pay Court-fee on the amount in question. It may be noticed that this case is at variance with a previous case which is reported as *Ram Phal* v. *Deputy Commissioner, Bharaich* (2). It was laid down in *Basdeo Ban* v. *Sri Krishen Gir* (1), that the ruling in *Ram Phal* v. *Deputy Commissioner Bharaich* (2) should no longer be followed as it was contrary to the current of authorities both in this Court and in the Allahabad High Court. It was argued before me that the decision arrived at in *Basdeo Ban* v. *Sri Krishen Gir* (1), is based on an erroneous principle, namely, that the Court has applied to a suit in ejectment the same considerations which would be properly applicable to a suit for redemption. It may be possible to argue that there is some distinction in principle between the two cases and that in the case of a suit in ejectment, different considerations ought to apply. Clearly, in a suit for ejectment, the plaintiff does not admit any title in the defendant whereas where a plaintiff sues to redeem, he necessarily admits a title existing in the defendant and which he is entitled to displace on payment of a certain sum. However, a consideration of the pleadings in this suit seems to make it clear that the appellant is no longer in a position to argue that his case is in any way distinguishable from the case set out in *Basdeo Ban* v. *Sri Krishen Gir* (1). After the written statement had been filed, the plaintiff filed a replication, in paragraph 19 of which he stated that if it were held that the property in suit has become *stridhan* of Sital Singh's widows, even then he, being the heir to both these ladies, was entitled to recover possession. In the concluding portion of this paragraph, the plaintiff stated that if any amount were found due to the defendant, he would have no objection in making payment thereof. Obviously, this was an invitation to the Court to grant the plaintiff a redemption decree in case the facts were found against him on which he relied in his plaint for his cause of action. In short the plaintiff set up two alternative cases, he asked either for an unconditional decree for possession as being the heir of Sital Singh or, alternatively, for a decree for possession by redemption in his capacity as heir of both the widows of Sital Singh. The Courts below have given him a decree for redemption and if he now disputes the amount which the Courts below had declared him liable to pay, he must pay the Court-fee on the amount in question. It is stated that the Court-fee is in excess of the value of the property and Mr. Ishwari Prasad informs the Court that his client is unwilling to pay the additional Court-fee of Rs. 977. It is no use, therefore, giving the appellant time to make good the deficiency. I, therefore, direct that the appeal be dismissed with costs.

Appeal dismissed.

(2) 12 O. C. 130; 2 Ind. Cas. 600.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 11 OF 1911.

February 15, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Rafique, A. J. C.

WAJID ALI KHAN—PLAINTIFF—APPELLANT

versus

SAKHAWAT ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENT.

Muhammadan Law—Prompt dower, non-payment of—Wife's right under Sunni *Law to refuse to surrender her person in spite of consummation—Decree for prompt dower passed by a competent Court out of Oudh*—Res-judicata—*Oudh Laws Act* (*XVIII of* 1876), *s.* 5.

Under the *Sunni* Law, a wife has the right to refuse to surrender her person to her husband, in spite of consummation of marriage, so long as the prompt dower remains unpaid.

Jaun Beebee v. *Sheikh Moonshee Beparee*, 3 W. R. 93; *Sheikh Abdool Shukkoar* v. *Musammat Raheem-un-nissa*, 6 N. W. P. H. C. R. 94; *Wilayat Husain* v. *Allah Rakhi*, 2 A. 831; *Nasrat Husain* v. *Hamidan*, 4 A. 205; *Nazir Khan* v. *Umrao*, A. W. N. (1882) 96; *Eidan* v. *Mazhar Husain*, 1 A. 483; *Khodaija Begam* v. *Saiyid Naki*, Select Case No. 57; *Nawab Wazir Jahan Begam* v. *Nawab Haidar Raza Khan*, 10 O. C. 11; and *Abdul Karim Khan* v. *Musammat Chotti*, A. W. N. (1906) 136, 3 A. L. J. 432, relied upon.

Abdul Kadir v. *Salima*, 8 A. 149, dissented from.

Where a decree fixing the amount of prompt dower was passed by a competent Court out of Oudh

WAJID ALI KHAN *v.* SAKHAWAT ALI KHAN.

Held, that the question could not be re-opened by the Oudh Courts and section 5 of the Oudh Laws Act had no application to the case as the matter had passed out of the stage of contract and dower had become a debt of record.

Appeal against the decree of the Additional Judge, Hardoi, dated 17th October 1910.

Mr. *Mumtaz Husain*, for the Appellant.
Mr. *Sami-ullah Beg*, for the Respondents.

JUDGMENT.—It appears that the plaintiff-appellant was married to one *Musammat* Bilkis Jahan Begam on the 25th of June 1905. The marriage took place at Shahjahanpur at the house of the bride's parents. The bride was a minor at the time of the marriage. The *rukhsat* ceremony (going to the husband's house) took place on the 24th of May 1907. The plaintiff-appellant and *Musammat* Bilkis Jahan Begam lived as man and wife for about two years. On the 9th of July 1909, Israr Hasan, the brother of *Musammat* Bilkis Jahan Begam, went to Shahabad where the plaintiff-appellant lives and persuaded him to let *Musammat* Bilkis Jahan Begam go to see her mother at Shahjahanpur who was said to be ill at the time. The plaintiff-appellant allowed his wife to go to Shahjahanpur, with her brother on condition that she was to return home after about a week. But it seems that her marriage life was not a happy one and she did not return to her husband as promised. On the 3rd of December 1909, she instituted a suit in the Court of the Subordinate Judge of Shahjahanpur, under the guardianship of her father as she was still a minor, against her husband, the plaintiff-appellant, for the recovery of her prompt dower. The plaintiff-appellant denied her claim, but a decree was passed against him for Rs. 10,000 on the 23rd of April 1910, which was upheld by the High Court at Allahabad on the 29th of November 1911. In the meantime, subsequent to the institution of the suit of *Musammat* Bilkis Jahan Begam in the Court of the Subordinate Judge of Shahjahanpur, the plaintiff-appellant brought a suit in the Court of the Subordinate Judge of Hardoi, on the 5th of January 1910, against her parents and her three brothers. The plaintiff-appellant sued for the restitution of conjugal rights, for a perpetual injunction against her parents and her brothers to prevent them from obstructing her return to him and for the recovery of ornaments worth Rs. 4,150 or their price. The plaintiff-appellant alleged in his plaint that Israr Hasan, the brother of *Musammat* Bilkis Jahan Begam, had taken her to see her mother on the promise that she would return to her husband in a week; that at the time of her departure she had taken with her ornaments worth Rs. 4,150, which he had got made for her and that she, at the instigation of her parents and her brothers, refused to return to him or to restore the ornaments. The suit of the plaintiff-appellant was resisted by his wife, her parents and her brothers. Her parents and her brothers denied that she had gone to their house with any ornaments belonging to the plaintiff-appellant or that they were standing in the way of her return to her husband. *Musammat* Bilkis Jahan Begam supported the defence of her parents and her brothers and added that she was unwilling to return to the plaintiff-appellant because he had been cruel to her and she was in danger of her health and her life at his hands. She further advanced a legal plea to the effect that the plaintiff-appellant could not claim restitution of conjugal rights without paying her prompt dower.

The learned Subordinate Judge of Hardoi, found that *Musammat* Bilkis Jahan Begam did not go to her mother's house at Shahjahanpur with the ornaments of the value of Rs. 4,150, or any ornaments belonging to the plaintiff-appellant. The plea of cruelty was found not to have been proved. But the plea of the non-payment of prompt dower was upheld. A decree was accordingly passed for restitution of conjugal rights subject to the payment by the plaintiff-appellant of prompt dower. The claim for ornament or their price and for a perpetual injunction against the parents and the brothers of *Musammat* Bilkis Jahan Begam was dismissed. The lower Court mentioned no sum as payable to *Musammat* Bilkis Jahan Begam for prompt dower. The plaintiff-appellant preferred an appeal to this Court which came up for hearing before us on the 1st of June 1911. It was urged for the appellant then that the decree of the lower Court was so vague as to be incapable of execution inasmuch as it did not fix the amount of prompt dower payable by the plaintiff-appellant. The sum decreed by the Suborbinate Judge of Shahjahanpur could not,

it was said, be considered as the amount of prompt dower payable by the plaintiff-appellant because in Oudh dower is to be determined according to the means of the husband. For the respondents, it was admitted that the decree of the lower Court was vague, but it was argued that the question as to the amout of prompt dower payable by the plaintiff-appellant was *res judicata* between him and his wife by reason of the decree of the Shahjahanpur Court. We accordingly framed the following issues and remitted them for trial to the lower Court, namely:—

1. Is the question of the amount of prompt dower payable by the plaintiff to the defendant No. 6 *res judicata*?
2. If not, what is the amount of prompt dower payable by the plaintiff to the defendant No. 6?

The learned Subordinate Judge submitted his findings on the above issues on the 15th of August 1911. He found on the first issue that the question of the amount of prompt dower payable by the plaintiff-appellant to his wife was not *res judicata*, as an appeal was pending at the time in the High Court at Allahabad from the decree of the Subordinate Judge of Shahjahanpur. On the second issue, the lower Court found that the sum of Rs. 5,000 was the amount of prompt dower payable by the plaintiff-appellant to his wife. The plaintiff-appellant has filed objections to the finding of the lower Court on the second issue. And as the decree of the Subordinate Judge of Shahjahanpur was upheld by the High Court at Allahabad subsequent to the remand finding, but prior to the hearing of the present appeal before us, the respondents have pressed the plea of *res judicata* as to the amount of prompt dower payable by the plaintiff-appellant. The appeal has been argued at some length before us on all the points in dispute between the parties with the exception of the plea of cruelty which was taken by the respondent No. 6 in the Court below.

There appear to be four questions for determination in the appeal, namely:—

1. Has the wife, after consummation of marriage, the right to refuse her person to her husband so long as her prompt dower remains unpaid?
2. Is the question of the amount of prompt dower payable by the plaintiff-appellant to his wife *Musammat* Bilkis Jahan Begam *res judicata*?
3. If not, what is the amount of prompt dower payable by the plaintiff-appellant to his wife?
4. Did *Musammat* Bilkis Jahan Begam, when going to her mother at Shahjahanpur, take with her jewelry worth Rs. 4,150 belonging to the plaintiff-appellant?

Elaborate arguments have been advanced at the Bar on the first question which raises a somewhat difficult point of Muhammadan Law. The difficulty is due to the difference of opinion among the Muhammadan lawyers and to the conflict of authority in the case-law. But, before proceeding to consider the text-books or the case-law, it would be just as well to clear the ground for the consideration of the question by stating some undisputed facts. Both the plaintiff-appellant and his wife are *Sunni* Muhammadans. They were married according to the *Sunni* Law which governs their marital relations. They lived as man and wife for sometime prior to the present litigation. Prompt dower is payable by the plaintiff-appellant, which remains still unpaid in spite of a demand for it prior to the institution of the plaintiff-appellant's suit. Now, we have to see whether, under these circumstances, the respondent No. 6 can resist the suit of her husband on the ground of the non-payment of her prompt dower according to the Hanafi Law, which binds the Sunni sect of Muhammadans. The majority of the writers of the text-books, as will appear from the quotations given below, favour the defence of the defendant-respondent No. 6.

I.—*Bidaya*, which is the text of *Hedaya*, contains the following passage on the subject:—"A woman has a right to refuse to surrender herself to her husband until she receive her dower, and to prevent him from taking her upon a journey; and the husband has no right to prevent her from going out of his house or from visiting her relatives until the payment of the whole of the prompt dower; but if the dower be deferred, the woman has no right of refusal. But if cohabitation has taken place, then also she has the same (right)".

II.—In the Chapter on *Nikah* in *Hedaya*, the following passage is relevant:—"It is the wife's right that she may deny herself to her husband until she receive the dower and she may prevent him from taking her away, so that her right in the return may be fixed in the same manner as that of the husband in the object of the return and become like sale. And it is not for the husband that he may prevent her from travelling or going out of his house and visiting her friends until he has paid the whole prompt dower, because the right of restraint is for securing fulfilment (of his right) to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment himself; and if the whole dower is deferred, it is not for her to deny herself because of her having dropped her right by deferring it, as in sale. And in this matter, Abu Yusuf holds the contrary opinion. And if the husband has retired with her, the same would be the answer according to Abu Hanifa, but the two disciples have said that she has not the right to deny herself, and the difference of opinion subsists where there is retirement with her consent; but if she was forced or an infant or insane, her right of denying herself does not drop according to the unanimous opinion of our Doctors."

III.—The learned author of the *Durr-ul-Mukhtar*, a well known book on the Muhammadan Law, expresses the following opinion:—"It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her, even though after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly."

IV.—*Fatwa-i-Qazi Khan* has the following passage on the subject:—"A wife, having surrendered herself to her husband before the payment of dower, subsequently denies herself to him for securing the payment of the dower. She has this right in the opinion of Abu Hanifa; but Abu Yusuf and Imam Muhammad maintain that she has not the right of prohibiting him from connubial intercourse, and doubts have arisen with regard to their opinions as to the power of preventing her from journeying. And, according to the opinion of Abul Qasim Assaffar, it is her right that she may prevent him from taking her on a journey."

V.—*Fatwa Hamadiah*, referring to *Umdat-ul fatwa*, contains the following passage:—"According to usage, a woman has a right to withhold her person from her husband until she receive her whole dower. But in determining what amount is prompt for similar women, her status must be considered. If the amount which forms the prompt dower for similar women is paid, she has no right of refusal."

VI.—The same book with reference to the *Fatwa-e-Mufti* has the following passage:—"A woman has a right to deny herself to her husband, and she can go on a journey or out of her husband's house without his permission until she receive her dower in full to the last *dirham*."

VII.—*Hamadiah* quotes a passage from *Tahzib*, which is as follows:—"A woman has power to deny herself to her husband till the payment of the whole dower on the analogy of sale, and she is at liberty to go on a journey or to live anywhere before receiving her dower. And though she has once cohabited willingly with her husband, she has a right of refusal contrary to the view of the *Sahibain*."

VIII.—*Tanvir-ul-Absar*, which is the text of *Durr-ul-Mukhtar*, has the following passage:—"A woman can refuse to accompany her husband on a journey or to cohabit with him until the payment of her prompt dower even though the refusal takes place after there has been a valid retirement or cohabitation with her consent."

IX.—In *Wikayat-ur-rivayah*, which is the text of *Sharha Vikayah*, the rule is stated thus:—"It is the right of the wife to deny herself to her husband and refuse to travel with him and in spite of this refusal take food and raiment from him, notwithstanding that such refusal may be after cohabitation with her consent, so long as she does not receive her dower either the whole or such part as is specified prompt or which is customarily prompt for such woman without

consideration whether it is one-fourth or one-fifth, unless it is specified."

X.—The law is thus stated in *Kanz-ud-dakaik*:—"A woman has a right to withhold her person from her husband and refuse going on a journey with him though consummation may have taken place."

XI.—The following passage in *Fatawa-i-Alamgiri* discusses the point under discussion:—"In all places, when the husband has had connubial intercourse with her, or validly retired with her, the whole dower is confirmed. If she intends to deny herself to him for securing the payment of her prompt dower, it is her right to do so according to Imam Abu Hanifa; but this is opposed to the opinions of his two disciples, and in like manner, the husband cannot prevent her from going out or travelling or going on a voluntary pilgrimage, according to Abu Hanifa, except when she goes out in an indecent manner. As to her right to all this before she has surrendered herself, there is unanimity of opinion, as there is as to the rule when the husband has had connubial intercourse with her whilst she is a minor or has been forced or insane, in which cases her father might refuse to surrender her until the payment of her prompt dower—so in the *Itabyyah*. And if the husband has had connubial intercourse with her or retired with her consent, it is her right to refuse herself to go on a journey until payment of her whole dower according to the written engagement or the prompt part of it according to the custom of our country. This view is according to Abu Hanifa, but his two disciples maintain that she has no such right, and the Shaikh-ul-Imam, the jurisconsult, the pious Abul Qasim Assaffar, was accustomed to decide according to Abu Hanifa, so far as going on a journey is concerned; but in matter of refusing herself, he used to decide according to the opinions of the two disciples and several of our learned doctors have approved of this distinction."

Three propositions are clearly deducible from these authorities:—

first, that if consummation of marriage has not taken place, the wife may refuse to admit her husband to sexual intercouse or to obey his orders so long as her prompt dower remains unpaid;

second, that in case consummation of marriage has taken place, she has the right to refuse her person to her husband according to Imam Abu Hanifa, but has no such right according to the Sahibain (that is, his two disciples, Abu Yusuf and Muhammad); and

third, that the majority of Muhammadan jurists have accepted the view of Imam Abu Hanifa.

The Sunni Ulamas in this country have always given *Fatwa* (or decision) on the point under consideration in accordance with the view of the Great Imam. This is borne out by case XXXI, mentioned by Macnaghten in his book on Muhammadan Law, eighth reprint, at page 281. The question and answer are as follows:—

"*Q.*—1. Has a wife a right to oppose the inclination and resist the authority of her husband, before she has received her dower, notwithstanding the previous interchange of conjugal habits, without objection on her part?

"*R.*—1. If it had been stipulated that a portion of the dower is to be paid immediately, she has a right to do so, with a view to obtain that portion of her dower. So also if no mention have been made of the immediate payment of any portion, she may do so, with a view to obtain such a portion as may be consistent with her situation in life, unless the postponement of the payment of the whole had been expressly stipulated; according to the *Munnih ul-Ghuffar*,—'she is competent to preclude him from the enjoyment of conjugal rights, or from carrying her on a journey, or removing her from one house in a town to another, (although matrimonial intercourse may have passed between them and the marriage may have been consummated, without any objection on her part), for the purpose of obtaining a portion, or the whole, of the dower, prompt payment of which was stipulated, or for the purpose of obtaining such a portion of it as is usually paid promptly to her equals in condition, unless the payment of the whole was expressly postponed;' according to Abu Yusuf,—'she has a right by a favourable construction in this case also; and opinions have been given

according to this doctrine on a principle of favourable construction.' Such also is the doctrine contained in the *Durr-ul-Mukhtar*,— 'she is competent to preclude him from the enjoyment of conjugal rights; and according to Abu Yusuf, even although the payment of the whole dower was expressly postponed. Opinions have been given according to this doctrine on a principle of favourable construction.' Therefore, before the dower that may be due is paid, the husband has no right to force and compel his wife to come to his house."

The Anglo-Indian decisions followed the opinion of the Great Imam up to the case of *Abdul Kadir* v. *Salima* (1), decided in 1886, by the High Court at Allahabad. In fact, some of those decisions went a little further than the rule laid down by Imam Abu Hanifa and held that the husband could not maintain a suit for the restitution of conjugal rights against his wife if the prompt dower had remained unpaid up to the date of the institution of the suit. One of the earliest cases on the point is that of *Jaun Beebee* v. *Sheikh Moonshee Beparee* (2). It was observed in that case that the husband could not enforce his right to his wife till he paid the dower. The most definite pronouncement was made by the North-Western Provinces High Court in 1874 in the case of *Sheikh Abdool Shukkoar* v. *Musammat Raheem-un-nissa* (3). In that case, the husband sued for the restitution of conjugal rights on the allegation that his wife refused to return and that her mother dissuaded her from returning to him. It was urged in defence of the suit that the plaintiff, the husband, could not compel his wife to return to him as the prompt dower had not been paid. The learned Judges, who decided that case, held that "a suit will not lie by a Muhammadan to enforce the return of his wife to his house even after consummation with consent, until her prompt dower has been paid" The suit was accordingly dismissed. The same view was adopted in the cases of *Wilayat Husain* v. *Allah Rakhi* (4), *Nasrat Husain* v. *Hamidan* (5) and *Nazir Khan* v. *Umrao* (6). But in the case of *Eidan* v. *Mazhar Husain* (7), the view taken in the cases mentioned above was modified so far that a decree in favour of the husband for the restitution of conjugal rights was passed conditional on the payment of prompt dower due to the wife. The point again came up for consideration before the Allahabad High Court in the case of *Abdul Kadir* v. *Salima* (1), when the case-law and the text-books on the point were reviewed in an elaborate judgment by the late Mr. Justice Mahmood, who held that a wife could not resist the suit of her husband for the restitution of conjugal rights after consummation of marriage on the ground of the non-payment of her prompt dower. The law, as laid down by him, has been accepted in subsequent cases by other High Courts. On the other hand, this Court has adopted the principle enunciated in the case of *Eidan* v. *Mazhar Husain* (7). It has been held by this Court, in at least two reported cases, that even if there has been a consummation of marriage, the wife can resist the suit of her husband for the restitution of conjugal rights and a conditional decree on the payment of her prompt dower should be passed in favour of the husband—*vide* the cases of *Khodaija Begam* v. *Saiyid Naki* (8) and *Nawab Wazir Jahan Begam* v. *Nawab Haidar Razi Khan* (9). In view of the importance of the question under discussion and the eminence of the learned Judge who was responsible for the judgment in the case of *Abdul Kadir* v. *Salima* (1), we propose to consider and examine that case in order to see what was actually decided in it and whether the view expressed therein is supported by authority. The facts of that case, as given in the report, are that Abdul Kadir was married to Salima on the 15th of March 1883, and that her dower was fixed without any specification as to whether it was to be partly or wholly prompt or deferred. She cohabited with her husband, the plaintiff, up to the 15th of June 1883, when she went on a visit to her father. On the 28th June 1883, Abdul Kadir instituted the suit in the Court of the Munsif of Mirzapur for the restitution of conjugal rights on the allegation that Salima, under the influence of her father, refused to return to him. Salima resisted the suit on several grounds but the main pleas in

(1) 8 A. 149.
(2) 3 W. R. 93.
(3) 6 N. W. P. H. C. R. 94.
(4) 2 A. 831.
(5) 4 A. 205,
(6) A. W. N. (1882) 96.

(7) 1 A. 483.
(8) Select Case No. 57.
(9) 10 O. C. 11.

defence were (1) that she had been divorced by Abdul Kadir, (2) that Abdul Kadir had been guilty of cruelty to her, (3) that Abdul Kadir had not paid her dower and was not, therefore, competent to bring the suit for the restitution of conjugal rights so long as he did not satisfy her dower-debt. After the defence of Salima had been made and before the case was decided by the Munsif, Abdul Kadir deposited the whole dower money in Court. The Munsif found on the pleas of cruelty and divorce against Salima. He further held that as dower debt had been paid into Court, the plaintiff was entitled "to succeed in his claim for bringing his wife to his house." A decree was accordingly passed in favour of Abdul Kadir. On appeal, the District Judge reversed the decree of the Munsif on the ground that "payment into Court after institution of the suit was insufficient, because the husband had no cause of action at the time when he brought his suit." Abdul Kadir preferred an appeal to the High Court when a Division Bench referred the question whether under the circumstances of the case the suit was maintainable or not to the Full Bench. Mr. Justice Mahmood, whose judgment was adopted by the Bench, reviewed the Muhammadan Law of marriage and dower and came to the conclusion that marriage among the Mahomedans was purely a civil contract, two incidents of which were the mutual right of the husband and wife to cohabitation with each other and the liability of the husband to pay his wife's dower. To quote Mr. Justice Mahmood's words: "The legal effects of marriage come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous and there is no authority in the Muhammadan Law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife." In other words, Mr. Justice Mahmood's inference from the text-books on Muhammadan Law of marriage and dower was that the right of cohabitation by the husband or the wife and the liability of the husband to pay dower arise simultaneously on the completion of the marriage contract. And hence a suit for the restitution of conjugal rights by the husband was maintainable in spite of the non-payment of his wife's dower. The expression of the opinion that the suit of Abdul Kadir was maintainable was quite sufficient for the disposal of the appeal. But Mr. Justice Mahmood went further. He agreed, on the authority of the text-books quoted by the learned Pleader for Salima, that, according to Imam Abu Hanifa, Salima could, in spite of consummation of her marriage, refuse to admit her husband to sexual intercourse until her prompt dower was paid and remarked that under a well understood rule of construction of Muhammadan Law in case of difference of opinion between the three Masters (Abu Hanifa and his two disciples are described by Mr. Justice Mahmood as the three Masters), the opinion of the majority must prevail. The only point for consideration before the High Court was, as has already been remarked, whether the suit of Abdul Kadir was maintainable. That point was decided and we think correctly in favour of Abdul Kadir. The further expression of opinion on the question whether Salima could deny herself to her husband because of the non payment of her prompt dower may have been an interesting one, but it did not arise in the case as Abdul Kadir had paid the whole amount of the dower immediately after the defence of Salima had been filed. The view expressed by Mr. Justice Mahmood was at the most an *obiter dictum*. However, we do not wish to reject the proposition laid down by him on the ground that it was *obiter dictum*, for an expression of view of such an eminent lawyer is entitled to respect and consideration. Besides, the arguments advanced by Mr. Justice Mahmood are urged by the learned Counsel for the appellant in support of his contention that the plea of the respondent No. 6 in this case based on the non-payment of her prompt dower should not prevent an unconditional decree for the restitution of conjugal rights being passed in favour of the plaintiff-appellant. We, therefore, propose to consider the arguments discussed by Mr. Justice Mahmood in the case of Abdul Kadir. The learned Judge based his opinion, that a suit for the restitution of conjugal rights by the husband could not be resisted by the wife by reason of the non-payment of her prompt dower, on two grounds, namely, *first*, that it is a general rule of interpretation of the Muhammadan

Law that whenever there is a difference of opinion among the three Masters, the opinion of the two will prevail against the third, and *secondly*, that under the Muhammadan Law, dower is regarded as the consideration for connubial intercourse and the right of refusal of her person by the wife to her husband till her prompt dower is paid is like the vendor's right of lien on the goods sold till paid for. And as when once the goods are delivered, the vendor's right of lien is lost, so when once consummation of marriage has taken place, the right of the wife to refuse to admit her husband to cohabitation until the payment of her prompt dower is lost. He gives no authority in support of the first ground, the so-called well-understood rule of construction of the Muhammadan Law that in case of difference of opinion among Imam Abu Hanifa and his two disciples, the opinion of the majority will prevail, but refers to a passage in the case of *Sheikh Abdul Shukkoor* v. *Kaheem-un-nissa* (3) in support of his view. The passage is as follows:—

"The appellant's Pleader has cited a passage from the *Durr-ul-Mukhtar* in support of his argument that where on such a point there is a difference between Abu Hanifa and his disciples, the opinion of the latter should prevail." The words "such a point" clearly show that whatever passage was cited was no authority for the proposition that as *a general rule and in every case* the opinion of the majority is to prevail when there is a difference of opinion between Imam Abu Hanifa and his two disciples.

The rule of interpretation in case of difference of opinion is discussed by the Muhammadan lawyers under the heading of *Rasm-ul-Mufti* (rules of practice or procedure to be observed by the *Mufti*.)

I.—According to the author of *Durr-ul-Mukhtar*, "a *Mufti* should give his final *fatwa* in accordance with the opinion of all the *ulamas* if they agree: but if they differ, the Doctors are not agreed as to the course which is to be followed by the *Mufti*. The most approved doctrine is that a *fatwa* should generally be given in accordance with the opinion of Imam Abu Hanifa. This opinion is also supported by the *Sirajia* and other books. The opinion of Abu Yusuf should be next acted upon, and then that of Muhammad, then that of Zafar and then that of Hasan Ibn Ziad."

It may be observed here in passing that among numerous pupils of Imam Abu Hanifa forty were recognized as *Mujtahids*—four of whom were pre-eminently such, namely, (1) Abu Yusuf, (2) Muhammad, (3) Zafar and (4) Hassan Ibn Ziad.

II.—In *Kitabul Kaza* of *Durr-ul-Mukhtar* it is said that: "a *Kazi* like a *Mufti* should generally act upon the opinion of Abu Hanifa, then on that of Abu Yusuf, then on that of Muhammad, then on that of Zafar and then on that of Hassan Ibn Ziad. This is the most correct view and has been held to be correct in *Sirajia* and *Munnia*."

III—*Rudd-ul-Muhtar* has the following passage on the point: "If one of the two opinions be that of the Imam and the other of some one else, preference should not be given to the latter over that of the Imam because when the two *dicta* conflict, they cancel each other; consequently we must revert to the original opinion of the Imam."

IV.—*Fatwa Khairia* referred to in *Rudd-ul-Muhtar* is to the following effect:—

"In the opinion of the Hanafi jurists, it is a settled principle that no *fatwa* should be given and no opinion acted upon, but that of the Great Imam. One should not act contrary to his opinion and in conformity with their opinions (that is of Abu Yusuf and Muhammad) or one of them or that of any other person except when it is expedient as in questions of *Muzara'at* (cultivation), and although it may have been explained by the learned in religion that the *fatwa* is in accordance with their opinions (that is of Abu Yusuf and Muhammad): because the Great Imam is the founder of the religion and the first Imam. It is written in *Kitabul Kaza* of the *Bahr-ur-raik* that it is not only allowable but incumbent that a *fatwa* should be given according to the opinion of the Great Imam although it may not be certain upon what authority his saying was based."

V.—*Fatwa Sirajia* quoted in *Rudd-ul-Muhtar* has the following passage on the subject:—

"The *fatwa* should generally be given according to the opinion of Imam Abu Hanifa, then according to the opinion of

Abu Yusuf, then Muhammad, then Zafar and then Hasan Ibn Ziad. Some say that when Abu Hanifa is on one side and Abu Yusuf and Muhammad on the other, the *Mufti* has the option, but the first opinion is more preferable, when the *Mufti* is not a *mujtahid*."

Those authorites contradict the rule of interpretation adopted by Mr. Justice Mahmood. But, apart from these authorities, the texts quoted in the earlier part of this judgment show that the majority of the Mahomedan Jurists have adopted the view of Imam Abu Hanifa on the question of the right of a wife to refuse to surrender herself to her husband on the ground of the non-payment of her prompt dower. The quotation from *Fatwa i-Alamgiri* referred to by Mr. Justice Mahmood itself shows that Abul Qasim Assaffar used to follow the opinion of Imam Abu Hanifa in one respect, namely, as to going on a journey, and the opinions of his two disciples in respect of the right of the refusal of the wife to surrender herself on the ground of the non-payment of dower after consummation of marriage. Had the alleged rule of construction been such as mentioned by Mr. Justice Mahmood, Abul Qasim Assaffar would not have made a sort of compromise by adopting the view of Imam Abu Hanifa in one respect and of his disciples in another. The more orthodox view seems to be that the opinion of Imam Abu Hanifa should always be followed except in certain cases such as *muzara'at* and *muamilat* (cultivation and lease) and some others which are expressly mentioned in the books on Muhammdaan Law. Nor would the other writers, some of whom have already been quoted, have ignored the alleged rule of construction and followed Imam Abu Hanifa in preference to his two disciples had there been any such rule. Some, however, say that in case of difference of opinion between him and his two disciples, the *Kazi* has the option to choose between the two opinions.

The second ground upon which Mr. Justice Mahmood gives preference to the opinions of the two disciples—that based on the analogy of the lien which the vendor possesses upon the goods for the payment of the price before their delivery—may well be questioned. The reasoning implies that dower is the price for consummation of marriage and as soon as the first connubial intercourse has taken place, the right of the wife to withhold her person from her husband is gone because upon the analogy of sale the delivery of goods has taken place. The learned Judge came to that conclusion presumably on the consideration that a wife's right to dower arises on consummation of marriage. But because the right to dower accrues to the wife on consummation of marriage, it does not necessarily follow that dower is the price for the first connubial intercourse. Dower under the Muhammadan Law is not a consideration for marriage nor the price for the first connubial intercourse. Dower is consideration for the enjoyment of the *buza* (the private parts) as the *Sharah Vikaya* says.

According to the author of *Durr-ul-Mukhtar*, dower is the consideration for all or continuous connubial intercourse during the continuance of the married life as appears from the following passage: —

"It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her, even though after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly."

Even on the analogy of the delivery of goods in sale, the first connubial intercourse would not be a complete delivery of goods on the authority just cited. The *obiter dictum* of Mr. Justice Mahmood is neither supported by authority nor by legitimate inference from any principle of the Muhammadan Law. Indeed the opinion of Imam Abu Hanifa has, as has already been shown from quotations from text-books, been followed by the majority of writers on the Muhammadan Law. It may also be interesting to note here that in a case subsequent to that of Abdul Kadir, the High Court at Allahabad itself did not follow the view expressed by Mr. Justice Mahmood in *Abdul Kadir* v.

Salima (1)—vide *Abdul Karim Khan* v. *Musammat Chotti* (10).

We, therefore, hold that, in spite of consummation of marriage, *Musammat* Bilkis Jahan Begam, respondent No. 6, has the right to refuse to surrender her person to her husband so long as her prompt dower remains unpaid.

The next point for consideration in the appeal is whether the question of the amount of prompt dower payable by the plaintiff-appellant to his wife is *res judicata*. The argument for the plaintiff-appellant is that the plea of *res judicata* is urged on the basis of the decree of the Subordinate Judge of Shahjahanpur and that the decree fixed the amount of prompt dower payable to the respondent No. 6. The plaintiff appellant does not deny that the amount awarded by that decree is the amount of the prompt dower due to the respondent No. 6. But under section 5 of the Oudh Laws Act, the Courts in Oudh are forbidden to award a decree for dower or allow it by way of set-off, lien or otherwise, if the amount of dower is excessive and disproportionate to the means of the husband. The decree of the Shahjahanpur Court does not take away the power by the Oudh Courts given to them by section 5 of the Oudh Laws Act. Moreover, the plaintiff-appellant could not raise any plea with reference to section 5 of the Act in the Court of the Subordinate Judge of Shahjahanpur. In order to appreciate the argument for the plaintiff-appellant, it is necessary to examine section 5 of the Oudh Laws Act. That section is as follows:—

"Where the amount of dower stipulated for in any contract of dower by a Mahomedan is excessive with reference to the means of the husband, the entire sum in the contract shall not be awarded in any suit by decree in favour of the plaintiff, or by allowing it by way of set-off, lien or otherwise to the defendant; but the amount of dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of wife."

It is evident from the language of the section that the power of the Oudh Courts to reduce the amount of dower is limited to the case where it is excessive and where it is claimed on the basis of the contract of dower. The provisions of section 5 of the Oudh Laws Act do not apply to a case where the claim to dower is advanced on the basis of a decree of a competent Court. The fact that the plaintiff-appellant could not avail himself of the provisions of the section in the suit brought by his wife in the Court of the Subordinate Judge of Shahjahanpur would not enable the Oudh Courts to enforce that section, when the matter has passed out of the stage of contract and dower has become a debt of record. We are of opinion that the question of the amount of prompt dower payable by the plaintiff-appellant to his wife is concluded by the decree of the Shahjahanpur Court.

The third point in the appeal requires no discussion in view of our finding on the second.

The last contention for the plaintiff-appellant relates to the jewelry alleged to have been taken away by *Musammat* Bilkis Jahan Begam when going to her mother. The plaintiff appellant examined six witnesses including himself on the point. They were the plaintiff, his brother Waris Ali, his two cousins, Sarfaraz Ali and Altaf Husain, his sister, *Musammat* Kutban, and a maid-servant, called *Musammat* Masuman. Waris Ali admits that he was not present at the time when *Musammat* Bilkis Jahan Begam left her husband's house for Shahjahanpur. Sarfaraz Ali says that the respondent No. 6 at the time of her departure from her husband's house took away 19 ornaments. She had two ornaments on her person already, put on 12 more in the presence of the witness and placed 5 in a tin box. Altaf Husain says that the lady put on her person 16 ornaments in his presence and placed 5 in her box. These latter differ from those mentioned by Sarfaraz Ali. The plaintiff, who was examined after his brother and his two cousins, improved on their story by stating that his wife had a bath before her departure and before going to bathe, she took off her ornaments and gave them to him for cleaning. According to him, his wife put on 19 ornaments and placed 14 in the box. *Musammat* Kutban gives a much longer list of the ornaments said to have been taken away by the respondent No. 6. *Musammat* Masuman gives evidence in support of the case for the plaintiff-

(10) A. W. N. (1906) 136; 3 A. L. J. 432.

appellant, but her list is not so large as that given by *Musammat* Kutban. The evidence of Sarfaraz Ali and Altaf Husain is false on the face of it, as no woman, however closely related, would put on some of the ornaments mentioned by them on her person in the presence of her husband's male relatives. The witnesses for the plaintiff-appellant do not agree as to the number of the ornaments taken away by his wife or the number or names of those worn by her and those placed by her in her box. The evidence has only to be read to be disbelieved. We find that the plaintiff appellant has failed to prove that his wife, when going to her mother at Shahjahanpur, took away jewelry worth Rs. 4,150 belonging to him.

The result of our findings is that the appeal fails on the merits. We modify the decree of the Court below by awarding the plaintiff-appellant a decree for the restitution of conjugal rights conditonal on the payment of Rs. 10,000, the amount of prompt dower due to the respondent No. 6. As, in our opinion, the claim made by the plaintiff-appellant with respect to the ornaments was untrue, we do not consider it necessary to modify the decree of the Court below in so far as it relates to costs. In this Court as the appeal has failed, we direct that the respondents' costs be borne by the appellant.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 60 OF 1909.

October 6, 1911.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

JACOB ELIAS SASSOON AND OTHERS—APPELLANTS

versus

DOSSA KALIAN—RESPONDENT.

Master and servant—Pleadings—Point pleaded but not put in issue—Evidence adduced on the point—Reliance on the point—Construction of document—Hardship—One part repugnant to another—"Guarantee," meaning of—Facts justifying dismissal—Waiver of right to dismiss—Agreement to supply work during period of service—Provision of dismissal on notice—Wrongful dismissal—Conversion—Measure of damages—Act of God, when an excuse—Contract Act (IX of 1872), ss. 39, 73.

In an action for wrongful dismissal of a servant, the defendant, the master, pleaded fraud, general misconduct, negligence and breach of contract on the part of the servant.

The lower Court framed a general issue as to the justification for dismissal, in which the question of negligence and breach of contract was not separated from the question of fraud and misconduct. The parties, however, produced evidence on all the points. On appeal, the allegations of fraud and misconduct were abandoned by the master and he sought to rely only on negligence and breach of contract by the servant:

Held, that the master was entitled to drop the allegations of fraud and misconduct and rely entirely on negligence and breach of contract.

Sayad Muhammad v. *Fatteh Mahomed*, 22 C. 324, 22 I. A. 4, relied upon.

Hickson v. *Lambard*, 1 H. L. 324; *Guthrie* v. *Abul Mozuffer Noor-ud-din Ahmed*, 15 W. (P.C.) 50; 7 B.L. R. 630; 14 M. I. A. 53. *Rajendra Kumar Bose* v. *Gangaram Koyal*, 37 C. 856; 6 Ind. Cas. 472; 12 C. L. J. 70, distinguished.

The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued in order that each may bring forward evidence appropriate to the issues.

No question of surprise arises if a point is covered by the pleadings and evidence is adduced by both sides regarding it, although no issue on the point has been framed by the lower Court.

The ordinary meaning of the word "to guarantee" is to 'promise' or to 'undertake.'

The argument *ab inconvenienti* is only admissible in the construction of an agreement where the meaning is obscure. A possibility of hardship to one of the parties under an agreement cannot be allowed to obliterate the terms of such agreement.

If there are two clauses or parts of a deed repugnant to each other, the first will be received and the latter rejected unless there is some special reason to the contrary.

When a man chooses to answer for the voluntary act of a third person, he is held to warrant his ability to procure that act.

Parshotamdas Tribhovandas v. *Parshotamdas Mangaldas*, 21 B. 23, relied upon.

Where the master does not repudiate a contract which has been broken by the servant, but merely intimates that he would claim damages for the breach of contract and allows the servant to continue to perform his part of the contract, such conduct amounts to a waiver of the master's right to repudiate the contract.

Bentsen v. *Taylor Sons & Company*, (1893) 2 Q. B. D. 274; 63 L. J. Q. B. 15; 4 R. 510; 69 L. T. 487; 42 W. R 8; 7 Asp. M. C. 335, relied upon.

Ordinarily, it is not necessary that a servant should be dismissed by his master for a valid reason; it is sufficient if a valid reason in fact exists, even if the master be not aware of it at the time of the dismissal. But this rule has no application to a case where the master has knowledge of the facts constituting the justification for the dismissal, and deliberately condones them and waives his right to dismiss the servant on account of them.

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An agreement to retain or employ a servant does not involve an undertaking to supply work unless such an undertaking is expressly contained in or must be necessarily inferred from the whole of the terms of the agreement. But a contract, in which the servant is engaged for a definite period and is to be paid by wages estimated with reference to his work, does ordinarily involve an obligation to supply work and this inference is stronger if the contract contains a stipulation providing for dismissal by giving a specified length of notice.

In actions for wrongful dismissal, the general rule is that the plaintiff may recover damages for the whole unexpired period of service. Where, however, it is provided that the agreement may be terminated at an earlier date by giving previous notice, the parties may reasonably be held to have contemplated the time limit of the notice as attaching to any liability for wrongful termination of the agreement. In such cases, the damages for wrongful dismissal should be limited to the period of notice required under the agreement.

Where the law creates a duty and a party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him; but where a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity.

Nicholas v. *Marsland*, (1875) 10 Ex. D. 255, relied upon.

The ordinary measure of damages in an action for conversion is the market-value of goods at the time of the conversion.

Appeal against the decision of the Additional Judicial Commissioner of Sind.

Mr. *L. P. E. Pugh*, and Rai Bahadur *Tekchand Oodhavdas*, for the Appellants.

Messrs. *Eardley Norton*, and *Rupchand Billaram*, for the Respondent.

JUDGMENT.

FAWCETT, A. J. C.—The first question raised in this appeal is whether the lower Court was wrong in holding that the defendants-appellants, Messrs. E. D. Sassoon & Co., were not justified in dismissing the plaintiff-respondent, Dossa Kalian, who was their *Muccadam* under a written agreement on the 30th June 1907.

The facts and circumstances, under which the dismissal was made, are fully given in the judgment of the learned Additional Judicial Commissioner, Mr. Crouch, and need not be noticed in detail.

In the intimation of dismissal (Exhibit 87), no reason is given for it, except that "we have decided to work our own *Muccadamage* from the 1st July and that we shall have no further need of your services." In the plaint para 8, it is alleged that the dismissal, without giving the previous notice of three months as provided for in clause 21 of the plaintiff's agreement, was illegal and wrongful. In reply to this, para. 2 defendants' written statement pleads that "the plaintiff's services were dispensed with without three months' previous notice under clause 23 of the agreement as the plaintiff failed to carry out the terms and conditions of the agreement and that the plaintiff otherwise misconducted himself in the performance of his duties and was, therefore, rightly dismissed without any notice." It appears that originally clause 21 was referred to in this plea, but this was subsequently corrected to clause 23, on the plaintiff's pointing out the mistake in para. 1 of his rejoinder. Exception was also taken to this part of the written statement on the ground that "the defendants' charges are vague and unsupported by specific instance;" and the defendants were accordingly ordered by the Court to file a supplementary written statement specifying how the plaintiff failed to carry out the terms and conditions of the agreement so as to justify the defendants' rescission of the contract. This was filed on the 14th July 1908 and is as follows:—

"Statement of particulars of the breach of agreement and misconduct.

"*First.*—Knowingly and fraudulently attempting to ship damaged produce in spite of the protest of the Captain of the S. S. "Glenlee" and the orders given by the defendants and thus failing to obtain clean receipts as required by clause 11 of the agreement.

"*Second.*—Dishonesty in sampling and analysing produce received from up-country constituents, thus necessitating the employment by the defendants of their own men to do this kind of work.

"*Third.*—Wilful disobedience of orders in refusing to work between 1st and 5th June and 10th and 17th June 1907, thus causing considerable diminution in the export business of the defendants and also considerable damage to the goods lying at Keamari by exposure to rain, etc., and also not attending to his work after the rains with promptitude and despatch."

The issues raised on the question of justification for the plaintiff's dismissal without three months' notice follow the wording of these particulars, with some immaterial variations; and the learned Judge in the Court below, in paras. 19 to 24 of his judgment, holds that none of the allegations

of misconduct contained in these particulars have been proved, that there is no foundation for the charges of fraud and dishonesty brought against the plaintiff or for those of wilful disobedience to orders and general neglect, and that there was, consequently, a wrongful dismissal of plaintiff by defendants.

In this appeal, the learned Counsel who appeared for appellants, abandons the allegations of fraud, dishonesty and wilful disobedience to orders relied on in the defendants' statement of particulars, but contends that the plaintiff was justifiably dismissed under clause 23 of his agreement, (1) because he failed to obtain clean receipts for the shipment made on the SS. "Glenlee" in June 1907, as required by clause 11 of the agreement, and (2) because he was negligent in performing his duties under the agreement after the cyclone on the 6th June 1907. It is contended that the plaintiff thereby committed breach of contract entitling the defendants to dismiss him summarily under clause 23 of the agreement.

Mr. Norton for the respondent argues that the defendants cannot now be permitted to drop their allegations of fraud and rely on negligence or breach of contract, not put forward as the primary justification for the dismissal in the defendants' particulars of 14th July 1908. In support of this contention, he has referred us to the cases of *Hickson* v. *Lombard* (1), *Guthrie* v. *Abool Mozoffer Noor-ud-din Ahmed* (2) and *Rajendra Kumar Bose* v. *Gangaram Koyal* (3). All these are, however, cases of suits brought by plaintiffs on allegations of fraud, which stand on a somewhat different footing to that of a defendant in an action of wrongful dismissal, seeking to justify the dismissal on the ground of a breach of contract entitling him to dismiss without notice. This was the plea distinctly raised in para. 2 of the defendants' written statement; and though the particulars allege fraud and dishonesty on the part of the plaintiff, it is clear that the defendants did not thereby intend to abandon that plea and rely entirely on general misconduct, such as would entitle the defendants to dismiss the plaintiff under the general law of master and servant, apart from the terms of the agreement between the parties. At any rate, as regards the first clause of the particulars, which is the one on which appellants mainly rely subject to the dropping of the charge of fraud, there is a distinct allegation of breach of contract by failing to obtain clean receipts for the shipment *per* SS. "Glenlee," and the fact that this failure is alleged to be due to fraudulent conduct on the part of the plaintiff, which the defendants have failed to establish, does not debar the defendants from relying on the specific breach of contract mentioned in that clause. This is not a case of the allegation of breach of contract being put forward as a proof of fraud or as a subsidiary matter to the charge of fraud: rather, the fraud is subsidiary to the plea of breach of contract, and is at most alleged as an *additional* justification for the dismissal. Nor [though the issue 1 (*a*) does not separate the question of breach of contract from the further allegation of misconduct in regard to such breach of contract, as should, we think, have been done] is there any reason to suppose that the parties were misled thereby or on that account did not adduce evidence which they otherwise might have tendered. The evidence on the record is more than ample to consider the question in all its bearings, nor has any material complaint been made by respondent's Counsel to the contrary. There is, therefore, no good ground for holding that the plaintiff-respondent has been in any way taken by surprise, which is the main principle on which cases like those of *Hickson* v. *Lambard* (1) rest: and a case more applicable to the present one is that of *Sayad Muhammad* v. *Fatteh Mahomed* (4), where the Privy Council, after pointing out that the object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued in order that each may bring forward evidence appropriate to the issues, held that certain questions, though not formally stated in the issues, had been sufficiently open upon the proceedings to give each Court a right to form a judgment upon them See also Order VIII, rule 2, of the present Code of Civil Procedure, which, *inter alia*, requires a defendant to raise by his pleadings all such

(1) (1866) 1 H. L. 324.
(2) 15 W. R. (P. C.) 50; 7 B. L. R. 630; 14 M. I. A. 53.
(3) 37 C. 856; 6 Ind. Cas. 472; 12 C. L. J. 70.
(4) 22 C. 324; 22 I. A. 4.

grounds of defence as if not raised, would be likely to take the opposite party by surprise. For these reasons, we overrule Mr. Norton's contention that the defendants are precluded from justifying the plaintiff's dismissal on the ground of breach of contract, apart from fraud or other misconduct. The general negligence relied on is, we think, also sufficiently covered by the third clause of the particulars; and though no specific issue was raised in the lower Court on the point, yet evidence was adduced by both sides regarding it and there is no question of surprise.

This latter plea of negligence can first be shortly dealt with. It is sufficient to say that there is no evidence which would justify us in differing from the finding of the lower Court on the point. It is, no doubt, true that clean bills of lading were in certain cases only obtained on a letter of indemnity from defendants, such as that given in the case of the "Glenlee" (Exhibit 169) and that defendants had to pay over $2\frac{1}{2}$ lakhs for allowances on account of inferiority of quality and damage on shipments in July, August and September 1907: but there is no evidence which establishes that this was due to plaintiff's negligence at any rate to an extent which would justify his dismissal on that ground. On the contrary, the evidence of Exhibits 93 and 270 tends to show that the loss was mainly, if not entirely, incurred in respect of shipments with which the plaintiff had nothing to do. The defendants' letter of 20th June 1907, to their London branch (Exhibit 91) also goes against them as it makes no imputation against the plaintiff, but rather puts the blame on the Steamer Captains or owners for unnecessarily refusing to sign clean bills of ladings. The defendants' letters of 17th, 25th and 28th June to the plaintiff (Exhibits 74, 81 and 85), no doubt, do complain of his delay and negligence, but the cyclone and subsequent rain undoubtedly caused exceptional difficulities: and in the absence of more specific and reliable evidence in support of this charge against the plaintiff than that which is afforded by Mr. Booker's testimony (Exhibit 17), we do not consider it in any way substantiated.

Then, was the plaintiff's failure to get clean receipts for the produce shipped on the "Glenlee" a breach of contract on his part, entitling the defendants to dismiss the plaintiff without giving him the three months' notice specified in clause 21 of the agreement? In our opinion, reading clauses 11 and 23 together, we think the answer to this is in the affirmative.

Under clause 11, it is provided, without any reservation, that "the *Muccadams*" (*i.e*, the plaintiff) "guarantee to bring to the merchants" (*i.e*, the defendants) "clean receipts for all produce delivered by them either on board the steamer or to any third party." Mr. Norton contended that the word "guarantee" shows that this was only intended to be a "contract of indemnity" as defined in section 124 of the Indian Contract Act under which the plaintiff became liable for any subsequent loss due to the non-production of clean receipts. But the word "guarantee," which in strict law is only used in relation to the default of a person other than the promisor, is admittedly inappropriate for this purpose. The agreement is one obviously prepared by, or with the assistance of, a legal draftsman: and if it had been intended that the plaintiff should not undertake, as an essential term or condition of the contract, to obtain clean receipts, but only to bear any loss resulting from his failure to obtain clean receipts, this would presumably have been expressed in clear terms. Thus, in the same clause 11, there is a provision under which the *Muccadams* "agree to make good to" the defendants, any loss arising in a certain case. Similarly under clause 10, relating to the "home guarantee", which was modified by the renewal on the 7th May 1907, it is clearly provided that any loss arising from plaintiff's failure under his "guarantee must be paid for" by him; while under clause 12, he is "responsible for" any difference of weight to the extent mentioned. There is no reason why some such expression should not have been used in the first sentence of clause 11 if it had only been intended to be a contract of indemnity. The word "guarantee" is also used in clauses 13 and 15 without any indication that it is intended to denote a contract of indemnity only. Nor is there anything in the underlying correspondence (Exhibits 2 to 29) which shows that such was the intention of the parties. We think, therefore, that the word must be construed as merely equivalent to

'promise' or 'undertake' as is its ordinary meaning in a Charter Party (See Straud's Judicial Dictionary, 2nd Edition, Volume II, page 842).

The argument that the defendants would not be prejudiced by the failure to produce clean receipts, unless there was some resulting loss, is not entitled to much weight, in face of the absence of any words making such loss, and not the failure to obtain clean receipts, the actual subject-matter of the undertaking. It is quite probable that defendants wished to avoid the trouble and risk entailed by dirty receipts, without reference to the question of ultimate loss. No doubt, the plaintiff might conceivably be prevented from bringing clean receipts by circumstances beyond his control, *e. g.*, the unreasonable refusal of a Captain to give them (*Cf.* Exhibit 53) but this is not sufficient to outweigh the considerations already mentioned on which our construction of the clause is based. The principle that applies is that when a man chooses to answer for the voluntary act of a third person, he is held to warrant his ability to procure that act—See Pollock's Commentary on the Indian Contract Act, 2nd Edition, page 255, and the case of *Parshotamdas Tribhovandas* v. *Parshotamdas Mangaldas* (5). The argument *ab inconvenienti* is only admissible in construction where the meaning is obscure (*Cf.* Hardcastles' "Statutory Law", 3rd Edition, page 101): and a possibility of hardship to the plaintiff under his agreement cannot be allowed to obliterate the terms of such agreement. If the plaintiff wished to avoid the possibility of such hardship, he should have seen that an exception was inserted accordingly.

Clause 23 runs as follows:—"In the event of the *Muccadams* failing to carry out any of the terms and conditions of this agreement, the merchants shall be at liberty, if they think fit, to determine this agreement at any time." This clause is about as wide as it possibly could be and a mere *failure* by plaintiff to carry out *any* of his promises renders the agreement terminable thereunder. Clause 11, as already shown, contains an unqualified promise by the plaintiff to bring the defendants clean receipts: and his failure to do so in regard to the produce shipped on the "Glenlee," therefore, did, in our opinion, render the agreement terminable under clause 23.

Having regard to the wording of this clause 23, it is unnecessary to consider whether there was *a refusal* to perform the promise to bring clean receipts within the meaning of section 39 of the Indian Contract Act or whether the obligation to bring clean receipts should be considered to "go to the root of the contract," (*Cf.*, the cases of *Sultan Chand* v. *Schiller* (6) and *Rash Behary Shah* v. *Nrittya Gopal Nundy* (7). As pointed out in Pollock's Indian Contract Act, 2nd Edition, page 217, "parties can undoubtedly make any term essential or non-essential; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his part, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach." In the present case, for the reasons given above, the mere failure of plaintiff to bring clean receipts, as required by clause 11, gave the defendants a right to put an end to the contract: and even though this may go beyond the terms of section 39 of the Indian Contract Act, it is valid by virtue of the saving in section 1 regarding "any incident of any contract not inconsistent with the provisions of this Act."

At the same time, there is nothing in clause 23 to exclude the ordinary law as to election to rescind for breach of contract: on the contrary, this is implied by the words "shall be at liberty, if they think fit." It becomes, therefore, necessary to see whether (as alleged by plaintiff's Counsel) the defendants waived their right to put an end to the contract on account of the plaintiff's failure to obtain clean receipts in respect of the "Glenlee" shipments. It appears from (Exhibit 190) that the S. S. "Glenlee" was at Karachi from the 11th to the 23rd June. On the 13th June, a survey was held at the request of the steamer owners on the condition of 2008 bags shipped by defendants and the surveyor recommended that they should be discharged and good bags be shipped instead (Exhibit 180). On the 14th June, defendants applied to the Port Trust Authori-

(5) 21 B. 23.

(6) 4 C. 252; 3 C. L. R. 287.
(7) 33 C. 477; 3 C. L. J. 249.

ties for permission to discharge the same and send a fresh cargo accordingly (Exhibit 129). They also apologised to the Steamer owners for not having taken the necessary steps earlier. The discharge appears to have actually taken place on Saturday, the 15th June (Exhibit D. l. 22). On the 17th June, some more bags were rejected as containing damaged wheat and had to be re-landed (Exhibit D. l. 82 and Exhibit E.), and on the same date, defendants wrote to plaintiff a letter in which they gave him notice that should any claim be made by the Steamer owners for demurrage, they would look to him to make good such loss, as the delay was stated to be due to his still sending damaged wheat for shipment (Exhibit 74). To this plaintiff replied on the 18th, repudiating his liability. On the 25th June, defendants again wrote to plaintiff complaining as to his delay in loading and expressing their dissatisfaction with the manner in which he was conducting his business (Exhibit 81). No reference is, however, made in this to the question of clean receipts. The plaintiff replied the same day giving explanations for the delay, etc, and repudiating liability for demurrage or any other loss arising out of the non-fulfilment of any shipment or other contracts of defendants (Exhibit 82). On the 27th June, defendants gave a letter of indemnity to the owners of the S. S. "Glenlee" in consideration of their granting them clean Bills of Lading for their shipment by that steamer (Exhibits 160 and 169). On the 28th June, defendants replied to the plaintiff's letter of 25th June saying that his explanation is by no means satisfactory and making comments thereon (Exhibit 85). This letter contains the following paragraph:—"We have further to complain of your having failed to bring to us clean receipts for our produce shipped by S. S. "Glenlee" and S. S. "Silverdale" in accordance with the terms of your agreement with us, and hereby give you notice that we shall hold you responsible for any loss we may sustain thereby." On the 29th June, plaintiff replied, alleging as regards the failure to get clean receipts, that he was not to blame for this (Exhibit 86) and on the 30th June he was dismissed, as already stated. It also appears that, though the defendants' Manager, Mr. Booker, must have been aware of the breach of contract by failure to obtain receipts for shipments by the S. S. "Glenlee" from about the 17th June (*Cf.* Exhibits D. and 74), or at any rate the 22nd June, when he says he personally saw the Captain about the shipping of damaged wheat (Exhibit 176 line 435), yet he took no steps before the 30th June to treat the contract as at an end, but on the contrary continued to use the plaintiff's services as *Muccadum* as if the contract between them still subsisted. Mr. Booker in fact candidly admits in his deposition that though "I made up my mind after "Glenlee" that I would dismiss him, I had to wait until the June shipments were complete" (Exhibit 176 line 501). This is corroborated by Exhibits 187 to 190 which show that the plaintiff received shipping order on the 17th June for steamers which were loaded towards the end of June. The plaintiff was in fact virtually told by the defendants, that, though he had broken the contract by his failure to bring clean receipts, yet he was still bound by the contract and they would only hold him responsible for any loss they might sustain thereby. This is clear waiver of their right to put an end to the contract and amounts to an "acquiescence in its continuance," within the meaning of section 39 of the Indian Contract Act. The case is somewhat similar to that of *Bentsen* v. *Taylor Sons & Co.* (8), where the Court of appeal held that the conduct of the defendants in not repudiating a contract which had been broken, but merely intimating that they would claim damages for the breach of contract and allowing the plaintiff to continue to perform his part of the contract, amounted to a waiver of their right to repudiate the contract. We hold, therefore, that the defendants cannot justify the summary dismissal of the plaintiff by his breach of contract in failing to obtain clean receipts.

The defendants' Counsel relied on the rule (as stated in Macdonnell's Law of Master and Servant, 2nd edition, page 184) that "it is not necessary that a servant should be dismissed by his master for valid reason; it is sufficient if a valid reason

(8) (1893) 2 Q. B. D. 274; 63 L. J. Q. B. 15; 4 R. 510; 69 L. T. 487; 42 W. R. 8; 7 Asp. M. C. 385.

in fact exists, even if the master be not aware of it at the time of dismissal." This doctrine is also stated by Macdonnell [Loc. Cit. footnote (s)] not to be limited to cases in which the master had no knowledge of the facts constituting the justification at the time of the dismissal; but even so, it obviously has no application to a case where the master has knowledge of such facts and deliberately condones them or waives his right to dismiss the servant on account of them. In this particular case, there can be little doubt that the main reason which induced Mr. Booker to dismiss the plaintiff was his desire to work departmentally instead of through a *Muccadum*, to which arrangement he had been opposed from the commencement. The correspondence of defendants which has been put in clearly points to this, and Mr. Booker deposes that he had from the beginning determined to work departmentally as soon as he could and that he renewed the agreement in May 1907 only because they were not then ready to work departmentally (Exhibit 176, lines 160-164). We also agree with the view taken in paras. 12 and 13 of Mr. Crouch's judgment as to the arrangements made by the defendants in May and June with the intention of eventually carrying on the work departmentally. In the circumstances, some suspicion necessarily attaches to the evidence in regard to the plaintiff's alleged neglect of duty and supports the finding already given that this ground for his dismissal is not made out. And as the other ground relied on was waived by the defendants, we concur with the lower Court in holding that there was a wrongful dismissal of plaintiff by defendants.

In view of this, it is unnecessary to consider the contention of respondent's Counsel that even under clause 23, three months' notice is necessary (as under clause 21) to terminate the agreement: but we may say that we do not agree with this construction of the agreement. The case is quite different from that of *African Association, Limited*, v. *Allen*(9), where the agreement contained a clause for summary dismissal distinct from the particular clause under which the dismissal actually took place. It is true that clause 18 contains a provision for summary dismissal, which is unnecessary in view of the general terms of clause 23, but this is explicable by the fact that clause 18 relates to an act outside the particular duties of the plaintiff as a *Muccadum*, for which it may have been considered desirable to make special provision and in any case this is not sufficient to justify the construction sought to be put on clause 23 by Mr. Norton.

Coming to the question of damages, the first point for determination is the period in respect of which the loss caused to plaintiff and the compensation for the same, should be calculated. The general rule is that in actions for wrongful dismissal, the plaintiff may recover the wages for the whole unexpired period of service, including wages due at the date of dismissal (Halsbury's "Laws of England", Volume X, section 624 at page 339): and the lower Court has on this principle held that the plaintiff is entitled, under section 73 of the Contract Act, to such compensation as represents the loss caused to him by the defendants' failure to retain plaintiff in their employment until the end of the 12 months of the agreement (para. 25 of the judgment.) Admittedly, however, the claim of Rs. 30,000 for damages in para. 17 of the plaint is based on his probable profits if he had worked for the three months following his dismissal; and though there is nothing in the plaint, which clearly limits his claim in that way, yet the reference to the termination of the agreement *without due notice*, indicates a restriction of the damages to those sustained through his having been dismissed without three months' previous notice, as required by clause 21 of the agreement. This is corroborated by the notice of 11th March 1903 (Exhibit 157), where complaint is made of the wrongful termination of the agreement "without giving our client three months' previous notice as provided for, at a time and season when our client could have made large profits out of the business and our client estimates the loss thereby sustained at the lowest at Rs. 30,000." Under section 73 of the Contract Act, the plaintiff is entitled to compensation for any loss or damage caused by his summary

(9) (1910) 1 K. B. D. 397; 79 L. K. B. 259; 102 L. T. 129; 26 T. L. R. 234.

dismissal (*a*) which naturally arose in the usual course of things from such dismissal or (*b*) which the parties knew, when they made the contract, to be likely to result therefrom. As pointed out in Pollock's Indian Contract Act, 2nd edition, pages 312-313, the latter mode of estimating damages is generally the simpler and more easily ascertainable of the two; and in the present case we think that the clause requiring three months' previous notice does supply a time limit which the parties may reasonably be held to have contemplated as attaching to any liability for wrongful termination of the agreement. This is borne out by the fact just mentioned that the plaintiff himself adopts this time limit in estimating his damages. The fact that the plaintiff was not dismissed under clause 21 is immaterial. And though there is no invariable rule that damages for wrongful dismissal should be limited to the value of the notice lost, see *Maw* v. *Jones* (10), this is, in our opinion, clearly a case in which having regard to the length of the notice and the other circumstances attending the plaintiff's employment and dismissal, the three months' notice affords a proper measure of the damages to be awarded, so far as regards the period for which compensation should be given. Mr. Pugh contends that as clause 21 also gave the defendants the right to "stop deliveries" to the plaintiff at once, this also is a condition attaching to the liability for wrongful dismissal, so that the plaintiff is not entitled to recover damages, except in regard to work actually done by him prior to his dismissal This point is considered and overruled in paragraph 25 of the lower Court's judgment. Without endorsing all the grounds on which that ruling is based, we think that the contention is clearly inadmissible. No doubt, an agreement to retain and employ does not involve an undertaking to supply work unless such an undertaking is expressly contained in or must be necessarily inferred from the whole of the terms. But a contract, such as this, in which the servant is engaged for a definite period and is to be paid by wages estimated with reference to his work, does ordinarily involve an obligation to supply work and this inference is stronger if the contract contains a stipulation (as does the present one) providing for dismissal by giving a specified length of notice (see Mayne on Damages, 7th Edition, page 243). The exact meaning and validity of the stipulation allowing defendants to "stop deliveries" in such a case is uncertain: but so far as it may be repugnant to the implied obligation to supply work until the expiry of the period of the agreement or of the three months' notice, it would, I think, probably be held of no legal effect under the general rule that "if there are two clauses or parts of a deed repugnant to each other, the first will be received and the latter rejected, unless there is some special reason to the contrary" (Halsbury's Laws of England, Volume X, section 759, at page 456). But, for the purposes of the present case, it is sufficient to say that such a restriction on the ordinary measure of damages in such a case cannot reasonably be held to have been in contemplation of the parties. The whole effect of the provision for three months' notice is nullified if the defendants could stop supplying him with work by which to earn his remuneration during that period; and the loss of such remuneration is clearly loss in respect of which compensation is recoverable under section 73 of the Contract Act.

The next question arising is how the compensation for plaintiff's loss of remuneration in respect of the three months of July, August and September 1907 should be calculated. Leaving aside for the present the bags in stock on the 30th June, in respect of which the plaintiff had already done some work, we have to consider first the general claim of Rs. 30,000 in respect of new stock shipped during those three months, which has been awarded him by the lower Court. No exception was taken by appellants' Counsel to the calculation of the learned Judge under which it is held that plaintiff would have been entitled to Rs. 52,730 less his actual expenses in preparing and shipping the 4,60,216 bags, representing the new stock shipped during that period. The point at issue is what deduction should be made on account of such actual expenses. The learned Judge has taken Rs. 5 per 100 bags as a fair average of such expenses and deducted Rs. 23,010 accordingly, as well as a sum of Rs. 1,500 on account of the costs of supervising staff at Rs. 500 per mensem, or Rs. 24,510 in all,

(10) (1890) 25 Q. B. D. 107; 59 L. J. Q. B. 542; 63 L. T. 347; 38 W. R. 718; 54 J. P. 727.

leaving plaintiff a net profit of Rs. 28,220. The extra Rs. 1,780 has been awarded as due in respect of bags wholly or partly prepared for shipment, but not shipped by the 30th September.

In arriving at this estimate of Rs. 5 per 100 bags, the learned Judge proceeds on certain evidence as to the actual cost to defendants of carrying out the work which the plaintiff would otherwise have done and the actual cost to Ralli Brothers of doing similar work during the three months in question. The figures, on which his conclusions as to such actual cost are based have been attacked as erroneous, and this point will be considered later on. A more important point is whether such evidence affords a proper, or at any rate the best, method of estimating the expenses which should be deducted. As to this, we agree entirely with the contention of Mr. Pugh that a more reliable estimate would be obtained from evidence showing what the plaintiff's actual expenses and profits were during the whole or part of his employment prior to his dismissal, and that such evidence, if available, should have been adduced by the plaintiff in order to put the Court in a proper position to determine the question of damages. In support of this, reference may be made to the case of *Devonald* v. *Rosser & Sons* (11), where in a case of dismissal of a workman paid by piece work, the measure of what was a reasonable amount of compensation was held to be the average amount of the workman's earnings previously to his dismissal. But quite apart from any such authority, it is obvious that evidence as to the actual expenses and earnings of the plaintiff affords a much safer basis to go on than evidence of the expenses incurred by the defendants under different conditions and still more than evidence of the expenses of other firms in Karachi, whose arrangements and circumstances may differ considerably.

The plaintiff admittedly kept a set of account books at Kiamari from which full details as to his earnings and expenses could be collected, but the books in question have not been produced, and the plaintiff says that he cannot tell how much profit he made (Exhibit 199 line 375). The excuse given for the non-production of these accounts is that the *roznama* and *khata*, which were the principal books, were missing, when the plaintiff took inspection of them; and it is suggested by Mr. Norton that they were purposely removed and suppressed by Mr. Booker, or one of his subordinates, for the purpose of preventing the plaintiff using them. In support of this, reliance is placed on Exhibits 98, 99, 112, 117, 120, 121, 122, regarding the breaking of the seal which was placed on the cupboard containing the Kiamari books on the 30th June and the removal of the cupboard to the defendants' town office on the 6th August. But there is no evidence that the seal was in fact broken by one of defendants' employees or that the missing books were removed by or at the instance of Mr. Booker. The suggestion that the seal had been broken by one of defendants' men was at once denied (Exhibit 113), and Mr. Booker deposes that the plaintiff's men had access to the books, while the key of the cupboard was in his possession (Exhibit 177, line 515). This is to some extent corroborated by the witness, Narayen, who says that after the 30th June he had to be in the defendants' office making out an account and he "may have had to refer to the Kiamari books" (Exhibit N. line 105). In any case, there is no evidence that the two books were missing when the cupboard was opened and inspected on the 7th August, nor does the correspondence, which plaintiff had with defendants prior to the suit, contain any complaint as to the books being missing. It is also clear that the defendants gave the plaintiff every facility for inspecting the books. Plaintiff says (Exhibit 199, line 616):— "We went on taking inspection for 2 months and we got all the information we required." The witness Chutturbuj, who did the main inspecting work, says (Exhibit 219, line 85): "I was inspecting the books at the office for 6 or 7 weeks. The books required for reference were all there except those containing entries with regard to Palls." He further deposes that the "general expense" account book, which presumably shows the items of plaintiff's expenses, was among the books: and, when questioned by the Court regarding any books being missing, says that this book and the book containing a list of people on

(11) (1906) 2 K. B. D. 728; 75 L. J. K. B. 688; 95 L. T. 232; 22 T. L. R. 682.

daily wages "appear missing," since he inspected the books at defendants' office. This evidence certainly does not corroborate the plaintiff's statement (Exhibit 199 line 377); that they could not find the *roznama* and *khata* when they had inspection; on the contrary, it shows that there was a book from which plaintiff's expenses could be ascertained. It is also difficult to believe that if those two books had been missing, the plaintiff would not have made a specific complaint about it in his correspondence with the defendants, which shows him to have been far from backward in making complaints as to his treatment by the defendants. The inspection of the Kiamari books appears from Exhibits 126, 127 and 132 to have taken place in about November 1907, and even as late as the 27th January 1908 (Exhibit 149). the plaintiff merely complains of the books being handled by defendants' office in the absence of any representative of his, and of the seal of the cupboard having been removed, and not of any books being missing. Again, it is very improbable that, if Mr. Booker had wanted to do away with evidence which might assist the plaintiff in advancing his claim against the defendants, he would have suppressed only the two books which might have been useful to defendants and left all the books required by plaintiff, for making out his claim in detail: the probabilities are rather in favour of plaintiff having suppressed those two books. In view of all this, we think that there is no foundation for the charge now brought against Mr. Booker, but not apparently put to him when he was examined in Court; and that all the surrounding circumstances point to the evidence in question having been deliberately withheld by the plaintiff.

That being so, there is legitimate ground for drawing the presumption mentioned in illustration (*g*) to section 114 of the Evidence Act, *viz.*, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The presumption that his Kiamari accounts would show that he was not in fact making a profit of Rs. 10,000 a month out of his contract, which is the rate at which his claim for Rs. 30,000 works out, is borne out by the figures given by the witness Chatturbuj (Exhibit 219) as to plaintiff's expenses on *Muccadamage* as shown in his *kothi* accounts. These figures were not given by him in examination-in-chief, but obtained in cross-examination, and they do not appear to have been checked or audited in any way. And though he says they include all that was spent on the *Muccadami* account, this does not really appear to be the case. Thus he admits that the pay of Walji, who was a superivsor on Rs. 100 a month employed by plaintiff (Exhibit 199 lines 392, 43), has not been debited to this account, nor did it contain all the sewing charges and the cost of gunny bags bought at Kiamari (Exbibit 199 lines 679, 685). It is also possible that money expended from cash advances received from the defendants on account would not be shown in the *kothi* accounts. The figures given, cannot, therefore, be accepted as absolutely reliable. But taking them for what they are worth, they show that plaintiff's profits during May and June could not have exceeded Rs. 2,147 and 4,672 respectively. His profits under the one anna and 5 pies rate of commission were, no doubt, larger, but we are not concerned with these. Accordingly, there is every reason to believe that plaintiff's Kiamari books would have shown that his profits were considerably lower than he asserts, and that the damages claimed at Rs. 10,000 a month are excessive.

Another thing, which goes against this claim is the plaintiff's estimate of the expenses which he would incur (Exhibit 202), *viz.*, Rs. 9-6 per 100 bags or 9 pies per cwt. This was given by him to defendants in January 1906 when the negotiations were going on about his employment, and constitutes an admission by him on which the defendants are entitled to rely. It is not, of course, conclusive against him, but it is certainly entitled to weight, and cannot properly be ignored as it has been by the lower Court. To get rid of the effect of this admission, it was open to the plaintiff to adduce evidence showing what in fact were his actual expenses, but, as already stated, he has deliberately refrained from doing so. The plaintiff's bare statement that his expenses amounted to Rs. 4 or 4-8 per 100 bags, including every thing except palls, (Exhibit 199, line 245) is insufficient to rebut the inference arising from this admission: and his further statement that he considered that 50 per cent.

of what was paid should be profit (*ib*, line 365) requires to be effective, some evidence that his profits actually were at that rate. In the absence of such evidence, we think that more weight must be given to this admission than to *ex parte* statements made after the suit was filed, and that special consideration must be given to it n estimating the damages due to plaintiff. t may, no doubt, be the case that plaintiff purposely over-estimated his probable expenses (*Cf.* Exhibit 36), but there is nothing which indicates that the excess was anything like what he now asserts. Even with an expense of 9 pies per cwt, the plaintiff would make a profit of 18 per cent. and it is extremely unlikely that a firm like the defendants, with its Bombay experience and the inquiries made from Karachi (*Cf.* Exhibits 11-A to 15), would make an arrangement which gave the plaintiff a profit of 50 per cent. or over, even at the reduced commission of 11 pies.

The rate of Rs. 5 per 100 bags allowed by the learned Judge is under 5 pies a cwt., so that, this actually gives the plaintiff a profit of more than 50 per cent. This rate is based mainly on the evidence of Apostolides (Exhibit 159) as to the cost to Ralli Brothers of doing the work in June to September 1907. But it is to be noted that the figures he gives of the bags handled and actual expense during the three months (lines 30-40) work out to over Rs. 5 per 100 bags, *viz.*, Rs. 5-4-0 for July, Rs. 5-15-0 for August and Rs. 7-3-10 for September. It also seems that the cost of sampling, patching (annas 7 to Rs. 1-5-0 per 100 bags, line 52) and removing (annas 12 per 100 bags, line 80) is not included in his rates. But in any case, as already noted, such evidence is a very unreliable method of estimating the plaintiff's probable expenses, and we do not think that any deduction as to the latter can be safely based on it.

The expenses actually incurred by defendants in doing the work departmentally during the three months, no doubt, afford a more trustworthy basis. But, unfortunately, the exact amount of such expenses is in dispute and uncertain. The learned Judge has taken Rs. 30,348-1 as the cost to defendants of carrying out the work which the plaintiff would otherwise have done This is based on the Commissioner's report, Exhibit 96, where, after an examination of the defendants' account books, he holds that that amount is shown to have been spent on (1) emptying, (2) weighing, (3) piling, (4) sewing, (5) mixing, (6) sampling and (7) loading at Kiamari during the months of July, August and September 1907, and Rs. 16,254-8-10 on "the rest of the work at Kiamari during the same period" This is in accordance with the Court's order of 5th April 1909 and assumes that the expenses that would have fallen on the plaintiff are all covered by the seven heads mentioned. But this is by no means certain, and, in our opinion, it would have been better if the Commissioner had been asked to ascertain and report what proportion of the total expenditure was properly debitable to *Muccadumage* charges, which the plaintiff would have had to bear, instead of tying down the Commissioner to specified heads. In the circumstances, we do not think, defendants are now precluded from contesting the lower Court's view that only Rs. 30,343 are so debitable. But we are not in a position to say with any accuracy what amount should be debited, though we think that some of the charges included in "the rest of the work at Kiamari" must probably be debitable. For instance, the charges for "unloading" shown in the summary of defendants' accounts (Exhibit Q) would seem to have been wrongly excluded, so also the plaintiff would be liable for at any rate some of the "*jamadari*" under clause 9 of the agreement. This summary was attacked by Mr. Norton as not being properly proved, but we see no sufficient reason to doubt its general correctness as an abstract from the defendants' accounts without necessarily relying on the particular amounts entered in it. The first portion of it also agrees substantially with the figures contained in the Commissioner's report, Exhibit 96, which deals with the same accounts, as will be seen by comparing the figures for the seven heads already referred to and the totals. The only large difference is as regards the sewing charges, which are some Rs. 1,400 higher in Exhibit Q, apparently owing to the sewing of tarpaulins and ground-palls being excluded

in the other account (see Exhibit O, line 39). Accordingly, it may be taken that the defendants' expenses, which would otherwise have been borne by plaintiff, amounted to some figure between Rs. 30,348 and Rs. 46,662: but the exact amount is not ascertainable from the evidence on the record. It may be noted that, even taking the expenses at Rs. 30,348, the rate per 100 bags works out to Rs. 6-8-0 and not "slightly over Rs. 5 per 100 bags," as stated in the lower Court's judgment.

In the circumstances, we think that the proper basis for estimating the plaintiff's probable expenses is the rate of 9 pies per cwt., which he himself put forward as a true one (though, no doubt, a rough one) in the negotiations prior to the agreement. If it errs unduly in favour of the defendants, he is himself to blame for this, by his conduct in refraining from adducing evidence as to his actual expenses and profits prior to his dismissal. It is in his favour, so far as it is under the rate of 10 pies a cwt., which is the defendants' estimate of working departmentally (Exhibits 32 and 49) and which is nearly what it did actually cost the defendants, taking their expenses at the amount of Rs. 46,662. It is also to be borne in mind that in these three months, there was a scarcity of labour and enhanced wages had to be paid (Exhibit 159, line 90, Exhibit 199, line 247). At the rate of 9 pies per cwt., the expenses in regard to the 9,20,432 cwts. in respect of which the payment of Rs. 52,720 is due, come to Rs. 43,145, leaving a balance of Rs. 9,585 in the plaintiff's favour. This gives him an average profit of nearly Rs. 3,200 a month, which substantially agrees with his average profits for each of the month of May and June 1907, *viz.*, Rs. 3,400. The plaintiff is clearly not entitled to anything in respect of goods not actually shipped by the end of September, although partly prepared for shipment as his commission was not earned until the goods were actually shipped (see clauses 8, 9 and 17 of the agreement) and the case must be treated as if his services had been rightly dispensed with on the 30th September. The remainder of the claim to damages for wrongful dismissal relates to the 2,55,285 cwts. in stock on the 30th June 1907, in respect of which the plaintiff claims Rs. 14,625-11-3 at the full remuneration of 11 pies a cwt. [para. 10 of the plaint and Schedule (G).] The further expenditure which plaintiff would have had to incur before the goods were actually shipped, so as to earn his *Muccadamage* commission, must, of course, be deducted in estimating his actual loss in respect of these goods and plaintiff's full claim was rightly disallowed by the learned Judge. On the other hand, the deduction of Rs. 1-4-0 per 100 bags on account of plaintiff's further expenditure on the *pucca* bags, was accepted by the appellants' Counsel, and there is no ground for thinking this to be excessive, especially as plaintiff in Exhibit 202 puts down the costs of loading at Re. 1 per 100 bags and this is corroborated by the Commissioner's report, Exhibit 96, which shows that the cost of loading 6,42,015 bags in July, August and September 1907 came to Rs. 7,044-6-5 or a little over Re. 1 per 100 bags. We accordingly confirm the finding of the lower Court that Rs. 5,108 are due to the plaintiff in respect of the *pucca* bags. As to the *kutcha* bags, the learned Judge's finding that plaintiff had expended annas 8 per 100 bags on them may be accepted (not being contested or shown to be erroneous), but his deduction must be increased on our finding that the total cost to plaintiff of preparing the goods for shipment must be taken to have been at the rate of Rs. 9-6-0 and not Rs. 5 per 100 bags. The amount to be deducted would, therefore, be $\frac{1,51,249 \textit{ plus } 3,963}{2 \textit{ by } 100}$ *by* Rs. 8-14-0$=\frac{1,55,212}{200}$ *by* $\frac{142}{16}$=Rs. 6,887. The difference between this and the Rs. 8,892 due on shipment is Rs. 2,005 and we accordingly reduce the Rs. 5,400 awarded by the learned Judge to this amount.

The total amount awarded to plaintiff as damages for his wrongful dismissal came to Rs. 9,585 *plus* 5,108 *plus* 2,005 equal to Rs. 16,693 as against his claim for Rs. 44,625 and the Rs. 40,508 allowed by the lower Court. Mr. Norton did not dispute that interest could not be awarded prior to the suit in respect of the claim for damages, and the order allowing interest on the amount of damages from the 1st October 1907 to date of suit is, therefore, reversed.

We now come to the various items of account in dispute between the parties. The

first is as to the rate at which the bill for April 1907 is payable, *viz.*, at 1 anna and 5 pies as under the agreement, or at 1 anna as Mr. Booker asserts. There is no doubt that the modification of the rate to 1 anna was discussed between the parties, but we concur with the learned Additional Judicial Commissioner in holding that there is no sufficient evidence to establish that he actually agreed to the rate being reduced. The plaintiff is, therefore, entitled to the Rs. 6,133-13-9 claimed by him for that month. His claim for the months of May and June must also be allowed, as Mr. Pugh did not contest the finding of the learned Judge in para. 34 of his judgment as to the difference in dispute of Rs. 114-5 3.

The next item in dispute is the plaintiff's claim for Rs. 3,600 (originally Rs 6,000) as the value of 600 ground palls belonging to him which were made use of by the defendants (see Schedule H to the plaint and para. 5 of respondent's cross-objections). The defendants admit to have taken over 25, for which they have allowed the plaintiff Rs. 125 (Exhibit 153 A). The learned Judge in para. 35 of his judgment holds that on the 30th June 1907, there were about 550 palls for which plaintiff could reasonably have asked to be paid, and has allowed Rs. 2-8-0 each for 525 of these, and annas 4 each for 50, plus Rs. 125 admitted by the defendants, in all Rs. 1,450. The evidence, however, on which these conclusions are based is certainly not such as can be regarded as affording very reliable data for the figures arrived at. The plaintiff's own statement that on the 30th June he had 600 or 700 serviceable palls, in addition to old ones, cannot be relied on in the absence of corroboration from his account books or other documents. Nor in the absence of similar corroboration, is Blackwell's statement as to there being 700 or 800 in April (Exhibit 176) more reliable: he was discharged from the defendants' service for acting contrary to instructions (line 132) and may be biased against them. The supposed corroboration afforded by a comparison of Exhibit 216 and defendants' answer to interrogatory No. 6 of 11th August 1908, is somewhat indefinite, though, no doubt, it does support the plaintiff's estimate of 600. The proper way in which to prove the number of palls left behind and their value was from the plaintiff's account books, as these admittedly contained entries with regard to palls and the purchase of bags for making them, and there was also a book kept specially for ground palls (Exhibit 199, lines 659-701, Exhibit 216, lines 87-89). But, as in the other case, these have "mysteriously disappeared." For the reasons already given, there can be little doubt that the plaintiff has deliberately kept back this source of information, and he has not even produced the notes and calculations made by his clerk, Chutturbuj, as to the number of palls supplied by plaintiff (Exhibit 199, line 580; Exhibit 219, lines 90-97). We must, therefore, presume that his books would not support the claim made by the plaintiff and that it is exaggerated. It has, however, been considerably reduced by the learned Judge, and, having regard to all the circumstances, we do not think any sufficient ground is shown for interfering with the amount of Rs. 1,450 allowed by him on this account.

The defendant's Counsel contended that nothing should be allowed on account of these palls, as they were the property of defendants under clause 15 of the agreement. Such palls cannot, however, reasonably be held to constitute "contents of the godowns" within the meaning of that clause; and defendants themselves have put a contrary construction on this clause by their admission that Rs. 125 are due to the plaintiff for 25 palls.

The cross-objection taken to the reduction of the claim in respect of the other items specified in Schedule H to the plaint from Rs. 210-12 to Rs. 150 was not pressed at the hearing of the appeal.

The only remaining part of the plaintiff's claim, apart from interest, is that for extra work done by plaintiff in re-drying and re-bagging on account of damage done by the cyclone of June 1907. The lower Court has allowed Rs. 500 as a "fair allowance" on this account, on the ground that "the extraordinary damage caused by the cyclone was not in contemplation of the parties when they made the agreement and not provided for." But there had been previous cyclones in Karachi (*e. g.*, two in 1902, see Gazetteer of the Province of Sind, Volume A, pages 7, 8) and there is nothing to justify the assumption that

the possibility of one happening again was not in contemplation of the parties when they made the agreement. If the plaintiff wanted to exempt himself from liability for extra expense caused by a cyclone or other "act of God", this should have been specially provided for in the agreement; and the case falls under the general rule that "when the law creates a duty, and the party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him; but where a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity" [per Mellish, L. J., *Nicholas* v. *Marsland* (12).] We, therefore, disallow this sum of Rs. 500.

As regards the plaintiff's claim to interest, that in regard to the damages awarded him has already been dealt with. As regards the *Muccadumage* bills for April, May and June 1907, it was the duty of the plaintiff, under clause 17 of the agreement, to submit his accounts first to the defendants, and the practice, assented to by the plaintiff, appears to have been for the defendants to make an advance of a substantial amount against any such bill and to settle it finally within a month or so (*cf.*, Schedule A to the plaint and Exhibit 153A which, *e.g.*, shows the bill for March 1907 as settled on the 1st May). His bill for April was submitted on May 16th (Exhibits 194 and 203); and as the defendants have been held to have wrongly disputed the amount claimed by the plaintiff at the rate of 1 anna, 5 pies a cwt. and there was no sufficient excuse for the non-payment of the full amount at any rate by the 1st July 1907, we think interest at the rate of 6 per cent., on the excess due to the plaintiff from that date to the date of suit has been rightly awarded by the lower Court, (para. 39 of the judgment). The case is, however, different as regards the bills for May and June. These are not shown to have been submitted by the plaintiff by the 1st July and 1st August 1907, from which dates interest has been allowed up to the 14th February 1908 (para. 40 of the judgment); and in Exhibits 127 and 134 the defendants expressly throw the blame for non-payment on plaintiff owing to his not having submitted his bills. This non-submission is not denied by plaintiff either in the correspondence prior to the suit or in his deposition: and from Exhibit 134, it appears that the bills had not been submitted even on the 26th December 1907. In the absence of evidence as to when the bills were tendered, there is nothing which points to unreasonable delay on the part of the defendants in not settling them prior to the 14th February 1908. We, therefore, disallow the interest awarded by the lower Court in para. 40 of its judgment.

The interest awarded on the sums allowed for ground palls and miscellaneous articles from 1st July 1907 to date of suit (para. 41 of the judgment) must also be disallowed, as no demand in writing for payment giving notice to defendants that interest would be claimed is shown to have been made and in its absence, interest is not allowable under the terms of Act XXXII of 1839.

The case, however, really falls under 3 and 4 Will. IV, Ch. 42, section 29, which authorizes the giving of damages in the nature of interest over and above the value of the goods at the time of conversion (See Mayne on Damages, 7th Edition, page 423). This section has not been extended to India like section 28 of the same Statute, which is re-produced in Act XXXII of 1839. It is agruable, therefore, that the Courts in India have no power to award interest in cases falling under section 29. But, putting this objection aside, there does not appear to be sufficient reason for departing from the ordinary measure of damages in an action for conversion, *viz.*, the market-value of the goods at the time of conversion, especially as plaintiff has not proved by evidence, which should have been adduced, the actual market-value, and the amount awarded to him is a rough estimate which may be excessive.

As to the claim for interest at the rate of 9 per cent. on the deposit of Rs. 50,000, we agree with the view taken by the lower Court that there was no unreasonable delay in its return and that plaintiff is not entitled to more than the agreed rate of 5 per cent.

Of the items claimed by the defendants against plaintiff, the only ones regarding which any arguments were addressed to us are Nos. 1 and 16, *viz.*, the haulage charges included in the "wharfage fees" paid by the defendants to the Port Trust. It is contended that these form part of the shipping

(12) (1875) 10 Ex. D. 255.

In re PESTONJI JEHANGIR.

charges to be borne by the plaintiff. But in view of clause 9 of the agreement, which expressly excepts "monies paid for wharfage fees", we agree with the lower Court that this claim is inadmissible. There is no sufficient reason shown for not taking the expression "wharfage fees" as covering all the charges levied by the Port Trust under that name. Nor do we think the accounts between the parties prior to the end of March 1907 can be re opened in the way proposed by defendants, *Cf.*, *Magniram* v. *Laxminarayen* (13). We, therefore, see no reason to differ from the findings of the learned Judge as to these, or any other items, included in the defendants' claim to a set-off.

We refer the appeal to the Court of Commissioner to take accounts on the basis of the above conclusions. Final orders will be passed on receipt of his report to be submitted within a week.

PRATT, J. C.—In accordance with the report submitted by the Commissioner, we order that plaintiff do recover from the defendants the sums of Rs. 27,958 7-2 with interest on the said sum at 6 per cent. from the date of suit to date of payment.

Plaintiff to recover costs in proportion from the defendants in the lower Court and the defendants to recover costs in proportion in the Appellate Court.

The proportion to be the proportion of the amount awarded in this Court to the amount claimed.

(13) 32 B. 353; 10 Bom. L. R. 281.

BOMBAY HIGH COURT.
Civil REFERENCE No. 1 OF 1910.
November 25, 1911.
Present:—Mr. Justice Macleod.
In re PESTONJI JEHANGIR HORMUSJI —CLAIMANT.

Land Acquisition Act (*I of* 1894), *ss.* 3 (*b*), 11, 31—"*Person interested*", *meaning of*—*Duty of Collector*—*Court's duty*—*Apportionment*—*Poundage and fees*—*Liability of Government.*

Under section 3 (*b*) of the Land Acquisition Act, the expression "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of the land.

A person may be interested in the compensation money without having an interest in the land in the legal sense of the term.

The Collector has, under section 11, to inquire into the value of the land and into the respective interests of the persons claiming the compensation, and after awarding a sum for compensation, he has to apportion the compensation among all the persons known or believed to be interested in the land of whom or whose claims he has information.

What the Collector and the Court have to do is to apportion the sum awarded amongst the persons interested as far as possible in porprotion to the value of their interests. It is impossible to lay down any general rule which can be followed. The market-value of an interest, if ascertainable, may afford some guide towards ascertaining the amount to be apportioned in respect of that interest, but that can only be considered in relation to the total sum awarded as compensation.

It is the duty of Government, under section 31, to deposit in Court the whole of the compensation money which it may be required to deposit by the Act, free from any deduction. When a demand is made by Court Officials under Court Rules for poundage and fees in respect of such deposit, Government has to pay such poundage and fees in addition to the compensation money. The Court has no power to direct that a portion of the compensation money deposited should be refunded to Government as representing the poundage and fees paid by it when the money was deposited in Court. As the money is compensation in respect of land acquired under the Act, the Court has power only to direct payment of such money, without any deduction, to the person or persons interested.

When land is acquired for a Company, the poundage and fees, which may become payable during the course of proceedings, may be recovered by Government from the Company as costs of acquisition.

Mr. *Strangman*, Advocate General, for the Crown.

Mr. *Jardine*, for Claimants Nos. 2 and 3.

Mr. *Setalvad*, with him Mr. *Kanga*, for Claimant No. 4.

JUDGMENT.—A certain plot of land, abutting on Hornby Road, known as "The Dispensary Plot," was vested in the City of Bombay Improvement Trust under Schedule C of Bombay Act IV of 1898. Thereafter, Government sought to acquire this plot for the extension of the Victoria Terminus Station of the G. I. P. Railway, and notified their desire to acquire it under the Land Acquisition Act, in August 1908. Proceedings followed before the Collector for ascertaining the amount of compensation payable, in which the parties appearing were the Improvement Trust and one Pestonji Jehangir, who was in occu-

pation of the premises under an agreement with the Improvement Trust. The Collector fixed the compensation payable at the rate of Rs. 80 a square yard, and though Pestonji disputed the award, on the ground that that figure was inadequate and asked for a reference to the High Court on that account, he did not pursue the matter when it came before the Court and so far the reference is dismissed with costs against him.

Out of the compensation money so fixed, a certain sum was awarded to Government in respect of their reversionary rights to the land and there is no dispute now regarding that part of the award.

The Improvement Trust then claimed from the Collector the balance of the compensation to the complete exclusion of Pestonji Jehangir on the ground that he had no interest in the land. Pestonji claimed that he was in occupation of the land under an agreement with the Trust, with a right to obtain a lease for ninety-nine years when certain buildings had been erected according to the terms of the agreement on the land. Mr. Delves, a witness for the Improvement Trust, in answer to this, conceded that a purchaser from the Trust would make a deduction due to Pestonji being in occupation and the consequent risk of litigation. He fixed such deduction at Rs. 25,000; and the Collector, adopting this method of valuing Pestonji's interest, awarded to Pestonji Rs. 25,000, and the balance to the Improvement Trust. As the Improvement Trust were not persons competent to alienate within the meaning of the Act, the Collector was bound to deposit this amount awarded to them in Court under section 31 (2) of the Act. Pestonji dissatisfied with the apportionment effected by the Collector asked that this question also should be referred to the Court.

After the hearing had been proceeded with for some time, an arrangement was arrived at between Pestonji and the Improvement Trust with regard to the apportionment; so I am no longer concerned with the question what is the value of Pestonji's interest. But, I think, it is competent to me to remark that the method adopted by the Collector at the suggestion of Mr. Delves was absolutely and entirely wrong.

The Collector has under section 11 to inquire into the value of the land and into the respective interests of the persons claiming the compensation and after awarding a sum for compensation he has to apportion the said compensation, among all the persons known or believed to be interested in the land of whom or of whose claims he has information. Under section 3 (*b*), the expression 'person interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under the Act. It is quite possible that a person may be interested in the compensation money without having an interest in the land in the legal sense of the term. The Act does not indicate how the Collector is to effect the apportionment, and sections 20 to 28, which deal with the proceedings of the Court when a reference has been made under section 18, are also silent on the question.

It was suggested in argument that in apportionment, the market-value of each interest has to be ascertained but with only a fixed sum to apportion, this would obviously lead to difficulties. The various rights of female members of a Hindu undivided family in the joint family property have no market-value though such members would be persons interested in the compensation-money. Again, even if the market-value of the various interests could be ascertained, their total value would not be likly to coincide with the sum to be apportioned. I think what the Collector and the Court have to do is to apportion the sum awarded amongst the persons interested as far as possible in proportion to the value of their interests and it is impossible to lay down any general rule which can be followed. The market-value of an interest, if ascertainable, may afford some guide towards ascertaining the amount to be apportioned in respect of that interest, but that can only be considered in relation to the total sum awarded as compensation. There remains a question as regards the refund to Government of the poundage and fees which they paid when they deposited the money in Court under section 31. It is clearly the duty of Government to deposit in Court the whole of the compensation-money which they may be required to deposit by the Act free from any deduction, and when a

demand is made by Court Officials under the Court Rules for poundage and fees in respect of such deposit, Government have to pay such poundage and fees in addition to the compensation-money. They now ask that when a decision is arrived at regarding who is entitled to the money so deposited, the poundage and fees should be paid back to them out of the said money. There is no doubt that this course has been followed by this Court in the past, though as far as I know, the question whether Government are, as a matter of right, entitled to such a refund, has never been argued. But in considering what is the character of the money so deposited by Government in Court, and what are the powers of the Court under the Act with regard to that money, it seems clear to me that the money is compensation in respect of the land acquired under the Act and that the Court has only power to direct payment of such money without any deduction to the person or persons interested therein and consequently that the Court has no power to direct that a portion of such money should be refunded to Government as representing the poundage and fees paid by them when the money was deposited in Court.

When Government are acquiring land for a Company, as in this case, the Company have to execute an agreement under section 41 of the Act with the Secretary of State for India providing, *inter alia*, for the payment to Government of the costs of acquisition, and the poundage and fees which may become payable during the course of the proceedings should be included in the costs of acquisition. If Government are acquiring land for their own purposes, then the payment of poundage and fees to the High Court is not a payment out of pocket to Government. It is merely the debiting of a certain sum to one account and crediting it to another. But, however that may be, as long as the Act is silent on the question and the Court is only authorized to apportion or pay out the compensation-money which has been deposited in Court under the Act free of all deductions to the person or persons interested, then if Government consider that the poundage and fees should be paid out of the money so deposited, they can take steps to get the Act amended.

Therefore, there will be an order in terms of the consent decree between claimants Nos. 2 and 3 and the Improvement Trust. Costs of Government, exclusive of poundage and fees, awarded against claimants Nos. 2 and 3 to be paid out of the money to which they are now entitled.

Attorney for Government: Mr. *E. F. Nicholson.*

Attorneys for the Claimants Nos. 2 and 3: Messrs. *Nanu Hormusji & Co.*,

Attorneys for Claimant No. 4: Messrs. *Crawford Brown & Co.*,

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PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 501 OF 1911.

May 18, 1912.

Present:—Sir Arthur Ried, KT., Chief Judge,

RADHA KISHEN AND OTHERS

—PETITIONERS

versus

KIDAR NATH AND OTHERS—RESPONDENTS.

Practice—Court finding value of suit beyond its jurisdiction—Plaint presented to a competent Court—Trial de novo—Evidence taken by first Court, inclusion of.

A suit for dissolution of partnership was brought in the Court of a Munsif first class. In order to decide whether the suit was within his jurisdiction, the Munsif held an inquiry, found that the value of the suit exceeded his jurisdiction and returned the plaint for presentation in a competent Court.

The Sub-Judge, in whose Court the plaint was presented, ordered that the case should be tried *de novo* and refused to include in the evidence before him the evidence recorded by the Munsif:

Held, (1) that the order was correct:

(2) that as the Munsif decided that he had no jurisdiction, he could not proceed to decide any point other than that of jurisdiction and no finding by him that a certain amount was due by one party to the other could be treated as a finding on the merits.

Manna Lal v. *Samandu*, 46 P. R. 1906; 94 P. L. R. 1906 and *Probhakar Bhat* v. *Vishwawbhar Pundit*, 8 B. 313 at pp. 317 and 218, relied upon.

Delhi Cloth and General Mills Company Ld. v. *R. B. Hardhian Singh*, 72 P. W. R. 1910; 6 Ind. Cas. 939 and *Muhammad Afzal Khan* v. *Nand Lal*, 16 P. R. 1908; 146 P. L. R. 1908; 13 P. W. R. 1907, referred to.

Petition for revision of the order of the Sub-Judge, 1st Class, Amritsar, dated 1st February 1911, (directing that the case be tried *de novo*), under section 70 (*a*) of Act XXV of 1899.

The Hon'ble Mr. *Shadi Lal* and Rai Bahadur Lala *Sukh Dial*, for the Petitioners.

BAI PARSON v. BAI SOMLI.

Mr. *Oertel*, for the Respondents.

JUDGMENT.—This is an application for revision of an order refusing to include in the evidence before the Court below evidence recorded by the Munsif with the object of deciding whether the suit was cognizable by him. A preliminary objection was taken that no revision lay, the alleged error being on a question of law and being, moreover, an interlocutory order from which an appeal would lie on appeal from decree. *Arur Singh* v. *Bua Ditta* (1); *Arur Singh* v. *Dayal Singh* (2) and *Umar Ali* v. *Nasib-un-nissa* (3) were cited.

For the petitioner, *Pandit Rama Kant* v. *Pandit Ragdeo* (4) and *Delhi Cloth and General Mills Co.* v. *Hardhian Singh* (5) were cited for the proposition that an erroneous refusal to admit evidence was a material irregularity and that unless the petitioner's remedy was granted at once, the Court below would proceed to record fresh evidence in place of that recorded by the Munsif and remedy by appeal from decree would be too late. This is possibly a case in which the remedy is by revision at this stage, but in my view of the correctness of the order attacked, the respondents will lose nothing by the decision that revision lies.

The suit instituted in the Munsif's Court was for dissolution of partnership and for such sum as might be found due on dissolution. The Munsif had to decide whether the suit was within his jurisdiction and for this purpose, he issued a commission for the examination of account-books. There was no question of under or over-valuation in his Court. The valuation was tentative only. *Muhammad Afzal Khan* v. *Nand Lal* (6) and *Manna Lal* v. *Samandu* (7) are ample authority for holding that it was the duty of the Munsif, on finding that the value of the suit exceeded his jurisdiction, to return the plaint for presentation in a competent Court. Inasmuch as the Munsif decided that he had not jurisdiction, he could not proceed to decide any point other than that of jurisdiction, and no finding by him that a certain amount was due by one party to the other can be treated as a finding on the merits. The proceedings before him were *coram non judice* so far as the eventual decision of the question of the indebtedness of the one party to the other one was concerned and the order of the lower Court attacked by the petitioner was correct. This view is supported by *Prabhakarbhat* v. *Vishvambhar Pundit* (8) and by *Kalian Dayal* v. *Kalian Narer* (9). I decline to refer this case to a Division or a Full Bench for a consideration of the respective correctness of *Muhammad Afzal Khan* v. *Nand Lal* (5) and *Sudarshan Das Shastri* v. *Ram Prasad* (10), as I see no reason for holding that the former is incorrect and the latter correct.

The application is dismissed with costs.

This judgment governs Civil Revisions Nos. 646 and 647 of 1911.

Application dismissed.

(1) 4 P. R. 1911; 45 P. L. R. 1911; 26 P.W.R. 1911; 9 Ind. Cas. 674.

(2) 20 P. R. 1911; 93 P. L. R. 1911; 54 P. W. R. 1911; 9 Ind. Cas. 579.

(3) 82 P. R. 1911; 13 Ind. Cas. 800.

(4) 60 P. R. 1897.

(5) 72 P. W. R. 1910; 6 Ind. Cas. 939.

(6) 16 P. R. 1908; 146 P. L. R. 1908; 13 P. W. R. 1907.

(7) 46 P. R. 1906; 94 P. L. R. 1906.

(8) 8 B. 313 at pp. 317, 318.

(9) 9 B. 259 at p. 265.

(10) 33 A. 97; 7 Ind. Cas. 385; 7 A. L. J. 963.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 463 OF 1911.

January 16, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Russell.

BAI PARSON—APPELLANT

versus

BAI SOMLI—RESPONDENT.

Hindu Law—Mitakshara—Mayukha—Stridhan—Sons inheriting from mother—Tenancy-in-common—Joint Tenancy—Basic principle of co-parcenary—Obstructed and unobstructed succession—Interpretation—Silence of Nilkanth—*Self-acquired property—Joint property.*

Under the law of the *Vyavahara Mayukha* as also under that of *Mitakshara*, property inherited by sons from their mother descends to them, not as a joint tenancy, but as a tenancy-in-common.

Karuppai Nachiar v. *Sankaranarayanan*, 27 M. 309, followed.

The basic principle of joint tenancy as distinguished from tenancy-in-common under Hindu Law explained.

A joint tenancy is created where property is inherited by unobstructed succession called *rikhta*. In such a case, heirs take the property as co-parceners.

BAI PARSON *v.* BAI SOMLI.

A tenancy-in-common is created where property is inherited by obstructed succession. In this case, the idea of inheritance and the idea of partition go together; one is a necessary complement of the other, so that, at the very moment the inheritance falls in, the heirs take by partition, that is, as owners of defined shares and, therefore, as tenants-in-common.

Heritage in the case of *stridhan* is obstructed succession.

Where *Nilkanth* is silent on any point, his silence must be regarded as assent to the proposition laid down in the *Mitakshara*.

Self-acquired property is that which is acquired by a member of a joint family by his own exertions without detriment to the joint property and not thrown into the common stock.

Property, originally self-acquired, becomes joint when it is thrown into the common stock and is mixed up with the joint estate.

Second appeal from the decision of the Joint Judge of Ahmedabad, in Appeal No. 121 of 1910, varying the decree passed by the Subordinate Judge at Borsad, in Civil Suit No. 279 of 1909.

Mr. *L. A. Shah*, for the Appellants.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.—The only question for decision on this second appeal arising under the Vyavahara Mayukha is, whether the sons of a woman who inherit her *Stridhan* property take it jointly as co-parceners or severally as tenants-in-common.

The lower Courts have held that they take it severally as tenants-in-common, on the authority of the Full Bench ruling of the Madras High Court in *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (1). That decision has been followed by a Division Bench of this Court, consisting of the learned Chief Justice and Batchelor, J., in *Dattambhat* bin *Appinbhat* v. *Yamnabai* kom *Rambhat* (2). Both these decisions are under the law of the *Mitakshara*. It is urged in support of this second appeal that the law of the Mayukha is otherwise. Reliance is placed on the passage in that authority, where the word *dayi* (heritage) is defined and then explained by the author, Nilakantha (Chapter IV, section 2, placita 1 and 2, pages 45 and 47, of Stokes' Hindu Law Books). There, after defining *daya* as "wealth not re-united, nor put back again into a common stock and (still) admitting of partition," Nilakantha goes on to quote from the Smriti Sangraha which says:—"That which is received through the father, and that received through a mother is described by the term Heritage." Upon this, it is argued that, since property inherited by sons from their mother is put by the text quoted from the Smriti Sangraha upon the same footing as property inherited by them from their father, and since the law of co-parcenary undoubtedly obtains as to the latter, the same law ought to prevail as the former also.

Before discussing the soundness of this argument, it will be convenient to consider first the basic principle or root-idea of the term co-parcenary or joint tenancy under the Hindu law, and then to determine whether that principle is common to both the Mitakshara and the Mayukha.

One of the cardinal principles of Hindu Law, borrowed from its Shastras, is that a son is his father re-born. This principle rests on a passage from the Vedas quoted by Baudhayana, in which a father thus addresses his son:—"From my several limbs thou art distilled; from my heart thou art produced; thou art indeed myself but denominated son." Every son is, therefore, identified in interest with his father and all the sons together with him constitute one body, so to say in the eye and for the purposes of law and the Shastras. So Vijnaneshvara tells us that when a father brings a suit as to his own property, his son or sons can appear for him and prosecute the suit even when he is living, and that, because the word *plaintiff* includes the sons and grandsons of the man suing, "their interests being identical" (Mit., Moghe's Edition No. 3, page 113). Starting with that idea of identity, the law has engrafted on it the principle that every son takes an interest by birth in his father's property. Hence the injunction that a man shall not give away the whole even of his self-acquired property, when he has sons, because "procreating sons, the father must perform their initiatory ceremonies and provide for their livelihood." (See the Chapter on Gifts of the Mitakshara, Moghe's Edition No. 3, page 225; West and Buhler's Digest, 3rd Edition, page 759, Note). The same injunction is given in the Mitakshara in placitum 27 of Ch. I, s.: "Though immoveables have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet un-begotten,

(1) 27 M. 300; 13 M. L. J. 398.

(2) S. A. No. 277 of 1911, decided on the 1st December 1911.

and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made." (Stokes, pages 374 and 376.)

The doctrine that sons take property in their father's estate by birth is propounded by the Mitakshara in a highly learned disquisition (Chapter I, s. 1, pl. 17 to 22) in answer to those who maintain that the "property" of the sons "is not by birth but by demise of the owner, or by partition." According to the latter, all property, whether inherited from the father or other relations, is of the same character, the man inheriting getting ownership in it on the death of the person from whom it is derived. The Mitakshara and those who follow it hold otherwise. They distinguish between property inherited by sons from their father and property inherited from others. The former they call unobstructed succession; the latter obstructed succession. According to the opposite school, all inherited property is obstructed succession. The Vyavahara Mayukha discusses the question and upholds the view of the Mitakshara. The passage in the Mayukha (Chapter IV, section 1, pl. 3, Stokes) is as follows:—

"According to Dhareshvara Acharya, 'the ownership of sons and the rest, in the wealth of the father, is not generated previously during his life, but is produced by partition.' And the author of the Smriti Sangraha says the same. But it is not so."

It will be perceived from these discussions in the *Mitakshara* and the Mayukha that their view is that sons take interest in their father's property *by birth*, and that the opposite view which they combat is that the sons' interest arises *by partition*. The contrast between these two expressions, *by birth* and *by partition*, is significant, because in them lies the root-idea or basic principle of the co-parcenary system as distinguished from a tenancy-in-common. To take ownership in an estate *by partition* is to take a defined share in it as a severalty at the very moment that it falls in as an inheritance. When the father dies, the estate at once of itself comes to the sons by partition in shares. To take the estate *by birth* means to have an inchoate, undefined interest, and all the sons take it as an aggregate of persons standing as the father re-produced; so when the estate falls in an inheritance on the father's death, no son can say "this is my share," but all take what was a joint interest from the time of their birth.

Hence it is that the right of sons to inherit their father's property is termed unobstructed succession (*apratibandha daya*). They are the primary heirs, whose interest arises when they are born and that interest ripens in its joint condition when the father dies and inevitably comes to them as heirs for enjoyment without any obstruction. They take jointly and the joint interest continues until they by common agreement effect a partition. And partition in this case does not create a fresh interest of ownership, for that existed from the time of their brith; only it substitutes defined ownership of a part for an undefined ownership of the whole.

It is because of this nature of the right of the sons that the word *rikhta*, which means inheritance, is defined as unobstructed succession (*apratibandha daya*). After pointing out that a man becomes owner of property in one of five ways, by inheritance, purchase, partition, seizure, or finding, Vijnaneshwara in the Mitakshara brings out the contrast between inheritance and partition. He says: "Unobstructed heritage is here denominated 'inheritance,' *rikhta*" (Chapter I, s. 1, pl. 13). And he then states of partition: "Partition intends heritage subject to obstruction." Explaining these definitions given by Vijnaneshwara, the Viramitrodaya points out accordingly that sons become "owners" of their father's property by birth, not by partition, and he quotes the Mitakshara, which contrasts the right of ownership acquired by partition with the right acquired by sons to their father's property from their birth (Viramit. Ch. I, s. 36, Sarcar's Edition, page 19).

Here, again, we have the root-idea or basic principle of a joint tenancy as distinguished from a tenancy-in-common brought out very prominently. When we are told that unobstructed heritage is *rikhta* or inheritance proper and that obstructed succession (*apratibandha daya*) is partition, the plain meaning is this: In the case of obstructed succession, the idea of inheritance and the idea of partition go together; one is a necessary complement of the other, so that, at

the very moment the inheritance falls in, the heirs take by partition, that is, as owners of defined shares, and, therefore, as tenants-in-common. But it is not so with unobstructed succession. There the sons inherit as a united body of heirs in virtue of right pre-existing (from the time of their birth) without the idea of partition being a natural incident of the inheritance at the moment it falls in. Obstructed succession, in other words, is *partitioned* succession; unobstructed succession is *unpartitioned* heritage, subject to partition at the option of the sons inheriting.

This division of heritage into unobstructed and obstructed succession, adopted in the Mitakshara and followed in the Mayukha and the Viramitradoya, who belong, generally speaking, to the Mitakshara school, is not recognised by another school of Hindu lawyers, which maintains that it is only on the death of a propositus, whether father or not, that the property of the heir arises and that "heritage is in all cases obstructed and never otherwise": (Viramitrodaya, Sarcar's Edition, Ch. I, s. 22, page 13).

This contrast between unobstructed and obstructed succession is further brought out by Vijnaneshwara in other portions of the Mitakshara. For instance, in the Chapter on Debts, he first deals with the liability of sons and grandsons of a deceased Hindu to pay his debts. Then he discusses the question—Who is liable to pay them, if the deceased has left no sons or grandsons? Yajnyavalkya's text answers that in that case the person who takes the deceased's property as heir must pay the debts. That person is termed in the text *rikhta grahaka*, *i. e.*, the person who takes the *rikhta* or inheritance. But we have seen that the term *rikhta*, as explained by Vijnaneshwara, means primarily not all but only unobstructed inheritance, *i. e.*, the inheritance of sons and grandsons and great-grandsons. How then does it come to be applied here by Yajnyavalkya on the subject of Debts to the case of obstructed succession? To remove ambiguity on that score, Vijnaneshwara explains what the term *rikhta grahaka*, as used by Yajnyavalkya in the text in question, means. Vijnaneshwara explains: "(The term) *rikhta grahaka* (means) he who takes the inheritance by means of partition as the door (*vibhagadwarena*)." That is to say, the person so taking enters into the inheritance through or by means of partition—at the very moment it comes to him it comes *partitioned*, so that if there are several heirs to the property in the case of obstructed succession, they take it by division as a natural and inherent incident of their right attached by law.

These considerations do not apply to property inherited by sons from their father. The term unobstructed succession (*apratibandha daya*) is exclusively used of that property and is out of place in the case of all other property such as that inherited by the sons from their mother or from other relations. In the latter case, the heir inheriting does not take any interest in the property by birth; and the basic principle of a co-parcenary is essentially absent with reference to the right to inherit. When it comes to the heirs on the death of the propositus, it comes not in virtue of a right pre-existing from their birth but in virtue of the character of *partition* annexed by law to it as obstructed succession.

So far, then, as the Vyavahara Mayukha is concerned, it agrees expressly with the Mitakshara in maintaining that sons take interest in their father's property from their *birth*, and not by *partition*. As to the other considerations derived from the Mitakshara, that is, as to its definition of *rikhta* or heritage as unobstructed succession and of *samavibhaga* or partition as obstructed succession, it is true that Nilakantha is silent. But on the established principle of this Court, his silence must be regarded as assent to the propositions laid down in the Mitakshara and dealt with in the foregoing part of this judgment, unless we find in the Vyavahara Mayukha anything which either expressly or by necessary implication shows that Nilakantha intended to apply the law of co-parcenary also to property inherited by sons from their mother.

It is urged for the appellant that Nilakantha does so intend, because in explaining the definition of *daya* (heritage), he quotes the Smriti Sangraha which says that that term applies both to paternal and maternal heritage. That definition of *daya*, it must be remembered, is from a Smriti or text, and, seeing that a Smriti is generally meant to be the condensed expression of a rule, it is in every case a question whether the subjects

or objects specified in it are exhaustive or whether they are illustrative. Now, in the case of the text quoted by Nilakantha from the Smriti Sangraha, on which the appellant's Pleader strongly relies in support of his argument, we have Nilakantha's own explanation to make it clear beyond doubt that the text in question is illustrative, not exhaustive. After quoting that text, he goes on to quote also from the Nighantu where it is said:—"The learned define heritage to be the wealth of a father, which admits of partition." Here is an apparent contradiction between the text from the Smriti Sangraha and the text from Nighantu. The former says heritage means *paternal* and also *maternal* property. The latter says it is *paternal* property. Nilakantha cites both. How are they to be reconciled? He reconciles them by explaining that "the word *father* is merely put to denote relations in general, as a part for the whole." In Nilakantha's view, *daya* means heritage derived from any relation father, mother, brother or so forth, the word "father" being merely illustrative. So the word "mother" in the text from the *Smriti Sangraha* comes in by way of description, not enumeration.

It must be observed here that though the words *daya*, and *rikhta*, are sometimes used indiscriminately to mean heritage in general, their strictly legal connotations are different and even popular language recognises that. A *dayada* in popular language is one who takes a deceased's estate by obstructed succession. That is its strictly legal sense also. The word *rikhta* primarily means in law he who takes by unobstructed succession. Often they are used as if they were interchangeable, but that is not strictly legal, according to Hindu Law. Vijnaneshwara points this out in pl. 33 Ch. I, s. 11, of the Mitakshara (Stokes), where he says:—"The word 'heir' (*dayada*) is frequently used to signify any successor other than a son."

If, then, both the Mitakshara and the Mayukha so far agree, is there anything in their treatment of the subject of *stridhan* and of devolution to it to support the argument of the appellant's Pleader? According to both those authorities, heritage in the case of *stridhan* is obstructed succession; so partition is its natural incident. According to both again, as interpreted by this Court, when daughters, and, in default of them, their daughters, inherit the mother's estate, they take as tenants-in-common. The same law must apply to the sons also, when they in their turn inherit, in the absence of any express rule that the law as to unobstructed succession applies. No distinction is made as between daughters and sons with reference to the character of their right to inherit their mother's *stridhan*. They all stand forth as *heirs*; and if daughters take as tenants-in-common, the sons ought to take as such on the principle of the canon called *nyaya samya* (rule from equity). And that the canon was intended to apply is clear from the gloss of the Mitakshara on a text of Manu quoted in the Chapter on *Stridhan* (Ch. II, s. 11, pl. 19 and 20, Stokes, pp. 462 and 463). Manu's text is: "When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate." On this the Mitakshara's gloss is:—"All the uterine brothers should divide the maternal estate equally; and so should sisters by the same mother." Both brothers and sisters are put on the same footing, so far as the nature of the right is concerned. In the case of both, the right of inheritance accrues when the mother dies; that is the point of time; and it is at that point that the division takes effect, whether sisters take or brothers take. The inheritance and the division are simultaneous in either case.

As held by a Full Bench of this Court in *Dayaldas Laldas* v. *Savitribai* (3), the Mayukha interprets the above-mentioned text of Manu with reference to *anvadheya stridhan* differently from the Mitakshara. While the latter takes it to mean that brothers form a class of heirs separate from the sisters and that the division mentioned is of brothers *inter se* and of sisters *inter se*, the Mayukha interprets the text as meaning that both the brothers and the sisters inherit together as one class and the division mentioned is of the mother's estate among them all equally. This difference of interpretation does not affect the question before us. Both the Mitakshara and the Mayukha agree so far that, whether the brothers and the sisters form one class or two distinct classes, they

(3) 34 Bom. 385; 12 Bom. L. R. 386; 6 Ind. Cas. 530.

take, when they take at all, by division. Nay, the Mayukha's interpretation serves as a cogent reply to the appellant's argument. If the *anvadheya stridhan* is inherited by brothers and sisters together as one class, and the sisters take as tenants-in-common, it follows the same rule must apply to the brothers, as they stand in the same category of heirs. This is on the rule of Hindu law laid down by Baudhayana (according to the Viramitrodaya), and by Ushanas (according to the Mitakshara), that "what is affirmed of even one among many that have a common property, the same is to be extended to all, since they are declared to be similar" (see the Viramit., Sircar's Edition, Chapter II, pl. I, s. 10, page 59; the Mit., Mogbe's Edition No. 3, page 397).

But it is urged for the appellant that, in dealing with the question of partition, both the Mitakshara and the Mayukha make no distinction between property inherited by sons from their father and property inherited by them from their mother. It is argued upon that, that both the authorities intended to put both the properties on the same footing and treat them as joint and subject to partition among the sons holding both as co-parceners. This argument overlooks the fact that even in the case of property which is inherited by the sons from their mother, the law must lay down what its character is as a succession coming in a *partitioned* condition as a tenancy-in-common. It would not have done for the law simply to have said that the estate falls in as an estate *divided* in interest, because, that gives rise to the question--What interest does each son take? How is that interest to be determined? Hence the necessity of dealing with the property as a subject of partition. Because, in so dealing with it, the law givers and the commentators deal also at the same time with the mode and time of partition of the property inherited from the father, when this partition is made by the sons by mutual agreement after the estate has come to them as joint in character, it does not follow that the mother's property is also inherited as a joint estate. To give to the estate inherited from the mother that character, it must be an unobstructed succession, which it obviously is not.

In dealing with the subject of self-acquired property, Vijnaneshwara, no doubt, explains that self-acquisition is that which is acquired without detriment to the paternal or the maternal estate inherited by sons. It may be argued that he would not have mentioned the maternal estate there with the paternal estate, if, in his opinion, the former were not joint like the latter. The argument, however, puts on Vijnaneshwara's gloss a construction which makes it practically contrary to the substantial meaning of Yajnyavalkya's text defining self-acquired property and to the meaning of Vijnaneshwara's gloss thereon. The question of self-acquired property arises and can arise only with reference to a family the members of which are or were joint in estate. Yajnyavalkya's text refers only to such a family. Now, property held by a family as joint need not necessarily be only paternal. It may be property originally inherited from other relations, or it may be property originally acquired by one or more of the co-parceners by his or their own exertions, and both these may have been thrown into the common stock and turned into joint property. The established law is that self-acquired property is that which is acquired by a member of a joint family by his own exertions without detriment to the joint property and not thrown into the common stock. When Yajnyavalkya speaks of self acquired property as property acquired without detriment to the *paternal estate* and Vijnaneshwara in his gloss speaks of it as property acquired without the help of the *paternal* and *maternal* estate, both mean in substance by such estate all estate which is joint in character, whatever its derivation. If the argument we are noticing is sound, we must take Yajnyavalkya's text and Vijnaneshwara's gloss in their literal sense and restrict self-acquired property to that which is acquired without detriment only to the paternal or to the maternal estate of the joint family and we must exclude all other property, acquired by inheritance or otherwise and then thrown into the common stock. Such exclusion is not sanctioned by Hindu Law—Yajnyavalkya's text defining self-acquired property—and the glosses of Vijnaneshwara and of Nilakantha do not warrant it. The sensible way of interpreting Vijnaneshwara's gloss is, therefore, to take the word *maternal estate* as standing for all property, which, though not inherited from

the father but acquired otherwise by the members, has been nevertheless thrown into the common stock and so has become joint by being mixed up with the paternal estate.

The paternal estate is the determining and dominant factor of the joint tenancy. When other estate is mentioned with it with reference to a joint family, the meaning is that that other estate has become joint by becoming, through the volition of the co-parceners, mixed with the paternal estate and, therefore, partaking of its character. In other words, the words *paternal estate* in Yajnyavalkya's text and *paternal and maternal estate* in Vijnaneshwara's gloss must be treated as illustrative and refer to all property treated as joint, though at the time of acquisition by inheritance or otherwise, it had been self acquired.

On these grounds, we must hold that, under the law of the Vyavahara Mayukha as also under that of the Mitakshara, property inherited by sons from their mother descends to them, not as a joint tenancy, but as a tenancy-in-common. This conclusion is in accordance with the view of the learned authors of West and Buhler's Digest (see note c, pages 710 and 711).

The decree must, therefore, be confirmed with costs.

Decree confirmed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 158 OF 1911.

May 16, 1912.

Present:—Mr. Lindsay, J. C.

GAYA PRASAD SINGH—JUDGMENT-DEBTOR—APPLICANT

MISRA SINGH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS

Execution of decree—Attachment—Effect of want of proper attachment—Sanction, effect of absence of—Sale, validity of.

The law requires that after every attachment of a share in a *mauza*, there should be a fresh sanction from Government to the sale of the property attached.

Where a certain share in a *mauza* is attached but a larger share is put up to sale and sold, the sale is invalid and must be set aside. It cannot be upheld to the extent of the share actually attached.

Appeal against an order of the District Judge of Hardoi, dated 2nd August 1911, reversing that of the Assistant Collector, Unao, dated 6th March 1911.

Pandit *Gokaran Nath Misra*, for the Applicant.

Mr. *Rowlin*, for the Respondent.

ORDER.—This is an application for revision of an order passed by the District Juge of Hardoi in certain execution proceedings. Having regard to the painful history of this case, I feel extremely reluctant to interfere with any order which would help the unfortunate decree-holder towards the realization of some of the money which has been owing to him for a period extending over nine years. However, in view of the points of law which are raised, I am afraid I shall have to direct that the decree-holder must wait a little longer before he is entitled to any relief. The history of the execution proceedings began away back in August 1903. It appears that the decree-holder made an application for attachment and sale of 12 *biswansis* odd share belonging to his judgment-debtor in *mauza* Kewana. Attachment was made to this extent and at a later stage, that is to say, somewhere at the end of 1905, a sale statement was submitted for sanction to the Government in order to enable the property to be sold in execution. Unfortunately, it appears that the statement which was sent up for sanction to the Government related to a share of some 15 *biswansis* odd. The reason of this appears to have been that after the date of the attachment, the judgment-debtor, in some way or other, acquired an additional 3 *biswansis* share over and above the 12 *biswansis* share which had already been properly attached. In pursuance of the application made to Government, sanction was granted to the sale of the 15 *biswansis* odd share and the property was sold. An objection was then lodged to the sale and it was set aside on the ground that there had been a material irregularity inasmuch as there never had been any valid attachment of the 15 *biswansis* odd share. With this order setting aside the sale, there was also coupled a further order dismissing entirely the application for execution which the decree-holder had made in 1903. An appeal from this order, which was passed by a Deputy Collector in the Unao District, was lodged in the Court of the District Judge of Hardoi. By his order of the 20th March

of 1907, the learned District Judge held that the sale and attachment were irregular. He was also of opinion that there was no justification for the Deputy Collector's order directing the application for execution to be dismissed. He ordered, therefore, that the application for execution should be restored and that the decree-holder should be asked to attach the property *de novo* to whatever extent he desired. An appeal against this order of the District Judge of Hardoi was preferred in this Court and was dismissed by Mr. Chamier on the 21st of August 1907. After this, what happened appears to be as follows:—The decree-holder went back to the Revenue Court in Unao and applied for execution against a 12 *biswansis* share exactly. An order for attachment was served in April 1908 and proceedings in the usual dilatory fashion began again in the Revenue Courts with a view to obtaining sanction of Government to a fresh sale of the property which had been attached. Some two years more had elapsed from the date of this attachment when it suddenly appears to have occurred to the Deputy Collector in charge of these proceedings that there was no need to obtain the sanction of the Government to the sale of this share inasmuch as the Government had, on a previons occasion, sanctioned the sale of a larger share, namely 15 *biswansis* odd. This was a strange decision of the Deputy Collector to come to, considering that he had been handling the case for more than two years and considering also the fact that both in the Court of the District Judge and in this Court the opinion had been expressed that it would be necessary to take proceedings afresh and to apply for a fresh sanction of Government. However, no sanction was obtained and eventually after some further delay property was put up for sale and purchased on the 23rd of December 1910. So far as can be ascertained, the property which was sold at that auction was not a 12 *biswansis* share exactly but a 12 *biswansis*, 5 *kachwansis*, etc., share. The result, therefore, is that property in excess of the property which was attached was offered for sale and was purchased by the decree-holder himself. The judgment-debtor, as may be well imagined, was not slow to avail himself of all the technical objections which these proceedings gave him an opportunity of raising and he promptly made an application to the Deputy Collector to have the sale set aside. The learned Deputy Collector, who dealt with this matter, accepted this application of the judgment-debtor and ordered the sale to be set aside apparently on the ground that there had been no fresh attachment of the property and also on another ground, namely, that fresh sanction should have been obtained. Again, the decree-holder found himself driven to the Court of the District Judge in appeal. He protested against the sale being set aside and the learned District Judge, having accepted his appeal, directed that the sale should be confirmed in his favour. This order of the learned District Judge is now attacked upon three grounds in this Court. One is, that the Court below failed to notice that the property, which was offered for sale and which was purchased, was 12 *biswansis*, 5 *kachwansis* odd share and not the exact share of 12 *biswansis* which the decree-holder had brought under attachment. There can be no doubt that this mistake did occur and so far as this is concerned, the decree-holder appears to be in a measure to blame himself for there is on the record a distinct application made by him in which he asks for the sale of 12 *biswansis*, 5 *kachwansis* and odd share I have been disposed to think that this objection was of a purely technical nature and was one in which there was no substantial force. However, I do not see what is to be done in the matter because, although it might be said that the sale was good to the extent of the property attached, namely, 12 *biswansis* exectly, there yet remains the fact that the property actually brought to sale and purchased by the decree-holder was in excess of 12 *biswansis*. I do not see how I could make any declaration that the share purchased by the decree-holder was 12 *biswansis* only or how I could make any reduction in the price which was paid by the decree-holder, a reduction proportionate to the extent by which the property sold would be reduced to a share of 12 *biswansis*. Another point taken is, that the learned Judge was in error in thinking that the sanction of Government, which had previously been given to the sale of the property, was a good and subsisting sanction which covered the transaction now in question. I should myself have been inclined to agree with the opinion of the learned District Judge, but for the

fact that both in the proceedings taken in the District Judge's Court in 1907 and in this Court in the same year, it seems to have been held that the only remedy open to the decree-holder was to apply for a fresh attachment and, having obtained that attachment, to apply for a fresh sanction. Strictly speaking, I think the law intends that after every fresh attachment, there should be a fresh sanction from Government to the sale of the property attached. The third objection which is taken to the order of the learned District Judge is this, namely, that the learned District Judge passed an order confirming the sale whereas certain other objections to the validity of the sale had been raised by the judgment-debtor before the Deputy Collector and had not been decided by him. It is urged, and I think very properly, that in the circumstances, all that was open to the learned District Judge was to remand the case to the lower Court for decision of certain other objections which had been raised by the judgment-debtor. The result of my examination of all these grounds put forward in revision is that I am constrained to set aside the order of the Court below. It seems to me that all that can be done at present is to hold that the decree-holder has obtained a valid attachment of a 12 *biswansis* share belonging to the judgment-debtor. If he desires to have this 12 *biswansis* share brought to sale, his proper course is now to go to the Revenue Court and to ask that this property be notified for sale after proceedings have been taken to obtain the sanction of the Local Government to the sale of the share in question. It is to be hoped that if he persists in these execution proceedings, the unfortunate decree-holder will be more successful than he has been up to the present and that when the case comes up in the Revenue Courts in Unao, it will be handled by some officer who possesses a moderate amount of intelligence which will be sufficient to prevent the recurrence of these most regrettable blunders. I do not think that I should be justified in saddling the decree-holder with the costs of this application. I, therefore, make no order as to costs.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 215 OF 1910.

January 23, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

SAPURLO SABSHETTI—APPELLANT

versus

THE SECRETARY OF STATE—RESPONDENT.

Grant, construction of—Grant of occupancy by Government—Reservation of rights to resume for Government purposes—Government remaining full proprietor—Subsequent sale by Government to private individual.

Under a *kabuliyat*, the occupancy of certain land had been granted to *A.* by the Collector subject only to the condition that it should be competent to Government to resume the land whenever it should be required by Government for Railway or other purposes.

Subsequently, the Government resumed the land and sold it to *B.*, a descendant of the person from whom the Government had acquired the land.

A., thereupon, sued the Government and *B.* for recovery of the land on the ground that the land was not resumed for Government purposes:

Held, (1) that the Government remained the proprietors of the land and could deal with the land in any way they pleased like any private owner;

(2) that the Government as proprietors of the land could resume it when they required it for their proprietary purposes.

Government purposes must be construed as meaning that they were purposes of Government as the State proprietor, purposes which Government alone were entitled to prescribe in the exercise of their discretionary power.

First appeal from the decision of the District Judge of Kanara, in Suit No. 1 of 1909.

Mr. *Weldon*, with him Mr. *S. V. Palekar*, for the Appellant.

Mr. *G. S. Rao*, Government Pleader, for Respondent No. 1.

Mr. *Nilkantha Atmaram*, for Respondent No. 2.

JUDGMENT.

CHANDAVARKAR, J.—There were only two points urged by the learned Counsel in support of this appeal in his opening address, first, that there was a valid contract as between the Government and the plaintiff, who is the appellant, in consequence of his application to the Commissioner to purchase this land, and the acceptance by him of the conditions which were imposed by the Commissioner in consequence of that offer. It was urged that after the Commissioner had accepted the plaintiff's proposal to purchase this land by receipt of the

money, it was not competent to Government to rescind the Commissioner's order, because, it was said the acceptance vested the title in the appellant. It is not necessary to go at length into the reasons for disallowing this argument, because the learned Counsel has himself given it up in his rejoinder.

It is clear from the provisions of the Land Revenue Code, and from the correspondence which passed between the different officers of Government, at the time the proposal of the plaintiff to purchase this land was considered, that the Commissioner was acting under section 60 of the Land Revenue Code and that there was a Resolution of Government at that time in force, which required that in respect of land of this description the Commissioner and the Collector could sell it only after obtaining the sanction of Government. Plainly, upon the facts this was Railway land, not required just then for Railway purposes, and, therefore, according to the evidence of Exhibit 44, the Commissioner could not dispose of it, in the way he did, without obtaining the sanction of Government.

The point on which the learned Counsel has laid special emphasis is his second argument; it is this. He urges: If the plaintiff has not acquired any title in virtue of the Commissioner's order, he has a right to fall back upon his old *kabuliyat* (Exhibit 15). Under that *kabuliyat*, the occupancy had been granted to him by the Collector subject only to this condition that it should be competent to Government to resume the land whenever it should be required for Government purposes, *i. e.*, for Railway or other purposes. It is urged that the sale of the land to defendant No. 2, a private individual, is not such a purpose.

Now, the correspondence, which had passed before the *kabuliyat*, Exhibit 15, was executed, makes it clear that what was intended by the contracting parties was that the land was to be resumed by Government whenever it was required by them for Railway or other purposes. The words in Exhibit 15, no doubt, enlarge those terms, because in Exhibit 15, it is stipulated that the Government could resume the land whenever they liked, for their purpose, either for a Railway or other Government purpose. These words are not to be found in the previous correspondence upon the subject. But even assuming that these words embodied the terms agreed upon, they are consistent with what was the real contract between the parties. The words in Exhibit 15, on which Mr. Weldon has laid so much stress, do not mean more than that Government as proprietors of the land could resume it whenever they required it for their proprietary purposes. Any other construction would be inconsistent with the condition of the tenure on which this land was held at the time by the plaintiff. This land was not held, under the *kabuliyat* Exhibit 15, on the ordinary *ryotwari* tenure, because it was not subject to the thirty years' settlement. Government still remained the proprietors of the land, like any private owner, and were not merely the State entitled only to the assessment and having the right to enhance that assessment at the end of the usual period of the thirty years' settlement. They were full proprietors who could deal with the land in any way they liked like any private owner. They granted this land under the terms of the *kabuliyat* Exhibit 15. They dealt with the plaintiff like any ordinary proprietor with this difference that the provisions of the Land Revenue Code, and the Rules made under it, applied to the case so far as they could apply. But the provisions of the Land Revenue Code and the terms of the *kabuliyat* did not take away the proprietary character of the title of Government.

If, then, Government were proprietors, then Government purposes must be construed as meaning that they were purposes of Government as the State proprietor, purposes which Government alone were entitled to prescribe in the exercise of their discretionary powers.

On these grounds, I think, the decree must be confirmed with costs. There must be separate sets of costs.

BATCHELOR, J.—I agree. It seems to me that so far as concerns the Commissioner's order of October 1906, upon which reliance was placed for the appellant, the appellant can get no advantage from that order seeing that it was first suspended by Government and then finally annulled under the power vested in the Government for that purpose by section 211 of the Land Revenue Code. It may be added that no *kabuliyat* was given to the appellant in order to vest in him any right of occupancy. As to the old *kabuliyat* (Exhibit 15), that must be read

and interpreted by the light of the appellant's application (Exhibit 36) upon which it was based, and by the light of the local officers' reports and decisions connected therewith. So reading it, it appears to me quite clear that the manuscript phrase added to the margin of this *kabuliyat* means only that the appellant undertook to surrender this land whenever Government in their discretion required him to do so.

Decree confirmed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1566 OF 1910.

April 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

G. NARAYANASAWMI NAIDU GARU —APPELLANT

versus

GANGADHARAM SITAYYA— RESPONDENT.

Madras Estates Land Act (I of 1908), s. 3 (e)—Inam village carved out of a permanently settled estate —Applicability of the Act.

The provisions of Madras Act I of 1908 apply to an *Inam* village carved out of a permanently settled estate, which was owned by certain *Agraharamdars* and was afterwards purchased by the *zemindar*.

Second appeal against the decree of the Subordinate Judge of Ellore, in A. S. No. 418 of 1910, presented against the decree of the District Munsif of Ellore, in O. S. No. 188 of 1907.

FACTS.—The facts appear from the following judgment of the Subordinate Judge:—

1. The suit out of which this appeal arose was instituted by the Receiver of the Nidadavole Estate for recovery of possession of the plaint land with Rs. 60 on account of profits.

2. The defendant contended, *inter alia*, that by virtue of the sale-deed from one Swami in 1904 and in virtue of his long possession and enjoyment thereof, he is not bound to quit the land.

3. The District Munsif dismissed the plaintiff's suit. Hence this appeal by him.

4. The only points arising for determination in this appeal are:—

(*i*) Whether the plaint village of Vegaram is an estate coming within the purview of the Estates Land Act I of 1908? and,

(*ii*) Whether the defendant is bound to quit the plaint land or not?

5. *The two points*:—The plaint village is certainly one to which the provisions of the Madras Lands Act apply. It is an *Inam* village carved out from the permanently settled estate of Nidadavole. It was owned by certain *Agraharamdars* and afterwards purchased by the Nidadavole *zemindar*. It comes under clause (*e*) of section 3 of the above Act I of 1908 and the tenants, therefore, in the village have permanentoccupancy-rights.

6. The defendant became owner of the land by purchase in 1904 from the original owner Swami. This Swami and the defendant have had possession of the land for over twenty-five years paying a uniform rent even according to the evidence of Bhadriah, examined on plaintiff's behalf as his 1st witness. The evidence of the defendant's witnesses besides corroborating it shows that they were in possession for a long period.

7. The defendant, no doubt, agreed to quit the land after the expiry of the period fixed in the *muchilika*, Exhibit A, passed by him in favour of the estate. He contended that it was passed under fraudulent misrepresentation by the plaintiff's servants and that the clause relating to quitting of the plaint land was not read out to him. He purchased the land paying his hard earnings therefor, in 1904 and it is not reasonable to say that he would have consented to the clause in question if really it was read out to him. Certainly, the *muchilika* must have been signed on fraudulent suppression of the existence of the clause relating to surrender.

Further, the plaintiff gave him no notice to quit.

7. In the result, finding the two points for the defendant, I dismiss this appeal with costs of both Courts.

The plaintiff appealed to the High Courts.

Mr. *K. Srinivasa Aiyangar*, for the Appellant.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—There is no foundation for the view that the village is not an estate within the meaning of the Estates Land Act.

That being so, the plaintiff is not entitled to eject tenant. The second appeal is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 34 OF 1912.

April 11, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Heaton.

EMPEROR—PROSECUTOR

versus

MANILAL MOHANLAL—ACCUSED.

Bombay District Police Act (IV of 1890), s. 3 (e)—Street, definition of—"Accessible to the public"—"Access to."

The definition of "street" in section 3, clause (*e*) of the Bombay District Police Act, 1890, is inclusive in its terms, and includes a place accessible to the public. The words "accessible to the public" mean that any member of the public as such has access to the land: and "by access to" would ordinarily be understood unimpeded entrance upon the land.

Criminal application for revision from the decision of the Magistrate, First Class, Ahmedabad.

Mr. *T. R. Desai*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.—This is an application for the revision of an order passed by the learned first Class Magistrate of Ahmedabad, who found the accused persons guilty of assembling for the purpose of wagering in a street and sentenced them to the payment of a fine. The only question involved in the application is whether the piece of land upon which the accused persons were assembled is a street within the meaning of the definition in clause (*e*) of section 3 of the Bombay District Police Act IV of 1890. That definition is inclusive in its terms, and "street" is said to include, among other things, any road or square, court, alley or passage accessible to the public. That this place is a square or a court within the meaning of the definition is not denied. What is denied is that it is accessible to the public. The only question, therefore, at issue is whether this place is or is not accessible to the public; by that, as it appears to me, is meant whether any member of the public as such member of the public, has access to this land: and by "access to" would ordinarily be understood unimpeded entrance upon the land. Whether the members of the public have such access or not is a question which must be answered upon the evidence. There is no evidence directed to this point, nor does the Magistrate appear to have directed his own attention in this way. The record, therefore, as it stands, is not sufficient to enable us to decide the question arising. We reverse the conviction and sentence and remand the case for disposal on the evidence with reference to the observations in this judgment. Both sides to be at liberty to adduce fresh evidence with a view to showing whether or not the land in question is accessible to the public within the meaning of the definition quoted.

Case remanded.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 3 OF 1911.

October 12, 1911.

Present:—Mr. Pratt, J. C., Mr. Crouch, A. J. C., and Mr. Fawcett, A. J. C.

Re application by VISHINDAS, ON BEHALF OF VARANBAI, WIDOW OF DEWAN HASSASING, UNDER SECTION 13, LEGAL PRACTITIONERS ACT

versus

M., PLEADER.

Pleader—Professional misconduct—Misbehavior—Sale of client's shares in private capacity—Appropriation of money to fees as Pleader—Wrongful conversion—Lien—Set-off—Undue influence—Consent—Burden of proof—Practice of not reducing agreements to writing—Sind Courts Act (XII of 1866), s. 16—Contract Act (IX of 1872), ss. 217, 221.

M., a pleader of 20 years' standing, received, in his private capacity, certain shares from a lady client with instructions to sell them, and realize the proceeds on her behalf.

He appropriated the proceeds, without her consent, to the payment of his fees as a pleader. The client repeatedly insisted on the payment of the money realized as sale-proceeds; but her consent to the appropriation of the money was obtained owing to a desire on her part to avoid a quarrel with her pleader:—

Held, (1) that in appropriating to himself the sale-proceeds of the shares, *M.* was guilty of wrongful conversion of his client's money, and was liable to be dealt with under section 16 of the Sind Courts Act for his misbehaviour;

(2) that *M.* had no right to pay himself for his fees out of the sale-proceeds of the shares, irrespective of his client's wishes;

(3) that *M.* had no lien or right of retainer under section 221 or 217 of the Contract Act, for that

would only attach in respect of services rendered in the matter of sale;

(4) that *M.* could have no general lien as a factor for sale in respect of a general balance due to him as pleader;

(5) that *M.* had not even a right of set off, for the shares were given to him in his private capacity;

(6) that *M.* stood in a fiduciary relation to his client and it was for him to show that she consented to the appropriation without undue influence on his part;

Ganesh v. *Vishnu*, 32 B. 37 at pp. 44, 45; 9 Bom. L. R. 1164; *In re Mid-Kent Fruit Factory*, 1 Ch. 567 at p. 570; 65 L. J. Ch. 250; 74 L. T. 22; 44 W. R. 284; 3 Manson 59; *In re Baylis*, 2 Ch. 107 at p. 119; 65 L. J. Ch. 612; 74 L. T. 506; 44 W. R. 533, relied upon.

(7) that, under the circumstances, *M.* should be given an opportunity to atone for his misconduct by making restitution to his client.

The practice of special agreements of engagements of Pleaders for the conduct of important cases for heavy fees not being reduced to writing, strongly deprecated.

The *Government Pleader*, in support of the Rule.

Mr. *Eardley Norton*, for the Opponent.

JUDGMENT.

PRATT, J. C.—A Rule has been issued in this case on *M.*, a Pleader of the Court, to show cause why he should not be dealt with under section 16, para. (2), of the Sind Courts Act for misbehaviour.

The charge against him is that he wrongfully withheld or refused payment of monies due to his client, Varanbai.

The facts out of which the charge has arisen are briefly as follows:—

One Hassasing died at Hyderabad on the 25th November 1909, leaving a Will by which he bequeathed to his widow, Varanbai Rs. 16,000, a fixed deposit in the Bank of Bombay, Rs. 4,000 due on a policy of insurance and 20 shares in the Indian Specie Bank of the face value of Rs. 50 each. Disputes arose between Varanbai and the sons of Hassasing by a predeceased wife. The Will was in the possession of Varanbai, but three days after the death, her step-sons deprived her of the safe and boxes and a few days later, her mother's brother, Vishindas, and her grandmother, Bhagbai, were beaten by the step-sons and driven out of the house (pages 38, 73, 234). Varanbai, however, made over the Will to Bhagbai who sought the advice of a law agent, Lilaram. By his advice, the Will was read on the 27th January 1910 at a meeting at a temple. The step-sons denounced it as a forgery and successfully opposed an attempt by Lilaram to get it registered.

On the 9th February, a suit was filed by one of the sons for a declaration that the Will was a forgery and for an injunction restraining Varanbai from dealing with the securities and monies bequeathed to her and a temporary injunction to that effect was issued the same day.

Lilaram then engaged Mr. Parsram, Pleader, according to instructions received from Varanbai (page 59).

A week or two later, it was ascertained that a Karachi firm of Pleaders had been engaged by the step-sons and so Lilaram in consultation with Rattonsingh, Vishindas and with Varanbai's consent, engaged Messrs M. & Co. to represent Varanbai. This engagement was made somewhere about the end of February and the first instalment of the fee settled was paid Rs. 350 on the 2nd and Rs. 150 on the 9th March.

The suit was in April referred to the arbitration of two Pleaders, Mr. Harchandrai for the plaintiff, and Mr. Hiranand of Messrs M. & Co., for the defendant, Varanbai. Nevertheless, the ill-feeling between Varanbai and her step sons grew so acute that on 21st May, Mr Santdas of the firm of M. & Co. arranged for her removal to her maternal grandfather Rattonsingh's house.

The arbitration proceedings fell through and when the Courts re-opened in July after the vacation, there followed negotiations for arbitration without the interventon of the Court. No progress was, however, made towards the disposal of the suit except that in August a guardianship application was filed by M. & Co. in the District Court on behalf of Varanbai, and on the 19th September, an appeal was filed in this Court against the temporary injunction that had issued against Varanbai.

Now, this interim injunction had by some oversight omitted the Indian Specie Bank shares. Vishindas says that in June, Mr. Santdas paid a visit to his house and suggested that the shares should be sold to keep them out of the reach of the step-sons.

It is admitted that the scrip was made over by Vishindas and Mr. Santdas to Mr. M. as the latter said he had a friend Narayendas in Bombay who would sell them. The share transfer application was signed by Varanbai

on the 8th June and the shares were sold on the 8th July.

Vishindas says that the first intimation of sale was given to him by Mr. Santdas in October and that he then went to Mr. M. in order to receive the sale-proceeds. Mr. M., at this and subsequent interviews, admittedly refused to part with the money.

It is this refusal that is the subject of the charge against Mr. M.

Now, according to Vishindas, Mr. M. was engaged at a fee of Rs. 2,000 inclusive of all but Court-fee expenses to conduct the suit in all Courts—Rs. 500 to be paid at once and the balance Rs. 1,500 on the successful termination of the suit. If this is the true version of the agreement, Mr. M.'s appropriation of the sale-proceeds before the termination of the suit was nothing less than a criminal breach of trust. But, according to Mr. M., the terms of the engagement were a fee of Rs. 2,000 exclusive of expenses for conducting the suit in the original Court only—Rs. 500 to be paid at once and Rs. 1,500 "as soon as monies came into Varanbai's hands." It is difficult to see how even this agreement would justify the refusal to part with the sale-proceeds. It would, however, mitigate the offence and reduce it to something less than criminal breach of trust. This is a matter which will have to be considered later—but the first question for decision is what were the trems on which Mr. M. was engaged. According to Vishindas, the persons present at the time of the engagement were Mr. M., the law agent, Lilaram, Rattonsingh, the grandfather, and Vishindas, the uncle of Varanbai. According to Mr. M., the persons present were himself, his partner Mr. Hiranand and Liiaram.

It is much to be regretted that the firm, when coming to a special agreement about the conduct of an important suit for a large fee, should not have recorded the terms of the engagement in writing. The only evidence of the terms of the agreement is oral testimony and that testimony is hopelessly conflicting.

It is, no doubt, improbable that the agreement should have been as Vishindas and Rattonsingh assert to include work in all Courts and all expenses except Court-fees—for the items of expense were uncertain and might have been heavy. But this improbability is discounted by the fact that it was expected that the case would soon be settled by a compromise or by arbitration. And the probabilities in favour of the truth of Vishindas' version are (1) the fact that an engagement of such importance is not likely to have been effected in the absence of the clients, (2) the numerous visits of protest that were paid when Mr. M. refused to give up the money, and (3) the fact that Messrs. M. & Co. did, as a matter of fact, work in the other Courts besides the original Court.

Now as to (1), the probability that Vishindas and Rattonsingh were present at the engagement is enhanced by the fact that Mr. Parsram was not engaged without being confronted with his clients and it does seem curious that Mr. M. can call no direct evidence in support of his story, but that of his partner and of the man Lilaram who appears, from Mr. Lalchand Chuharmal's evidence, to be little better than a tout. Again, as to (2), the visits are admitted and it is much more probable that they were visits of protest than visits of supplication. Dr. Wassanmal, who was present on one occasion, told Mr. Santdas that it was his duty to pay the money out of his own pocket if Mr. M. did not pay it. This incident is admitted by Mr. Santdas and Dr. Wassanmal is admittedly a disinterested witness. It is difficult to reconcile this language with Mr. M.'s version.

As to (3), there is scarcely an attempt to explain the appearance in the District Court in the guardianship application filed on behalf of Varanbai. Mr. M. says it was because his clients asked him to take it up free (page 212). His partner, Mr. Hiranand, says it was a small matter (page 174), the third partner Mr. Santdas frankly admits that he cannot give any explanation (page 126). But the case of the appeal filed in this Court is a more serious matter for it involved a good deal of trouble and expense. Mr. M. explains that this work was undertaken out of pity for his client. He says that intimation of the sale of the shares reached him at the end of August or the beginning of September (page 201); that a day or two later, Vishindas came and asked for the money and that he then replied that he would appropriate it to the balance due to his firm; that Vishindas wanted part at least of the money for domestic expenses but

that he refused to let him have it; that subsequently Varanbai sent word to him by Lilaram that she would agree to his appropriating the money to his fees if he would give her a written receipt and file the appeal in the Judicial Commissioner's Court without making an extra charge. He says that he consented, gave the receipt and filed the appeal not under the terms of the original agreement, but as a concession.

If this explanation is true, the whole incident must have taken place in the first week of September for the *vakalatnama* for the appeal is dated the 8th September. Mr. M.'s evidence on the point is that of himself, his partners and the law agent, Lilaram. Another Pleader, Mr. Motiram, who is in the employ of the firm, says he did the clerical work of writing the receipt and another witness is a dismissed police-man who says he happened to be present when the receipt was signed.

The only documentary evidence is the accounts of the firm, which show a credit to Varanbai of the sale-proceeds on the 3rd September and a debt against her of the payment to the firm on the 9th September. But these accounts, the District Judge has described as looking fresh and newly written. The documentary evidence that would have been more convincing is the correspondence between Mr. M. and Naraindas as to the sale of the shares. This omission has given rise to the suggestion that the accounts are forged; that the sale-proceeds were received even earlier than September and that Mr. M. was concealing the fact in the hope that the suit would be compromised and that he would then be able to pay himself his fee without further trouble. On the other hand, as soon as Varanbai broke with Mr. M. in December and Mr. McInerny demanded an explanation, Mr. M. did plead the receipt in a letter written on the 22nd December. This raises a probability that the receipt was actually given and the non-production of the receipt leads to an inference that the date on it would not assist Varanbai's case.

Instead of producing the receipt, Varanbai's legal advisers, at a very late stage of the inquiry before the District Judge, produced a letter which is said to have been written by Lilaram at Varanbai's instructions to Mr. M. but which is said to have been retained by Vishindas as he suspected Lilaram of colluding with Mr. M. In this letter (Exhibit 128, page 319), Lilaram states that Varanbai assents to the appropriation of Rs. 1,000 of the sale-proceeds to Pleader's fees, but asks as a favour that the appeal in the Judicial Commissioner's Court should be filed gratis and further that the balance should not be taken for expenses, but should be returned to her. The letter is dated the 14th October. The letter was shown to Lilaram's son and when he first saw it, he recognized it as his father's writing. But, even assuming that the letter was written by Lilaram, it is difficult to believe that the letter is a fabrication in Mr. M.'s interest. The letter, no doubt, recites that Varanbai had assented to the appropriation—but a forgery in Mr. M.'s interest, dated the 14th October, would have recited the appropriation and the filing of the appeal as past events and would have merely asked that the balance of the sale-proceeds should be returned to Varanbai and not taken for expenses. It would have been quite easy to construct a letter which would have accorded with the date of the filing of the appeal. The letter really conflicts with Mr. M.'s case that the appropriation was prior to the filing of the appeal and looks more like a clumsy attempt to attribute through Mr. Lilaram to Mr. M an admission that the incident was not closed in October and the fact that the letter was not shown to Mr. M., when he was in the witness-box, does not raise an inference favourable to Varanbai.

On the whole, therefore, in spite of several circumstances which do not admit of a satisfactory explanation such as the alleged absence of the clients at the time of the engagement, the non-production of the correspondence with Narayendas and the visits of indignant protest alleged to be in the very week in which the *vakalatnama* was filed—I do not think I can safely come to the conclusion that the agreement of engagement has been proved to be other than that which Mr. M. alleges it to have been. I take this opportunity of expressing my strong disapproval of the practice of special agreements of engagement of Pleaders for the conduct of important cases for heavy fees not being reduced to writing It is a loose system which leaves a wide margin for malpractice on both sides—and

in the present case, it has led to this deplorable result that an influential Pleader is charged with criminal breach of trust, perjury, and forgery of his accounts and I can come to no more decisive conclusion than that the weight of testimony on either side is so equally balanced that the charge is not proved. There now remains the question as to whether on the agreement Mr. M. alleges, he was justified in refusing to deliver the sale-proceeds to Vishindas from whom he had received the scrip.

Mr. Norton, who argued the case for Mr. M., said he did not rely on Varanbai's alleged acquiescence—and here he was, no doubt, right, for if the retention could only be justified by a subsequent ratification, then the retention must have been in violation of the terms of the original agreement. Mr. Norton sought to justify the refusal to deliver the sale-proceeds both under the agreement of engagement and under the instructions with which the scrip was delivered to Mr. M. It is obvious that if the right arose under the agreement, there was no necessity to rely on the instructions and conversely if the right arose under the instructions, it was unnecessary to plead the agreement. And I think it quite clear that there was no right either under the agreement or under the instructions.

The agreement stated by Mr. M. was that Varanbai should pay the balance of the fee as soon as money came into her hands. Therefore, as soon as the money was realized by the sale of the shares, the balance of the fee became payable. But the fact that the debt had become due, did not give Mr M. the right to pay himself or his firm irrespective of the wishes of his client and this was especially the case as the scrip had been given to him for a particular purpose. He had no particular lien or right of retainer under sections 221 or 217, Indian Contract Act, for that would only attach in respect of services rendered in the matter of the sale. He could have no general lien as factor for sale in respect of a general balance due to him as Pleader. He had not even a right of set off for the shares were given to him personally for sale and not to the firm.

It is faintly contended that the shares were given to the *firm* for sale. But it is no part of the business of a Pleaders' firm to sell stocks and shares. Mr. Santdas said he had never sold a share in his life—and the evidence that the shares were given to Mr. M. personally is quite conclusive. This is Mr. M.'s own account of the transaction (page 201):—

"One day, Mr. Santdas brought the shares to me and said that they had to be sold and he did not know how to do it. I said I have a friend at Bombay, and, if you will allow me, I will send the shares to him to be sold. Vishindas was with him. He said that this might be done. The shares were handed over to me and I sent them to Bombay to Seth Narayendas." It is quite clear that Vishandas requested Mr. M. to sell the shares privately through a personal friend of Mr. M. When the shares were sold, Mr. M. says:—"Seth Narayendas said that he was crediting *me* with the amount and *I* wrote agreeing to this." He had asked whether he should send the money and I said he might credit it to *my* account. Again, the account (page 134) shows that Mr. M. had a personal account with Naraindas and Mr. M. admits this for he says (at page 214) of the balance, Rs. 1,499-10 9 was spent on my behalf and Rs. 204-8 0 on behalf of my partner.

Under the agreement, therefore, Mr. M. had no lien or other right to appropriate the money to fees and if Varanbai had sued for the money, he would not even have had a right to set-off to this personal claim the balance of fees due to his firm.

Now, as to the instructions under which the scrip was received for sale. There is on this point also a faint suggestion that the scrip was given for the purpose of realizing money to pay the fees of Mr. M.'s firm. The only evidence on which this suggestion rests are two statements one by Vishindas and the other by Mr. Santdas. Vishindas, when first examined, stated that Mr. Santdas came to his house and advised him to sell the shares which had been omitted from the temporary injunction and "use the money as they had no other money with them to incur household expenses and Pleader's fees." On the next day, Vishindas explained that by Pleader's fees, he meant the debt already incurred in paying the first instalment of Rs. 500 and the fee paid to Mr. Parsram. That he did mean this is evident from the fact that in the next few lines of his deposition on the first day, he stated that Mr. Santdas, when informing him of the sale of the shares, ad-

vised him to go and get the money from Mr. M. (page 35) and that when he failed to get the money from out of Mr. M., Mr. Santdas told him that he was ashamed of his partner's conduct (page 36).

Mr. Santdas (page 115) says that a similar expression was used to him when the shares were given to him, but he evidently did not construe the phrase as an authority to appropriate the sale-proceeds, for he says (at page 122): "I could not say what Vishindas was thinking about when he asked me to sell the shares, or whether he thought that we should appropriate the money. I did not then suggest, nor did any member of the firm, that the money would be so appropriated. The money was appropriated after settlement. No such suggestion had been made up to the time of the receipt of intimation of the sale from Bombay."

It is clear, therefore, that no authority to appropriate the sale-proceeds to the balance of the fees was given at the time of the delivery of the scrip. There was no occasion at that time for Varanbai to pay or for the Pleaders to press for payment. Rupees 500 had already been paid and no work was being done. This was in June when the case was still with the arbitrators to whom it had been referred by the Court in April, Mr. M.'s own admission, however, settles the matter for he has said at page 205 :—

"When the shares were made over, there was no suggestion from me or from any body else that we might appropriate the money. Vishindas may have been once to the office to inquire about the money before I got intimation from Seth Naraindas. He must have been to office several times between June and August. He may not have met me. When he came to me, I did not tell him that when the money came, I should keep it for fees. There was no talk at all of such appropriation before the intimation of sale was received. The thought never crossed my mind, when I received the certificate, that this would be security for my fees. I first conceived the idea when I got the intimation. I first credited the money to Varanbai: then Vishindas came and I gave him the information and when he asked me for payment, I said my claim was first."

The defence that the sale proceeds were appropriated under instructions received at the time of the delivery of the shares is purely an afterthought. It was not set up before the case reached this Court. There is no suggestion of it in the letter of Mr. M. to Mr. McInerny of the 22nd December—nor in the written statement—nor in the deposition of Mr. M. Throughout his deposition, Mr. M. seeks to justify his retention of the sale-proceeds solely on the agreement; and on this all he can say is:—"She was my client and owed me money; and so I thought I was right in appropriating it; I still think so." It is time Mr. M. revised his conceptions of right and wrong. He probably was not consciously dishonest, but he was guilty of wrongful conversion in appropriating to himself the sale-proceeds of the shares. In doing so, he abused the confidence of this client for the shares were given to him in the confidence that he would sell them and pay the proceeds to his client.

This is misconduct which, in my opinion, would merit suspension; the matter is aggravated by the fact that Varanbai was at the time a destitute widow dependent on the charity of her maternal relations.

I do not wish, however, to deal harshly with Mr. M., who is a Pleader of 20 years standing. I would, therefore, give him an opportunity to atone for his misconduct by making restitution to Varanbai and for this purpose, I would defer passing final orders to this day week.

FAWCETT, A. J. C.—I concur with the conclusions of the learned Judicial Commissioner and shall only deal with some further points which seem to me to require consideration.

The following facts are, in my opinion, established by the evidence in this case:—

(1) the scrip was made over by Vishindas to Mr. Santdas for sale *in order that the proceeds might be given to Varanbai*, as she was hard up and wanted money for various expenses (pages 34, 115);

(2) Mr. M. agreed to arrange for the sale through his friend Seth Naraindas, *in a purely private capacity* and as an act of friendship, and not in any way in his capacity as Varanbai's Pleader (pages 115, 204, 206, line 500);

(3) there was no idea or suggestion of the proceeds being appropriated towards Messrs. M. & Co.'s fees when the transaction took place and Mr. M. did not think of doing this until after sale or the receipt of intimation of the sale (pages 122, 206) :

(4) the money realized by the sale, instead of being remitted to Mr. M. for payment to the vendor of the scrip, as should have been done in the ordinary course, was *with Mr. M.'s consent* placed to his credit in a private (or at any rate mainly private, *cf.*, page 214) account between him and Seth Naraindas (page 201);

(5) there was considerable delay in informing Vishindas of the sale which took place on the 8th July, but was admittedly not communicated to him till the end of August or beginning of September (page 201) and this delay is not adequately explained nor the alleged reason for it supported by evidence which was available as to the date when Seth Naraindas informed Mr. M. of it (*Cf.*, Judge's report, lines 450-490, at pages 24-26);

(6) when Vishindas was informed, he demanded payment of the amount from Mr. M. (page 201, line 223, page 206, line 529); and Mr. M. either then or the next day declined to pay him the amount, saying he would appropriate it towards the firm's fees (page 35, line 149, page 201, line 229);

(7) subsequent to this refusal of Mr. M. to pay over the proceeds, considerable efforts were made by Vishindas to get Mr. M. to alter his mind and pay over the money, but without success (pages 36, 37, 69, 71, 72, 82, 83, 117, 118, 175, 182, 205, 206, 262, 263, etc., etc.; *Cf.*, Judge's report, lines 345 to 378, pages 20, 21);

(8) Varanbai's consent to the appropriation, if obtained at all, was not a "free consent" but an unwilling acquiescence in a completed act of which she did not approve and to which she only consented through "undue influence" on the part of Mr. M.

The last point requires more detailed notice than the others which are sufficiently established by the evidence referred to under each head.

There can, I think, be no doubt whatever that Varanbai wanted the money herself and was not disposed to consent to its appropriation for fees. Lilaram, whose evidence is entirely in favour of Mr. M and cannot be suspected so far as it contains any admission in Varanbai's favour, clearly implies this when he deposes "I told Varanbai that we should not quarrel with the Pleaders: it would be better to be quiet and make other arrangements to raise the money. She said that her Rs. 100 maintenance had also been stopped and she wanted money for the marriages" (page 263, lines 401-409). This is corroborated by the admitted fact that Varanbai subsequently sent for Mr. Parsram and complained of want of money and asked him to get her some money out of the sale-proceeds of her shares from Mr. M. (page 224, line 251, page, 325, line 265, page 264, lines 443-458). In view of this and the other efforts made to induce Mr. M. to part with the money, there can, I think, be no reasonable doubt whatever as to the correctness of the District Judge's view that there was not merely a plea for mercy, but that she and Vishindas strongly objected to the appropriation (page 21). No doubt, it would have been better if Varanbai herself had been examined on the point but in view of the fact that all the arrangements with Mr. M. were made not personally, but through intermediaries and the well known reluctance of respectable women to give evidence, I do not think this sufficient to throw any doubt on the above conclusion; and it was perfectly open to Mr. M. to have applied for her examination, had he thought this would in any way benefit his case.

I am quite prepared to accept the evidence that Varanbai did eventually consent to the appropriation, but this does not, in my opinion, put an end to the whole matter. Even taking Lilaram's account of the circumstances under which that consent was obtained, it is clear that it was due to a desire to avoid a quarrel with Mr. M's firm, who were acting as her Pleaders in the litigation and could seriously prejudice her by their conduct of the litigation, and to his definite refusal to part with the money, in spite of the efforts made to induce him to do so. There was an "element of coercion" in his conduct as well as "an unconscientious use of power arising out of the circumstances;" and the case, in my opinion, clearly falls under section 16 of the Indian Contract Act, in that Mr. M. was "in a position to dominate the will of" Varanbai and "used that position to obtain an unfair advantage over" her; *cf. Ganesh* v. *Vishnu*(1), and the other case there cited.

Mr. M. stood in a fiduciary relation to Varanbai, and must, therefore, under sub-section

(1) 32 B. 37 at pp. 44, 45; 9 Bom. L. R. 1164.

(2) of section 16 be deemed to be in a position to dominate the will of Varanbai. And under section 111 of the Evidence Act, the burden of showing that the consent was not due to undue influence on his part lies on him. *Cf. In re Mid-Kent Fruit Factory* (2) and *In re Baylis* (3). Not only has he failed to discharge this burden, but the circumstances point all the other way.

In any case, even supposing that there was no "undue influence" within the meaning of section 16 of the Contract Act, Mr. M.'s conduct seems to me to have been clearly improper and to amount to "misbehaviour" under section 16 of Bombay Act XII of 1866. The scrip was given to him for sale in the confidence that he would hand over the proceeds on receipt, and he abused that confidence in order to gain an advantage for himself, to which he was not entitled. He contravened the principle that a trustee shall not derive any personal advantage of profit from the trust (Lewin's Law of Trusts, 10th Edition, page 296; Indian Trusts Act, 1882, section 51). Taking the case as merely one of principal and agent, he infringed the rule that agents are not permitted "to deal validly with their principals in any case except where there is the most entire good faith, and full disclosure of all facts and circumstances, and an absence of undue influence, advantage, or imposition" (Snell's Principles of Equity, 12th Edition, page 545). And this applies *a fortiori* to the case of a Solicitor or Pleader and client [*ib.*, page 534, citing *Tyrrell* v. *Bank of London* (4)].

In this particular case, no attempt was made by Mr. M. to carry out the trust in a straight-forward and honest way. He at once had the proceeds credited to himself in a private account and gave Varanbai no opportunity of handling them or acting as a free agent in regard to their disposal. He actually appropriated the money before telling her or Vishindas of the sale and even making a pretence of obtaining their consent. This was a clear breach of trust and the subsequent forced and reluctant consent of Varanbai induced by his refusal to give up the money and the objection to quarrelling with her Pleader, does not, in my opinion, mitigate the improper conduct preceding it.

There can also be no question that by this conduct he gained an unfair advantage. Admittedly, he had no lien on the money for his costs, or right of set-off in regard thereto; and his agreement with Varanbai certainly did not entitle him to appropriate the money towards his costs *nolens volens* in the way he did. Even to a charge of theft, it is no sufficient answer that the accused took the property in satisfaction of a debt due to himself (Mayne's Criminal Law of India, 2nd Edition, page 725); and his act technically amounted to "wrongful conversion," for which Varanbai could claim damages even though the act were done under a mistaken but honest and even reasonable supposition of being lawfully entitled (Pollock's Law of Torts, 7th Edition, page 350). By his conduct he secured payment of his costs in full at a comparatively early stage of the litigation and in direct contravention of the terms on which the scrip had been entrusted to him for sale. And the result in this case is that his firm have been paid their costs in full for the obligation on their part of carrying on litigation which they have only discharged in part and cannot now perform.

If Mr. M. had tendered the money and merely requested Varanbai to pay him the balance of costs in full or in part in accordance with her agreement, so as to leave her a free agent to decide, there would not have been any ground for objection. But his conduct has been quite the reverse and throughout of an improper character. Even if he made a concession to Varanbai in agreeing to conduct her case in the Appellate Court as well as in the original Court, this does not justify his breach of trust and the undue pressure he put on her in the matter.

It is recognized as the duty of a Solicitor to keep clear and accurate accounts of all monies received by him for and on behalf of his client and to keep such monies apart from his own (Encyclopædia of the Laws of England, Volume XI, page 590), and it is important that conduct, which is a breach of the relations of confidence and trust which should exist between client and Solicitor—or in this country client and Pleader—should not be allowed to pass unnoticed by a Court which is authorized

(2) (1896) 1 Ch. 567 at p. 570; 65 L. J. Ch. 250; 74 L. T. 22; 44 W. R. 284; 3 Manson 59.

(3) (1896) 2 Ch. 107 at p. 119; 65 L. J. Ch. 612; 74 L. T. 506; 44 W. R. 533.

(4) 10 H. L. Cas. 26; 31 L. J. Ch 369; 8 Jur. (N.S.) 849; 6 L. T. 1; 10 W. R. 359.

to deal with cases of "misbehaviour," I have no hesitation in holding that there has been such "misbehaviour" on the part of Mr. M. and I, therefore, concur in the course proposed by the learned Judicial Commissioner.

CROUCH, A. J. C.—I have had an opportunity of perusing the carefully considered judgments of my learned colleagues, and have nothing to add to them beyond an expression of concurrence with the course which the learned Judicial Commissioner has proposed to take.

PRATT, J. C.—As Mr. M. has made restitution to his client, it is not necessary for us to do more than record this order censuring him for his misconduct.

Censure passed.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 43 OF 1912.
May 25, 1912.
Present:—Mr. Justice Heaton and
Mr. Justice Macleod.
EMPEROR—OPPOSITE PARTY
versus
JANI HIRA—ACCUSED.

Penal Code (Act XLV of 1860), s. 420—Cheating—Immoral and illegal contract—Advance on such contract by false representation.

A. agreed to let her daughter on hire to *B.* for concubinage for a period of one year in consideration of *B.* paying her Rs. 70.

B. paid *A.* Rs. 35 in advance. Subsequently, *A.* refused to deliver her daughter to *B.* or to return the sum of Rs. 35 advanced by him.

On these facts, *A.* was convicted of cheating:

Held, that the conviction should be set aside, as a party should not be allowed to prosecute on a charge of cheating when he would not be entitled to obtain from a Civil Court any relief for breach of the contract.

Criminal reference made by the Sessions Judge of Nasik.

FACTS.—The accused agreed to let her daughter on hire to the complainant for concubinage for one year in consideration of the complainant paying her Rs. 70. The complainant paid Rs. 35 in advance. Subsequently, the accused refused to allow her daughter to go to complainant or to refund the money advanced to her. The accused was convicted of cheating on these facts.

GROUNDS.—"It is submitted that the conviction and sentence are not sustainable. There is no evidence to show that there was any fraudulent or dishonest intention on the part of accused at the time she took the amount of Rs. 35 from the complainant. On the other hand, it is most probable that at that time she intended to let complainant have her daughter, Sundri, and only changed her mind later.

That being so, if the arrangement had been an ordinary contract instead of being merely a void agreement, no criminal prosecution would have been successful and the complainant would have had to sue in the Civil Courts for specific performance or compensation or refund.

In this case, however, a suit for specific performance or compensation or refund would not lie as the agreement was void from the beginning for immorality.

It seems to me to be opposed to public policy to allow a person, who has parted with money under an agreement which the law lays down is void for immorality, to harass the other party to the agreement in the Criminal Courts when he could not do so in the Civil Courts. I am, besides, of the opinion that the offence of cheating was not committed."

Mr. *R. V. Desai*, for the Crown.

JUDGMENT.—For the reasons stated by the Sessions Judge in his statement of the case, we think that this is not a case for a Criminal Court. The accused and the complainant had entered into a contract which was clearly void for immorality. Therefore, the complainant would not be entitled to obtain any relief from a Civil Court for its breach. That is no reason why he should be allowed to prosecute the accused on a charge of cheating. Therefore, we think that the Magistrate's conviction and sentence must be reversed and the accused acquitted and discharged.

Conviction and sentence reversed.

HIDAYAT KHATUN *v.* MAHOMED HAYAT.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 123 OF 1911.

October 12, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

HIDAYAT KHATUN—APPLICANT

versus

MAHOMED HAYAT—OPPONENT.

Criminal Procedure Code (Act V of 1893), s. 488 (9)—Residence of accused—Settled abode of mistress—Mistress not shown to have permanent residence anywhere.

For the purposes of section 488 (9) of the Criminal Procedure Code, a man may be said to reside with the mother of his illegitimate children at the place of her settled abode, if he visits her there occasionally, so long as he has the intention of continuing to so visit her.

Where a mother of illegtimate children is not shown to have a permanent residence anywhere, her stay for two months at a place where she is occasionally visited by the father of the children, is sufficient to constitute that place as her residence for the purposes of the section.

Fernandez v. *Wray*, 25 B. 176; 3 Bom. L. R. 291; *Bright* v. *Bright*, 36 C. 964; 4 Ind. Cas. 419, relied upon.

Ananthu Narayana v. *Periyana Kone*, 5 M. H. C. R. 101, referred to.

Mr. *Isardas Oodharam*, for the Applicant.

JUDGMENT.—The question raised in this application is whether or not it was in the District of Larkana that opponent last resided with the mother of his illegitimate children, within the meaning of section 488 (9), Criminal Procedure Code.

The facts, as they appear from the record, are that applicant was formerly the kept mistress of opponent, Mahomed Hiat, and bore him two children, a boy and a girl. Mahomed Hiat belongs to the Jacobabad Taluka. The ordinary place of residence of applicant is in Larkana, but, during the period of her connection with opponent, she used to stay from time to time in his *otak* at the village of Naoro in the Taluka of Jacobabad; after her last visit to that place, she returned to Larkana and lived, for two months, in an *otak* belonging to a relation of opponent's, and she and her children were there maintained by him. During the two months opponent visited her occasionally, and it appears from her deposition that, on one occasion, he must have stayed at least two days. It was there that the connection ceased, and the two children were deserted by the father.

Now, the word "reside" has a variety of meanings according to the Statute or document in which it is used. [Per Erle, C. J., *Nuef* v. *Mutter* (1)]. It is an "ambiguous word," and may receive a different meaning according to the position in which it is found. [Per Cotton, L. J., *Re Bowie* (2).]

To reside means, primarily, to have a settled abode for a time. But a man may reside, or have a settled abode, at a place where his family, or his servants eat, drink and sleep, [per Bayley, J., *Regina* v. *North Curry* (3)]. In *Fatima Begam* v. *Sakina Begam* (4), it was held that a soldier, who travels about from place to place with his regiment, has his dwelling place where his family lived, and whither he had the intention of returning. A man may, therefore, be said to reside or to reside with his wife, at any place where his wife has a settled abode; and it is not necessary that he should himself live there permanently, or ordinarily, provided that he has the intention of going there and living there when opportunity occurs. [See also *Ananthu Narayana* v. *Periyana Kone* (5)].

Though "reside" connotes a stay of some time, no minimum has been laid down as a qualification. In *Fernandez* v. *Wray* (6), it was held that where a man has no fixed dwelling, any place where he is staying at any particular time may be treated as his residence; and in *Bright* v. *Bright* (7), the parties were held to have last resided together, for the purposes of the Divorce Act, at a Calcutta hotel where they had stayed for about a fortnight, they having no permanent residence.

In considering the case of a kept mistress, we cannot reasonably demand that the nature of residence on the part of the man should be more permanent than is required in the case of a lawful husband. I would, therefore, hold that a man may be said to reside with the mother of his illegitimate children, if he visits her only occasionally at her settled abode, so long as he has the inten-

(1) (1862) 31 L. J. C. P. 357; 12 C. B. (N. S.) 816; 9 Jur. (N. S.) 384; 10 W. R. 758.

(2) (1880) 16 Ch. D. 484; 50 L. J. Ch. 384; 43 L. T. 530; 29 W. R. 293.

(3) (1875) 4 B. and C. 953; 7 D. and R. 424; 4 L. J. (O. S.) K. B. 65.

(4) 1 A. 51.

(5) 5 M. H. C. R. 101.

(6) 25 B. 176; 3 Bom. L. R. 291.

(7) 36 C. 964; 4 Ind. Cas. 419.

tion of continuing to so visit her. I would also hold that two months was a sufficient length of stay to constitute the *otak* in Larkana applicant's residence for the purpose of the section, it not being shown that she had a permanent residence elsewhere.

I would reverse the order of the lower Court and return the papers with a direction to dispose of the case on its merits.

Order reversed.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 12 OF 1912.

March 20, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Heaton.

EMPEROR—OPPOSITE PARTY

versus

NANDBASAPPA BASAPPA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 257—Practice—Defence witnesses—Refusal to examine them—Evidence of witnesses considered unnecessary.

After an accused person was called upon to open his defence, he named thirteen witnesses, eight of whom were examined by the Magistrate and as to the remaining five, the Magistrate recorded: "All these people repeat the defence story; I shall dispense with their evidence as unnecessary":

Held, that the refusal of the Magistrate to examine the remaining witnesses was not justified; unless he had declined to issue process for the attendance of the defence witnesses under section 257, Criminal Procedure Code, he was not competent to decline to examine them on the ground that their evidence was unnecessary.

Mr. *Robertson*, with him Mr. *P. D. Bhide*, for the Accused.

Mr. *K. H. Kelkar*, for the Complainant.

JUDGMENT.

BATCHELOR, J.—The petitioners here have been convicted of the offence of rioting under section 147, Indian Penal Code, and have been sentenced each to a small fine. They apply in revision on the ground that a serious illegality was committed by the learned second Class Magistrate, before whom this trial was heard. Fortunately there is no dispute as to the facts underlying this contention. These facts are: that after the petitioners had been called upon to open their defence, several witnesses were called by them. Eight of those witnesses' depositions were recorded by the learned Magistrate, though in regard to six of them, it is clear that their story has been seriously abbreviated, possibly mutilated. However that may be, when the Magistrate had exhausted these witnesses, it would seem that he had also exhausted his own patience. For, concerning five other witnesses, who remained to be examined, he writes only: "all these people repeat the defence story; I shall dispense with their evidence as unnecessary." It does not appear upon what grounds the learned Magistrate stated that these people, who had never been heard, would, if they were heard, repeat the defence story. And the Magistrate should have borne in mind that, although the evidence of these witnesses may have appeared to him to be unnecessary, those witnesses' attendance was needed, not in the Magistrate's interest, but in the interests of the accused persons. If, therefore, the accused persons regarded them as necessary witnesses, it was not for the Magistrate to pronounce them to be unnecessary before he had heard them. It is quite clear that procedure such as this cuts at the very root of the fairness of a criminal trial. The case might have been different if the learned Magistrate had brought himself within the provisions of section 257 of the Criminal Procedure Code, which empowers a Magistrate to decline to issue process where he considers that application for such process is made for the purpose of vexation or delay or for defeating the ends of justice. Where the Magistrate so considers and records in writing his ground for so considering, it is competent to him to decline to enforce the attendance of witnesses. In this case, however, the Magistrate has not brought himself or his procedure within the provisions of section 257. And there is no justification for his action in refusing to hear the witnesses whom the defence desired to call. I think, therefore, that the petitioners are entitled to have their conviction set aside.

Mr. Kelkar, who appears on the other side, has urged that if the conviction be set aside, a re-trial ought to be ordered. But having regard to the triviality of the offence, said to have been committed by these accused persons, as disclosed by the punishment which the Magistrate saw fit to award, and having regard also to the harassment which these proceedings, protracted for such a long period, must have already caused to the petitioners,

I think it unnecessary that a re-trial should be ordered. The fines, if paid, to be refunded.

HEATON J.—I concur.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITIONS NOS. 746 AND 747 OF 1912.

June 21, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

RASLU BAKSH—ACCUSED—PETITIONER

versus

THE MUNICIPAL BOARD OF CHAPRA—OPPOSITE PARTY.

Bengal Municipal Act (III B.C. of 1884), ss. 217, 273, 353—Prosecution—Offence under Act—Institution of prosecution—Consent of Commissioners—Evidence of sanction what is—Public authority—Consent in writing—Tabular form—"I have seen," "prosecute," whether valid consent.

The only evidence of sanction of prosecution by a public authority, is a writing under the seal and signature of that authority.

In a tabular form, called the form of prosecution, there was the name, whether of the accused or the complainant was not shown, the second head "prosecute," presumably the charge which was laid against the man, the cause; names of witnesses; the date; and column of remarks; the Chairman or Vice-Chairman (of the Municipality); and in this column of remarks were the words: "I have seen myself" signed S. C. G. In another similar form, in the column of remarks, was the word "prosecute:"

Held, that this was not authority, written or otherwise, showing the consent of the Commissioners or the Vice-Chairman on their behalf to a prosecution within section 353 of the Bengal Municipal Act, 1884.

The authority which the Vice-Chairman has is to convey the sanction of the Commissioners, and not to pass any order of any kind, and he must convey that sanction under his own seal and signature to the Magistrate.

Rule against the order of the Deputy Magistrate of Chapra, dated January 19th, 1912, convicting the petitioner under section 217 of the Bengal Municipal Act, 1884, and sentencing him to a fine of Rs. 30 which order was, on appeal, modified by the Sessions Judge of Saran, on April 20th, 1912 by altering the conviction to one under section 273.

Mr. *Huque*, Counsel, Babus *Manmotha Nath Mukherjee*, *Chandra Sekhar Banerjee* and Moulvi *Nuruddin Ahmed*, for the Petitioner.

JUDGMENT.—We are of opinion that this Rule must be made absolute on the first ground on which it was issued. It was not necessary for the learned Magistrate to put forward the plea that the powers of the Chairman had been delegated to the Vice-Chairman because that was not the point on which the Rule was issued. But if he did put forward such a plea, he should have stated having regard to the ruling in *Kherode Prosad Paul* v. *The Chairman of the Howrah Municipality* (1), that this delegation had been lawfully made in writing; possibly as the first ground of the Rule had to do with the sanction in writing he may have meant that this delegation was made according to law. However, the Rule did not call upon him to show cause on that ground.

The point in this case is that, supposing the Vice-Chairman to have authority, we have no reason to suppose he has not, he must sanction the prosecution in writing; and there is no such sanction on the record. The only evidence of sanction of prosecution by a public authority is a writing under the seal and signature of that authority. We are wholly unaware of any procedure by which the complainant can come before a Magistrate and say, 'I have got the sanction of the public authority for this prosecution, and not be required to produce any writing showing that such sanction has been given. Here there is a tabular form which is called the form of prosecution. There is the name, whether of the accused or the complainant is not shown; the second head "prosecute," presumably the charge which is laid against the man; the cause; names of the witnesses; the date: and column of remarks; the "Chairman or Vice-Chairman;" and in this column of remarks are the words,—"I have seen myself," signed Shama Churn Ghosh. Who Shama Charn Ghosh is we do not know and we do not wish to inquire. But this certainly is not authority, written or otherwise, showing the consent of the Commissioners or the Vice-Chairman on their behalf to a prosecution.

On this ground, the order of the lower Court must be discharged. The fine, if paid, must be refunded.

In Rule No. 747, the order of Shama Churn Ghosh is different. Instead of saying, "I have

(1) 20 C. 448.

seen myself", he says, "prosecute". This does not seem to meet the law any more than the other. The authority which he has is to convey the sanction of the Commissioners and not to pass any order of any kind, and he must convey that sanction under his own seal and signature to the Magistrate.

This Rule will also be made absolute on the same ground. The fines, if paid, will be refunded.

Rule made absolute.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 47 OF 1912.
April 11, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Heaton.
EMPEROR—OPPOSITE PARTY
versus
JAFU BAPU—APPLICANT.

Arms Act (XI of 1878), ss. 14, 15, 19 (f)—Possession of gun—Servant—Master having license, dead—License not renewed—Servant continuing to retain possession of gun.

A. was licensed to possess a gun: the gun was kept by his servant the accused. *A.* died and *B.*, who succeeded to the management of *A.*'s property, failed to renew the license.

Two years after *A.*'s death, the quarters belonging to the accused were searched and the gun found therein.

The accused contended that the responsibility could not be attributed to him but ought to be attributed to *B.*

Held, that the accused had possession and control of the gun in contravention of the provisions of sections 14, 15 of the Arms Act and was, therefore, guilty of an offence under section 19 (*f*).

Criminal application for revision from conviction and sentence recorded by the Sub-Divisional Magistrate, first class, Kaira.

Mr. *L. A. Shah*, for the Applicant.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision of a sentence passed upon one Jafu Bapu under clause (*f*) of section 19 of the Indian Arms Act of 1878. That clause provides a penalty for any person who has in his possession or under his control any arms in contravention of the provisions of sections 14 and 15. The accused was the servant of one Chhotabhai, who was exempted from the provisions of the Arms Act; in other words, was licensed to bear this particular arm, a gun. Chhotabhai, however, died two years ago, and the search of the quarters belonging to the accused has revealed the existence of the gun in those quarters. It is said the responsibilty cannot be attributed to the accused but ought to be attributed to Vithaldas who succeeded Chhotabhai in the management of the property, and whose business it was, it is said, to renew the license which Chhotabhai had enjoyed. It appears to me that whatever may be the value of that argument on the question of moral responsibility, it has no value when the question is as to the meaning of section 19 (*f*) of the Arms Act. The gun in this case is an unlicensed gun, that is to say, it was possessed in contravention of the provisions of sections 14 and 15. It appears to me impossible to say that the gun was not in the possession or under the control of the accused person, for his master, who alone had been exempted, died two years before this discovery. For over two years, the gun had remained with the accused, and he was the only person who can properly be said to have had the possession and the control of this weapon; in my opinion, therefore, this application must be rejected, so far as regards the point of law.

We observe, however, that the sentence inflicted was a fine of Rs. 50 or in default one month's rigorous imprisonment. We have asked the learned Government Pleader whether he has instructions to defend this sentence on the ground that for some particular reason its apparent severity was necessary. He has told us, however, that he has no such instructions, and he leaves the point entirely to us. That being so, we think that the sentence is unnecessarily harsh and we reduce it to a fine of Rs. 10, or in default one week's rigorous imprisonment. The excess fine, if paid, to be refunded.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 60 OF 1912.

April 11, 1912.

Present:—Sir George Knox, KT., Judge.

THAKUR PANDEY—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Dispute relating to land likely to cause breach of the peace—Discretion of Magistrate.

Where a dispute relating to possession of immoveable property is likely to cause a breach of the peace, a Magistrate has a discretion to proceed either under section 107 or under section 145 of the Criminal Procedure Code.

Sheoraj Roy v. *Chatter Roy*, 32 C. 966; 2 Cr. L. J. 769; 10 C. W. N. 288, *Emperor* v. *Ram Baran Singh*, 28 A. 406; A. W. N. (1906) 61; 3 Cr. L. J. 323, followed.

Mahadeo Kunwar v. *Bisu*, 25 A. 537; A. W. N. (1903) 102; *Balajit Singh* v. *Bhoju*, 35 C. 117; 12 C. W. N. 487; 6 C. L. J. 697; 6 Cr. L. J. 398, referred to.

Criminal revision from the order of the Sessions Judge of Ghazipur.

Mr. *Ahmad Kareem*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—A Magistrate of the first class, after taking evidence, came to the conclusion that there was great probability of a breach of the peace.

There is apparently between the parties a dispute relating to immoveable property, and according to the Magistrate, one party is trying to set aside a possession of long standing on their own authority with the result, the learned Magistrate says, that a great riot will take place in *Pargana* Duaba; he accordingly bound down the petitioners before me and required that they should give security for keeping the peace for one year.

I am asked to interfere with this order on the ground that the dispute being a dispute in regard to immoveable property, the Magistrate should not have acted under section 107, and in support of this contention I am referred to the case of *Mahadeo Kunwar* v. *Bisu* (1). In that case, an order has been passed under section 147 of the Code of Criminal Procedure, without any of the procedure prescribed by section 145 being adopted, and that order was set aside as an order passed without jurisdiction. The learned Counsel relies upon certain dicta contained in the judgment in which it was laid down that where a report was made by the Police that a dispute likely to cause a breach of the peace existed between the parties concerned regarding certain land, the Magistrate should have proceeded in the manner prescribed in section 145 and not under section 107, but the learned Judge has been careful to add that "it was not necessary to decide, for the purposes of this case, whether the fact of the Magistrate having been informed that a dispute existed in regard to land, ousted his jurisdiction to take proceedings under section 107."

I was also referred to the case of *Balajit Singh* v. *Bhoju Ghose* (2). The learned Judges in that case holding that as the language of section 145 was mandatory and that of section 107 contained words which were discretionary, the order passed under section 107 of the Code of Criminal Procedure, when there was a dispute relating to land, was an order which should be set aside. I find, however, in the case of *Sheoraj Roy* v. *Chatter Roy* (3), the learned Judges of same High Court held that where a dispute relating to possession of land is likely to cause a breach of the peace, a Magistrate has a discretion to proceed either under section 107 or under sections 144 and 145 of the Criminal Procedure Code.

In *Emperor* v. *Ram Baran Singh* (4), the learned Judge of this Court held that a Magistrate under similar circumstances might legally take action under section 107 of the Code of Criminal Procedure. With that view, I entirely concur.

It is a matter of experience that cases coming under section 145 are, as a rule, cases long drawn out, and in the interval it is more than probable that owing to the hot blood excited over the matter, a breach of the peace might occur. The Magistrate often does well to take action under section 107. It is open to the petitioners in the present case to move the Magistrate having jurisdiction to take action under section 145, if they make out a proper case. I have no doubt that the Magistrate will take the necessary steps.

I find no cause for interference and dismiss the application.

Application dismissed.

(1) 25 A. 537; A. W. N. (1903) 102.

(2) 35 C. 117; 12 C. W. N. 487; 6 C. L. J. 697; 6 Cr. L. J. 398.

(3) 32 C. 966; 2 Cr. L. J. 769; 10 C. W. N. 288.

(4) 28 A. 406; A. W. N. (1906) 61; 3 Cr. L. J. 323.

In re KHANDERAO YESHWANT.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 1 OF 1912.
March 21, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Heaton.
In re KHANDERAO YESHWANT—APPLICANT.

Criminal Procedure Code (Act V of 1898), *s.* 195—*Sanction to prosecute—False recital in* panchnama—*Case committed to Magistrate—Magistrate finding case to be false—Sanction against Police officer preparing* panchnama *but not appearing as witness in the case—Penal Code (Act XLV of* 1860), *s.* 211.

The test for the necessity of the sanction under section 195, Criminal Procedure Code, is the character of the *offence* and not the character of the offender.

Sanction is necessary under the section when an offence punishable under section 211, Penal Code, is committed in or, in relation to, any proceeding in any Court.

A Police constable, *A.*, prepared a *panchnama* in regard to an offence said to have been committed by a certain *Talukdar* under the Arms Act. The investigation into the alleged offence was not made by *A.* but by the village constable who sent the case up to the Sub-Inspector, by whom in turn it was committed to a Magistrate. The Magistrate found that certain recitals in the *panchnama* were false and that the charge imputed to the *Talukdar* was false. He discharged the *Talukdar* and directed the prosecution of *A.* under section 211 of the Penal Code. *A.* did not appear before the Magistrate in the case against the *Talukdar*.

A. applied to the Sessions Judge, who found that the order of the Magistrate was an order for sanction under section 195, Criminal Procedure Code, but that no such sanction was necessary in the circumstances of the case before *A.* could be prosecuted:

Held, that *A.* could not be prosecuted without preliminary sanction because

(*a*) the offence imputed to *A* was the instigation of the false charge against the *Talukdar*, which took the form of a trial;

(*b*) even if the offence of instigation was committed before the proceeding in Court was begun, the instigation was an act committed in relation to the proceeding held by the Magistrate against the *Talukdar*.

Mr. *L. A. Shah*, for the Applicant.

Mr. *G S. Rao*, Government Pleader, for the Crown.

JUDGMENT.

BATCHELOR, J.—The petitioner here is a Policeman who, on the 20th February 1911, was at a village, named Dhanchi occupied in work about the census. On that day in that village a *panchnama* was made in regard to an offence said to have been committed by a certain *talukdar* under the Arms Act. The investigation into this alleged offence was not made by the petitioner but by the village constable Shamserkhan, who sent up the case to the Sub-Inspector by whom in turn it was committed to a Magistrate.

In the course of trying this alleged offence of the *talukdar's*, the learned Magistrate found that certain recitals in the *panchnama* were false. The *talukdar* was discharged, the Magistrate being of opinion that the charge imputed to him was false. In that view, he issued notice to the village constable Shamserkhan to show cause why sanction for his prosecution should not be granted under section 195 of the Criminal Procedure Code. After hearing Shamserkhan, the Magistrate issued notice also against the present petitioner, and ultimately on the 8th of September 1911, the Magistrate made an order directing the petitioner's prosecution under section 211, Indian Penal Code. The petitioner applied for a certified copy of that order but the Magistrate refused it on the ground that the order formed part of an official correspondence between himself and the District Police.

Thus rebuffed by the Magistrate, the petitioner applied to the Sessions Court and there the learned Judge has taken this view, that the order which the Magistrate made was really, whether the Magistrate knew it or not, an order for sanction under section 195, Criminal Procedure Code. But the learned Judge was of opinion that no such sanction was necessary in the circumstances of this case, and upon that ground, he rejected the petitioner's application.

It seems to me that there can be no doubt that the order made by the Magistrate is an order for sanction under section 195 of the Criminal Procedure Code. The order has been read to us, and though it is couched in Gujarati, the English word "sanction" is used to describe it The false charge in connection with which the sanction is given is also set out. And the order seems to me to contain all that is necessary under section 195. Next, I am of opinion that in the circumstances of this case, the petitioner could not be prosecuted without a preliminary sanction being granted against him It is, no doubt, the fact that the petitioner himself did not appear before the Magistrate who

was trying the case against the *talukdar*. But as I understand section 195, the test for the necessity of the grant of sanction is not the character of the offender but the character of the offence. Sanction is necessary under the section when an offence punishable under section 211, Indian Penal Code, is committed in or in relation to any proceeding in any Court. Now the offence imputed to the petitioner here was the instigation of the false charge against the *talukdar*, the charge which, in the ordinary course of criminal procedure, took the form of a trial. It may be that the instigation was committed before the proceeding in Court was begun but, none-the-less, I am of opinion, that the instigation was an act committed in relation to the proceeding held by the Magistrate against the *talukdar*.

In that view of the case, the order made by the learned Sessions Judge must be set aside and the petition must be remanded to him to pass such order as he deems fit in the light of this judgment.

HEATON, J.—I concur.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 539 OF 1911.

January 31, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

THE PUBLIC PROSECUTOR—APPELLANT

versus

VEERARAGHAVA PILLAI—ACCUSED.

Confession—Police officer—Evidence Act (I of 1872), ss. 25, 26.

A confession made to a foreign Police officer is inadmissible in evidence according to sections 25 and 26 of the Evidence Act.

Queen-Empress v. *Hurribole Chunder Ghose*, 1 C. 207; 25 W. R. Cr. 36; *Queen-Empress* v. *Naglakala*, 22 B. 235, followed.

Appeal under section 413 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Sessions Case No. 9 of 1911, by the Sessions Judge of South Arcot.

The accused Veeraraghava Pillai, who is a resident of Chinnababusamudram, a village of South Arcot district, was charged with having murdered his step-brother on the 14th December 1910. The boy was seen alive till noon of the 14th and his body was discovered the next morning floating in a well near Chinnababusamudram, which is nine miles from Pondicherry. The accused confessed his guilt to the Police at Pondicherry on the evening of the same day, *i. e.*, 14th December, and made a detailed statement of the same before Monsieur Duru, Assistant Procureur, on the 16th, while he was in the custody of the Police. Monsieur Duru was not called as a witness nor was any record of the statement taken by him attempted to be filed as evidence by the prosecution. The Sessions Judge disallowed the confession made to the Police on the 14th December and held that Monsieur Duru was not a Magistrate according to British law, as he cannot try an offender and has to prosecute offenders before the French Criminal Courts, and that the statement, recorded by him on the 16th December 1910, may not be proved and the accused was accordingly acquitted. The Government preferred an appeal against the said acquittal on the ground that the Sessions Judge erred in holding that the confessions made to the French Police authorities and to the French Magistatrate could not be proved.

In the course of the hearing of the appeal, it was contended by the Public Prosecutor that the expression "confessions made to a Police officer" in section 25 of the Indian Evidence Act should be restricted to those made to a British Police officer and not to those made to the Police of a Foreign Country, and that the comprehensive interpertation, given to the expression "Police officer" in *Queen-Empress* v. *Hurribole Chunder Ghose* (1) by Garth, C. J., should not be extended to Police Officers of a Foreign Country, while the defence argued to the contrary. The other question as to the admissibility of the confessional statement recorded by M. Duru was argued for a while, and given up by the Public Prosecutor for the reasons given in the judgment.

Mr. *M. D. Devadoss*, for the Public Prosecutor, for the Crown.

Mr. *I. V. Ramanuja Rau*, for the Accused.

JUDGMENT.—We see no reason to doubt the correctness of the decisions reported in

(1) 1 C. 207; 25 W. R. Cr. 36.

Queen v. *Hurribolechunder Ghosh* (1) and *Queen-Empress* v. *Nogla Kala* (2) as to the meaning of the words "Police Officers," in sections 25 and 26 of the Indian Evidence Act.

Mr. Devadoss for Public Prosecutor is unable to refer us to any document recovered by Mr. Duru, which the Sessions Judge improperly refused to admit as evidence, nor can he say that Mr. Durai, or any one else, was tendered as a witness to prove a confession made before Mr. Duru. There is, therefore, no ground for interference with the acquittal. The appeal is dismissed.

Appeal dismissed.

(2) 22 B. 235.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 59 OF 1911.

November 9, 1911.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

PHOTO *valad* HASAL AND OTHERS—APPELLANTS.

Evidence Act (I of 1872), s. 27—Statement made after discovery of property—Evidence—Pointing out property—Evidentiary value.

A statement by accused, not leading to discovery of property and made after discovery and production of the property, is irrelevant under section 27 of the Evidence Act. That section has reference only to statements made prior to the discovery of property and in consequence of which such property was discovered.

It is a question of fact whether the pointing out or production of property by a person does or does not raise a presumption of guilt. The production or the pointing out may indicate that the accused was in possession or that he had innocent knowledge that the articles had been left there by some one else.

Mr. *Achulsing M. Advani*, for the Appellants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The two accused have been convicted in the alternative of an offence under secti n 395 or section 412, Indian Penal Code.

The evidence on which they have been convicted refers to the production of property by them—and statements made by them at the ime of the production.

Accused No. 1 produced Rs. 10 and made a statement that it was part of the stolen property. The statement is irrelevant, for section 27 has reference only to statements made prior to the discovery of the property and in consequence of which such property was discovered. Here it is clear that the statement was made after the production and discovery of the property. The Rs. 10 cannot be identified as part of the stolen property and there is, therefore, no evidence to support the conviction of accused No. 1.

Accused No. 2 also produced Rs. 10 under similar circumstances, and though this production is, for the reasons just stated, not evidence of his guilt—there is as against accused No. 2 further evidence of his production of a blanket and a head-sheet. These two articles are identified by the complainant's wife and daughter as theirs.' Mr. Achalsing argues that these witnesses did not state in so many words that these articles were stolen. But we think this is the clear implication arising from the evidence and it was so understood in the lower Court for there was no cross-examination to suggest that these articles had not been stolen. Accused No. 2 produced these articles from a cattle pen where they had been buried. It is argued that mere production does not raise a presumption of guilt. This, however, is merely a question of fact. Does the production or the pointing out indicate that accused was in possession or that he had innocent knowledge that the articles had been left there by some one else? The latter inference is negatived by the fact that accused falsely denied having pointed out the property. The most probable inference, therefore, is that the accused was in possession and had kept the articles in the place where they had been concealed for it was, moreover, a place to which he had daily access. The accused was, therefore, in furtive possession of articles stolen in a dacoity and he must have been aware of the nature of the property for he lived close to the house of the complainant where the dacoity had occurred.

The conviction in his case under section 412 must be confirmed, but as he was not identified as being one of the dacoits, we think his sentence may be reduced.

We reverse the conviction and sentence of accused No. 1, Photo.

We alter the conviction of accused No. 2 to one under section 412, Indian Penal Code,

only and reduce the sentence to one of rigorous imprisonment for one year.

Sentence reduced.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 4 OF 1912.

March 14, 1912.

Present:—Sir N. G. Chandavarkar, Kt., Judge, and Mr. Justice Batchelor.

EMPEROR—OPPOSITE PARTY

versus

KASSIM ISUB SAB—ACCUSED.

Forest Act (VII of 1878), s. 32 (a), (b) and (c)—Penal Code (Act XLV of 1860), ss. 40, 79, 114—Quarrying metal in Reserved Forest under orders of Public Works Department—Permission of Forest Department not obtained.

A., a contractor engaged by the Public Works Department, quarried metal in a place pointed out to him by that Department. The place was within the area of a Reserved Forest and the permission of the Forest Department had not been obtained to the quarrying. *A.* was convicted of an offence under section 32 (*a*), (*b*) and (*c*) of the Forest Act, read with sections 40 and 114 of the Penal Code:

Held, that the principle of section 79 of the Penal Code applied to the case. The conviction and sentence were accordingly set aside.

Criminal Reference made by the acting Sessions Judge of Satara.

FACTS.—The accused was convicted of an offence under section 32 (*a*), (*b*) & (*c*) of the Forest Act read with sections 40 and 114 of the Penal Code.

The accused was a contractor engaged by the Public Works Department and quarried metal in a place pointed out by that Department. The place was, however, within a Reserved Forest, and the permission of the Forest Department had not been obtained to quarrying the metal.

The case was referred to the High Court by the following

ORDER:—"The conviction does not appear to me to be bad in law, the fact that metal had previously been quarried in Forest without any objection beirg taken does not excuse the accused in the present case. It is argued that he had reason to believe that the Public Works officials had obtained the necessary possession, but that is not supported by the evidence. From the accused's statement it appears that he did not know

that permission was necessary but ignorance of the law is no excuse. Nor is he excused by the fact that he quarried metal under the orders of the Public Works Department. The maxim 'The King can do no wrong' must be applied to the case, and a person who commits an offence cannot plead the orders of a Government official in excuse of his conduct.

"But, in the circumstances of the case, I think that the sentence should be a nominal one. The accused appears to have acted in good faith, quarrying in the place pointed out to him by the Public Works officials. The latter are quite as responsible as he for the failure to obtain the necessary permission, and it seems unjust that he should be punished for an offence which, in the circumstances, is only a technical one."

Mr. *P. B. Vinekar*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.—Applying the principle of section 79 of the Indian Penal Code, the Court reverses the conviction and sentence and directs the fine, if paid, to be refunded.

Conviction reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 154 OF 1911.

November 23, 1911.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

IMPERATOR—PROSECUTOR

versus

TRIBHUN—ACCUSED.

Criminal Procedure Code (Act V of 1893), ss. 12, 181 (2), 188—Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust committed in Native State—Part of property retained in British India—Jurisdiction—Power of British Court to take cognizance of offence.

Section 181 (2), Criminal Procedure Code, applies only when the offences referred to therein are committed in British India; it has no application to an offence committed in a Native State.

Where the offence of criminal breach of trust was committed in Jodhpur in a Native State but part of the property was retained by the accused in Hyderabad (Sind):

Held, that the Hyderabad Court could not take cognizance of the offence except on a certificate of the

Political Agent under section 188, Criminal Procedure Code.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—In this case, complaint has been filed against the accused for an offence of criminal breach of trust under section 408, Indian Penal Code, committed at Jodhpur.

The complaint has been filed in Hyderabad and the Court of the Special First Class Magistrate, Hyderabad, appears to have assumed jurisdiction under section 181 (2), as part of the property was retained by the accused in Hyderabad.

But this section only applies as between Courts of different local areas whose jurisdictions have been limited under section 12, Criminal Procedure Code, and to which the Code of Criminal Procedure applies. It has no application to an offence committed in a Native State, and of such offence the Magistrate cannot take cognizance except on a certificate of the Political Agent given under section 188.

As the Magistrate had no jurisdiction, we reverse his order taking cognizance of the complaint.

Order reversed.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE NO. 36 OF 1912.
May 25, 1912.
Present:—Mr. Justice Heaton and
Mr. Justice Macleod.
EMPEROR—OPPOSITE PARTY
versus
ANANDA LAXMAN BABAJI—ACCUSED.

Penal Code (Act XLV of 1860), s. 379—Sentence—Theft from Railway train—Accused previously convicted of theft and bound over for good behaviour—Deterrent sentence.

When a Magistrate is satisfied that an accused has committed the offence of theft from a Railway train, the sentence should be of a deterrent nature, especially where the accused had already been convicted of theft and had been repeatedly bound over for good behaviour.

Criminal Reference made by the District Magistrate of Nasik.

Mr. *K. D. Sathaye*, for the accused.

JUDGMENT.—In this case, the accused was convicted by the Second Class Magis-

trate of Nandgaon for having committed theft under section 379, Indian Penal Code, and sentenced to one month's rigorous imprisonment. Notice was issued by the High Court against the accused to show cause why the sentence should not be enhanced as it appeared that the Magistrate had taken too lenient a view of the case. We must deal with the question of enhancement on the footing that the accused was properly convicted and that the Magistrate found correctly that the accused had committed the theft in a Railway train. This is an offence of a peculiarly heinous character, extremely difficult to discover, and, therefore, profitable to those who are engaged in committing such thefts, and it is desirable, we think, that when the Magistrate is satisfied that an accused has committed such an offence, the sentence should be of a deterrent nature. In this case, it appears that the accused had already been once convicted of theft in 1907, and had been three times bound over for good behaviour. Taking all these facts into consideration, we think that the proper sentence in this case should be one of twelve months' rigorous imprisonment. Therefore, we enhance the sentence accordingly. We may point out that we could not enhance the sentence to a greater extent than two years, although the District Magistrate has suggested that three years would be the proper punishment.

Sentence enhanced.

SIND JUDICIAL COMMISSIONER'S COURT.
CRIMINAL REVISION APPLICATION NO. 141 OF 1911.
November 17, 1911.
Present:—Mr. Pratt, J. C., and
Mr. Crouch A. J. C.
TINDOOMAL NARAINDAS—APPLICANT
versus
SADHURAM AMBOOMAL—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 437, 439—Revision (Criminal)—Interference discretionary—Belated application not to be entertained—Sind Judicial Commissioner's Court Rules, R. 3, Ch. XV.

EMPEROR *v.* MAHRAM DHANIBUX.

Interference by revision in criminal cases is purely discretionary. Rule 3, Chapter XV, of the Court Rules, which requires that revision applications are not to be admitted unless presented within sixty days of the decision under objection, indicates that the Court will refuse to interfere in the case of a belated application.

The object of the rule is to prevent stale applications being made and to obviate the hardship that would ensue to accused persons if the finality of a criminal order were left in doubt for a long time.

Mr. *P. V. McInerny*, for the Applicant.

The *Public Prosecutor*, for the Crown.

Mr. *Wadhumal Oodheram*, for the Opponent.

JUDGMENT.—This is an application for revision of an order made by the District Magistrate on the 24th July refusing under section 437 to order further inquiry into a case of cheating which had been discharged by the Resident Magistrate, Larkana, on the 5th April.

By the rules of this Court, revision applications are not admitted unless presented within sixty days of the decision under objection. The object of this rule is to prevent stale applications being made and to obviate the hardship that would ensue to accused persons if the finality of a criminal order were left in doubt for a long time. Interference by revision in criminal cases is purely discretionary and the rule indicates that this Court will, in the exercise of that discretion, refuse to interfere in the case of a belated application.

Here the application, if treated as a revision of the District Magistrate's order, is made only one or two days within the period of 60 days. But it is in substance an application to revise the order of the Resident Magistrate—for this Court has concurrent jurisdiction with the District Magistrate under section 437. Regarded as such, the application is made nearly six months after the decision under objection.

On this ground alone, we think it our duty to refuse to entertain the application, which is, therefore, dismissed.

Application dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 146 OF 1911.

November 17, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

EMPEROR—PROSECUTOR

versus

MAHRAM DHANIBUX—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Discharge of cross-case.

The fact that a Magistrate has discharged a cross-case between the same parties is not *per se* a sufficient ground for transferring a case from his Court.

When the Magistrate has heard evidence in both cases, which he is not keeping distinct in his own mind, and has discharged the one case on the evidence that he has heard in both cases, that is not a sufficient reason for transferring the other case from his Court.

Crown v. *Kamil*, 1 S. L. R. 37; 8 Cr. L. J. 159, explained and distinguished.

Rajani Kanta v. *Emperor*, 36 C. 904; 10 Cr. L. J. 244; 3 Ind. Cas. 88, distinguished.

Mr. *Isardas Oodharam*, for the Applicant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The District Magistrate has transferred this case which was instituted in the Court of the City Magistrate, Shikarpur, on the ground that the Magistrate had discharged a cross-case between the same parties.

This was not *per se* a sufficient ground for transfer in view of the ruling of this Court in *Crown* v. *Kamil* (1). But there the Magistrate adopted a procedure which indicated that he was not keeping the evidence in the cases distinct in his own mind for he heard the prosecution evidence in the one case after the prosecution evidence in the other and appeared to decide the one case, which he discharged, on the evidence that he had heard in both cases. This fact distinguishes the case from *Crown* v. *Kamil* (1) and from that of *Rajani Kanta* v. *Emperor* (2).

Further, as the City Magistrate has been transferred from Shikarpur, the case will have, in any event, to be heard by another Magistrate.

We do not, therefore, think it necessary to interfere and dismiss the application.

Application dismissed.

(1) 1 S. L. R. 37; 8 Cr. L. J. 159.
(2) 36 C. 904; 10 Cr. L. J. 244; 3 Ind. Cas. 88.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 25 OF 1911.

October 13, 1911.

Present:—Mr. Crouch, A. J. C.

MESSRS. DONALD GRAHAM AND CO.—PLAINTIFFS

versus

KEWALRAM GHANSHAMDAS AND OTHERS—DEFENDANTS.

Sanction to prosecute—Object being to enforce payment of debt.

Sanction to prosecute should not be granted if it appears that it is not to be used *bona fide* for the purpose of obtaining a conviction, the object being to enforce payment of a decree.

Mr. *Dipchand T. Ojha*, for the Plaintiffs.

Mr. *Wadhumal Oodharam*, for Defendant Harbhagwandas.

JUDGMENT.—This is an application under section 195, Criminal Procedure Code, for sanction to prosecute Harbhagwandas Ghanshamdas for making certain false statements when giving evidence in Suit No. 253 of 1909 on the 3rd August 1910.

Plaintiffs had obtained awards against two firms Bhagwandas Assanand and Co., and Bhagwandas Kewalram and Co., for large sums. Harbhagwandas objected to the filing of the awards as against himself on the ground that he was not a partner, but merely a manager on commission.

The statements, in respect of which sanction to prosecute is sought, are all, directly or indirectly, to the effect that he was not a partner. It was found by the Court (Waley Cohen, A. J. C.) that he was a partner. The judgment is dated 17th August.

An appeal was filed, but was rejected on the ground that no appeal lay. An application of revision was also rejected, the order being passed on the 8th June 1911.

This application was filed on the 3rd August 1911.

No order was passed by Mr. Waley Cohen, under section 476, Criminal Procedure Code, nor does it appear to have been suggested by the plaintiffs that such order should be passed. As all the evidence in proof of the alleged offence is under the direct control of plaintiffs, or their guarantee brokers, the Court would have naturally been disinclined to order a prosecution, even if perfectly satisfied that perjury had been committed, unless assured that the plaintiffs would do their utmost to obtain a conviction.

Not only was no such assurance given, but there was ground for supposing that there would even be a reluctance on the part of plaintiffs to press a charge; for, Bhagwandas, one of the partners in both debtor firms, is the guarantee broker who introduced the business, and who is, either solely or as a partner, actually responsible to make good any loss. It was stated in argument by Mr. Wadhumal and not contradicted, that the real creditors are not Messrs. Graham & Co. but the guarantee brokers. It is, therefore, at least possible that Mr. Cohen felt that a prosecution would probably end in an acquittal, through no proof being offered.

On the 25th October 1910, all the members of the two debtor firms, including Hurbhagwandas, signed a reference to Arbitration in favour of Messrs. Nebhundas Nichumal and Dipchand T. Ojha. In the reference, the order of the Court filing the award appears to have been treated as conclusive; but Hurbhagwandas contended that he was at any rate liable only for his proper share. No stay of execution had been granted. Mr. Dipchand, who was acting throughout as Pleader for the judgment-creditors, appears to have spent the year in half-coaxing, half-threatening Hurbhagwandas to settle up. The latter stipulated that he should receive an absolute quittance of the judgment-debt in return for a lump sum representing his alleged share. Mr. Dipchand was urging him to withdraw his appeal, and to produce the books which were expected to contain conclusive evidence of the partnership. To such good effect did Mr. Dipchand act as the kind friend that he states that Harbhagwandas admitted to him that he was a partner.

The present application has clearly been filed as a last resource. The guarantee brokers want their money, and if it be in their power to hold over their debtor the threat of imprisonment, it is probable that he will make far more earnest endeavours than he has hitherto to satisfy their decree. But I feel

no confidence whatever, that the sanction, if granted, will be used, *bona fide* for the purpose of obtaining a conviction. It will on the contrary, I feel sure, be used for the purposes of enforcing payment, and if payment be obtained, it will probably be on the understanding that the prosecution is not pressed.

I consider, therefore, that the sanction should not be granted. Application rejected.

Application rejected.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 9 OF 1912.
CRIMINAL REVISION PETITION No. 9 OF 1912.
May 2, 1912.
Present:—Mr. Justice Sundara Aiyar.
SENGODAN AND OTHERS—PETITIONERS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 147, 296—Causing disturbance to a religious procession—Right of members of a community to pass in procession along the public streets—Assaulting members of procession—Rioting—Common object.

The members of a religious community or denomination have every right to pass through the King's Highway in procession for purposes of religious worship.

Kandasawmy Mudali v. *Sabraya Mudali*, 32 M. 478, 1 Ind. Cas. 716; 19 M. L. J. 617 and *Mannada Mudali* v. *Nallaya Goandan*, 32 M. 527; 19 M. L. J. 467; 6 M L. T. 285; 4 Ind. Cas. 870, referred to.

Assaulting a religious procession with the common object of disturbing it, amounts to rioting.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of the 1st Class Magistrate of Karur, in Criminal Appeal No. 59 of 1911, confirming the conviction and sentence passed on the petitioners by the Stationary 2nd Class Magistrate of Karur, in C. C. No. 279 of 1911.

FACTS.—The facts of the case are clear from the following judgment of the Appellate Magistrate :—

The appellants have been convicted of rioting, causing disturbance of a religious assembly, and hurt, and sentenced to rigorous imprisonment for six weeks each by the Stationary Sub-Magistrate, Karur.

2. On 5th May 1911, the Vettuva Goundens of Pogalur conducted a worship, and carried a procession of their Kandiamman along the streets. When the procession turned into the south street, stones are alleged to have been pelted by a large body of Pallas assembled in their *mandai* and in one or two lanes in the neighbourhood. Two of the Vettuva Goundens, *viz.*, 5 and 9 P. Ws., were hit by the stones, some of the drums were torn by the stones that fell on them and the procession had to be given up owing to the confusion engendered by the riot.

3. The origin of the disturbance, as abundantly proved, is this. There was a dispute between the Pallas, to which community the appellants belong, and the Goundens regarding the employment of Chuklers by the former to beat drums. The Parayas, who had always been beating drums for the Pallas, refused to do service in funerals, and the Pallas had in consequence to discard the Parayas altogether and employ Chuklers in their stead. The Vettuva Goundens had either real or fancied grievance is not having been consulted about the change. It is in the evidence that after one marriage had been celebrated by the Pallas with Chuklers' music, the Vettuva Goundens took it in their heads to object to a second wedding procession marching in their streets with Chuklers playing the drums. This was some little time before the present riot. There were petitions and counter-petitions about it. Meanwhile, the Vettuva Goundens arranged this procession of their deity. The Pallas, exasperated by the opposition which they had encountered from the Goundens, were apparently determined to revenge themselves by throwing stones at, and scattering this, procession.

4. There can be no doubt that a riot did actually take place on the night of the 5th May last. The case for the appellants is that the Goundens organised the procession in order to afford a pretext for attacking them, and that as soon as the procession turned down the south street, the P. Ws. set down the deity and went back armed with sticks to the Pallas' *mandai*, fell upon them and wounded three or four of them. I consider it very probable that the Goundens did attack the Pallas. But as a defence to this case, I regard it as unimportant, as the

evidence makes it quite clear that the Pallas pelted stones first at the procession and disturbed a religious assembly which was perfectly lawful.

5. The appellants' Vakil has taken an important objection to the conviction, *viz.*, that the Sub-Magistrate has failed to specify the common object of the rioters. I should hold this objection valid but for the fact that both in the charge and in the judgment, unlawful common object has been sufficiently indicated and the appellants do not appear to have been prejudiced in their defence by the omission to specify it in terms. The common object, to state it precisely, was voluntarily to disturb an assembly lawfully engaged in the performance of a religious worship. In pursuance of this common object, it is proved that stones were pelted, and hurt was caused to two of the prosecution witnesses Nos. 5 and 9, and 14th P. W. proves that the drums beaten by the *pirayas* were torn.

Dr. *S. Swaminathan*, for the Petitioners.

Mr. *J. L. Rosario* Acting Public Prosecutor, for the Crown.

ORDER.—In the face of the rulings in *Kandasawmy Mudali* v. *Subraya Mudali* (1) and *Mannada Mudali* v. *Nallaya Goundan* (2), I cannot say that the prosecution party was not lawfully engaged in religious ceremonies when going along the public road in procession. Besides, I may observe that there can be no doubt on the findings that the accused combined with the object of assaulting and causing hurt to the prosecution party. That would be sufficient to justify their conviction for rioting. I am unable to say that the sentence is excessive. I dismiss the revision petition.

Petition dismissed.

(1) 32 M. 478; 1 Ind. Cas. 716; 19 M. L. J. 617.

(2) 32 M. 527; 19 M. J. L. 467; 6 M. L. T. 285; 4 Ind. Cas. 870.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 148 OF 1911.

November 9, 1911.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

KADIRBUX *valad* DILU—ACCUSED.

Culpable homicide—Wife detected in act of adultery and killed—Sentence.

Wife-murder is so common an offence in Sind that deterrent sentences should be passed in all such cases, even where the husband has killed his wife in the provocation that he detected her in the act of committing adultery.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The accused has been convicted on his own plea of culpable homicide not amounting to murder and has been sentenced to three years' rigorous imprisonment.

The accused killed his wife because, as he alleges, he detected her in the act of committing adultery. Ordinarily, the sentence inflicted would be sufficient having regard to the provocation. But wife-murder is so common an offence in Sind that we think it necessary that deterrent sentences should be passed in all such cases. It is important that the impression should not be formed that the life of a woman can be lightly taken under any circumstances.

We, therefore, enhance the sentence to one of rigorous imprisonment for five years.

Sentence enhanced.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 149 OF 1911.

November 16, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

IMPERATOR

versus

AKIDULLAH *valad* AZIZULLAH—ACCUSED.

Penal Code (Act XLV of 1860), s. 427—Mischief—Act done negligently—Criminal Procedure Code (Act V of 1898), s. 35—Imprisonment in default of fine—Concurrent sentences.

Where the accused is only guilty of negligence, he is not liable to be convicted of mischief, for that offence imports that the act was done wilfully.

Queen-Empress v. *Shaikh Raju*, 9 B. 173, followed.

Sentences of imprisonment in default of fines imposed for two or more offences cannot be directed to run concurrently as not being justified by section 35, Criminal Procedure Code.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The accused has been convicted of rash and negligent driving under section 279, Indian Penal Code, and also for mischief under section 427 in respect of damage caused by such rash driving. As the accused was only guilty of negligence, he was not liable to be convicted of mischief —for that offence imports that the act was done wilfully—see *Queen-Empress* v. *Shaikh Raju* (1). Again, the Magistrate has imposed a fine for each offence and has directed the terms of imprisonment in default of the fines to run concurrently. Such an order is not justified by section 35, Criminal Procedure Code. In case of part payment of the fine, it would be difficult to estimate what portion of which term of imprisonment should terminate under section 69, Indian Penal Code.

We, accordingly, confirm the conviction and sentence under section 279, Indian Penal Code, and reverse the conviction and sentence under section 427.

Sentence reversed

(1) 9 B. 173.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 267 OF 1912.

CRIMINAL REVISION PETITION No. 221 OF 1912.

July 18, 1912.

Present:—Mr. Justice Ayling.

LAKSHMINARAYANA REDDI—PETITIONER

versus

GNANAPRAKASA MUDELIAR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Possession—Proceedings—Appointment of Receiver before completing inquiry under section 145—Jurisdiction.

An order by a Magistrate, appointing a Receiver under clause (2) of section 146 of the Criminal Procedure Code, before completing the inquiry under section 145 of the Code, is *ultra vires* and without jurisdiction.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Sub-Divisional Magistrate, Cuddalore Division, dated 1st May 1912, attaching certain lands in dispute under proviso 2, clause (4) of section 145, Criminal Procedure Code and appointing a Receiver to manage the property.

Mr. *P. R. Narayanasawmi Iyer*, for the Petitioner.

Dr. *S. Swaminathan* and Mr. *G. S. Ramachandrier*, for the Respondent.

ORDER.—A Magistrate is only empowered to appoint a Receiver under clause (2) of section 146 of the Criminal Procedure Code, *i.e.*, after termination of the inquiry as to possession conducted under clause (4) of section 145. The order sought to be revised, so far as it relates to the appointment of a Receiver, is *ultra vires* and is hereby set aside.

The records will be returned to the Magistrate at once and he should complete his inquiry under section 145, Criminal Procedure Code, with the least possible delay.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 19 OF 1912.

March 28, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Heaton.

In re VAZIRSAHEB ALLISAHEB JHAGIRDAR—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 188—Extradition Act (XV of 1903), ss. 7, 22—Indian (Foreign Jurisdiction) Order in Council, 1902—Extradition Rules, r. 3—Political Agent—Warrant issued on requisition of Native State—Accused surrendering of his own accord—Certificate granted by Political Agent for trial of accused in British India—Subsequent recall of certificate—Accused ordered to be tried in Native State—Practice.

The Authorities of a Native State made a requisition to the Political Agent, who was also the District Magistrate of Bijapur, for the surrender of an accused. The Political Agent issued a warrant under section 7 of the Extradition Act, for the arrest of the accused, who surrendered of his own accord and the warrant was accordingly returned unexecuted. Then, upon the application of the accused, the Political Agent issued in his favour a certificate under section 188, Criminal Procedure Code, to the effect that the accused should be tried in British India. Subsequently, the Authorities of the Native State pressed for the man's surrender and the Political Agent, yielding to that pressure, finally ordered that the accused be tried in the Native State:

Held, that the Political Agent had no power to cancel the certificate already granted and that the subsequent order for the trial of the accused in the Native State must be set aside.

In re Hormusji Nasarwanji, (1886) Urep. Crim. Cas. 253, followed.

Rule 3 of the Rules under the Indian (Foreign Jurisdiction) Order in Council 1902 and under section 22 of the Extradition Act does not control section 188, Criminal Procedure Code.

The Rule contains a reminder to Political Agents of their duty to consider the admissibility of issuing a certificate prior to issuing any warrant.

A certificate under section 188, Criminal Procedure Code, can be issued even after a warrant has already gone out.

Criminal Reference made by the District Judge of Bijapur.

Mr. *D. A. Khare*, for the applicant.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.

BATCHELOR, J.—This is a Reference by the learned Sessions Judge of Bijapur who submits for the orders of this Court the petition of one Vazirsaheb *valad* Allisaheb, who prays that he may be tried by the First Class Magistrate of Bijapur for the offence imputed to him under sections 395 and 109, Indian Penal Code, and may not be sent for trial to the Authorities of the Jath State. It appears that in September 1911, the authorities of that State made a requisition to the Political Agent, who is also the District Magistrate of Bijapur, for the surrender of Vazirsaheb in reference to this charge. On the 21st September, the Political Agent issued a warrant under section 7 of the Extradition Act (XV of 1903) The accused, however, surrendered of his own accord and the warrant was returned unexecuted.

Then, upon the application of Vazirsaheb, the Political Agent issued in his favour a certificate under section 188 of the Criminal Procedure Code, to the effect that Vazirsaheb should be tried in British India.

Subsequently, however, the Jath Authorities pressed for the man's surrender, and the Political Agent yielding to that pressure passed his final order in these words:—"As the Chief wishes the case to be tried in his Court, it must be tried there." It is against that order that Vazirsaheb's petition is directed, and the learned Sessions Judge was of opinion that the petition was well founded and should be allowed. I am also of that opinion. No point was taken at the Bar as to this Court's jurisdiction, and we must, therefore, decide the matter on the assumption that we have jurisdiction. I mention this so that it may be clear that no question of jurisdiction has been argued or determined. The case, as the learned Judge observes, resembles *In re Hormusji Nasarwanji* (1) in all material particulars, and the Government Pleader conceded that unless he could distinguish that case, the decision must go against him. He sought to distinguish it by reason of the rules issued by the Governor-General in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, and by section 22 of the Indian Extradition Act (XV of 1903). These rules will be found at page 1831, Vol. III, of the General Statutory Rules and Orders. Rule 3 provides that "if the accused person is a British subject, the Political Agent shall, before issuing a warrant under section 7 of the said Act, consider whether he ought not to certify the case as one suitable for trial in British India." Relying upon these words, Mr. Rao has contended that the

(1) (1886) Unrep. Crim. Cas. 253.

rule in substance provides that if a certificate has to be issued at all by the Political Agent under the first Proviso to section 188, Criminal Procedure Code, that certificate must be issued before and cannot be issued after a warrant has already gone; in other words, that any certificate issued, as was the certificate here, after the issue of the warrant, is bad in law. I am, however, unable to take that view. It appears to me that the directions or admonitions contained in rule 3 neither control nor purport to control section 188, Criminal Procedure Code. I rather read rule 3 as containing a reminder to Political Agents of their duty to consider the advisability of issuing a certificate prior to issuing any warrant. But I cannot import into this admonition any rule of law that a certificate issued after the warrant would be of no effect. It appears to me, therefore, the ground fails upon which *In re Hormusji Nasarwanji* (1) was sought to be distinguished. It follows that we must abide by that decision and affirm the Sessions Judge's view with the result that Vazirsaheb will be tried by the Magistrate in British India.

HEATON, J.—I agree in this order, because I have no doubt whatever that, if we have jurisdiction to make an order at all, that is the right order to make, and I agree that it is a right order to make for the reasons which are given by my learned colleague. Nobody raised the question of jurisdiction and I say nothing about it, but I wish this to be understood that I do not for myself assume that it is certain that we have jurisdiction.

Decision affirmed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 61 OF 1911.

October 27, 1911.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

IMPERATOR

versus

VAHIAL *valad* MIR MAHOMED AND OTHERS—APPELLANTS

Penal Code (Act XLV of 1860), ss. 34, 302—Common intention—Evidence—Assault by hatchet—Hitting by stick another person—Death of the person assaulted.

A. struck *B.* with hatchet. *B.* fell down whereupon *C.* hit *B.* and *B.* subsequently died:

Held, that it was not a necessary inference that *C.* had a common intention with *A.* to kill *B.*

Gouridas Namasudra v. *Emperor*, 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186; 2 Ind. Cas. 841, referred to.

Mr. *Achalsingh M. Advani*, for the Appellants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—We see no reason to disagree with the finding of the Sessions Judge and the two Assessors that all the four accused took part in the assault which resulted in the deceased's death. We concur in considering the main prosecution evidence reliable and in disbelieving the defence of *alibi* set up.

On the evidence, the accused No. 1 has been rightly convicted of murder and we also see no reason to interfere with the convictions and sentences in the case of accused Nos. 2 and 4.

As regards accused No. 3, the view taken by the lower Court is that the fact of his striking the deceased after he had fallen from the blows with the hatchet inflicted by accused No. 1, shows that his intention was similar to that of accused No. 1. We think, however, that there is a reasonable doubt whether the common intention of the accused, when they came up at Chakar's instigation, was more than one to cause grievous hurt to the deceased. Having regard to the fact of accused No. 1 being armed with a hatchet, a common intention to inflict grievous hurt with it, is a legitimate presumption in the circumstances but the evidence does not appear sufficient to justify a finding that there was a common intention to kill the deceased and we concur with the Sessions Judge in considering it unsafe to rely on the statements that Chakar actually told the accused to kill him. The fact that the accused No. 3 subsequently struck deceased with a stick does not, in our opinion, suffice to make him guilty of murder under section 302 read with section 34, Indian Penal Code, *Cf. Gouridas Namasudra* v. *Emperor* (1). We accordingly alter the conviction in his case

(1) 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186; 2 Ind. Cas. 841.

to one of voluntarily causing grievous hurt by a dangerous weapon under sections 326 and 34, Indian Penal Code, and sentence him to suffer rigorous imprisonment for five years.

Conviction altered.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 516 OF 1911.

March 22, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Heaton.

EMPEROR—OPPOSITE PARTY

versus

TUKARAM MALHARI—ACCUSED.

Penal Code (Act XLV of 1860), *s.* 401—*Gang associated for habitual theft—Evidence—Previous convictions of individual, relevancy of.*

When, under section 401 of the Penal Code, it has to be determined whether a party of accused persons constitute a gang of persons associated for the purpose of habitual theft, evidence that each individual of the party is a convicted thief, is relevant evidence for the purposes of that question.

That evidence can be tendered whether before or after the prosecution have established the association.

Bonai v. *Emperor*, 38 C. 403; 9 Ind. Cas. 555; 15 C. W. N. 461; 12 Cr. L. J. 97, referred to.

Mr. *Branson*, with him Mr. *D. W. Pilgamkar*, for the Accused.

Mr. *G. S Rao*, Government Pleader, for the Crown.

JUDGMENT.—The 21 appellants before the Court were charged before the Sessions Judge, together with one other accused person who was No. 15, under section 401 of the Indian Penal Code, with the offence of belonging to a gang of persons associated for the purpose of habitually committing theft or robbery. The 21 appellants were all convicted by the Sessions Judge of that offence, and hence their present appeal. The accused, who was No. 15 before the Sessions Judge, was acquitted by him. The assessors were for acquitting accused Nos. 5, 12 and 20 out of the 22 persons indicted. But, as the learned Sessions Judge has pointed out, they were unable to give any reasons why these three accused persons, Nos. 5, 12 and 20, should be held to stand on any different footing from that occupied by the other accused excepting No. 15. It may be added that no attempt has been made by the learned Counsel here to suggest that the case of accused Nos. 5, 12 and 20 is in any way different from the case of the other appellants.

In examining the evidence upon which these appellants have been convicted, we start with this, that they are related to each other; that they are inhabitants of the villages of Rui in Satara and of Vadgaon, Karanje, Baburdi and Morgaon, in Poona, and that all belong to the tribe known as Bhamtas or Uchlas. Now this record shows, what is otherwise familiar learning to those acquainted with these districts, that the Bhamtas are a tribe of thieves. By that I do not suggest that they are to be convicted merely because they were born into a certain class of people, but I do suggest that their connection with this particular tribe is a fact in favour of the prosecution. This record shows that of recent years the Bhamtas have specialized in running train thefts where their methods are so distinctive that their handiwork can be recognized without difficulty by Police officers concerned in such investigations.

Mr. Branson for the appellants, who has said everything on behalf of his clients that ingenuity would suggest, has dealt with the case rather on its broad aspects than in minute detail. We think that that is the proper way in which the case should be approached, and we propose to follow the learned Counsel in that respect. For, it seems to us, no good purpose would be served by any attempt to analyse the evidence in its bearings against each individual accused, inasmuch as the evidence of identification and of association is clear and uniform against all the accused. By that we mean that the evidence is good against any one accused as it is against all the others; nor has there been any argument before us that the evidence is comparatively weak or inconclusive against any particular accused person.

In discussing the question as to the manner in which the evidence in such a case as this should be assessed, the learned Counsel has drawn our attention to several cases of which we need only refer to that which is latest in time, namley, *Bonai* v. *Emperor* (1). The passage to which Mr.

(1) 38 C. 403, 9 Ind. Cas. 555; 15 C. W. N. 461; 12 Cr. L. J. 97.

Branson more particularly referred is as follows (page 411):

"In cases where the other evidence has established association for purposes of habitually committing theft, evidence of previous convictions, whether for offences against property or for bad livelihood, has, we find, always been admitted, not as evidence of character, but as evidence of habit."

It seems to us that for the purposes of the present appeal, it is unnecessary that we should go a step further than the Calcutta Judges went in that case. At the same time, if the meaning of the passage which we have cited, is that no evidence of previous convictions is admissible until the prosecution have affirmatively established the association for the purpose of habitually committing theft, then we are doubtful whether we should be able to follow that ruling if the point arose for decision. For it appears to us, with great respect, that where the question is, as it is, under section 401, Indian Penal Code, whether a party of accused persons constituted a gang of persons associated for the purpose of habitual theft, evidence that each individual of that party is a convicted thief is relevant evidence for the purposes of that question. And whether that evidence is tendered before or after the prosecution have established the association, seems to us to be a matter of no particular moment. We understand that is the view which commended itself to this Court in the unreported Criminal Appeals Nos. 163, 207 of 1910.

Then, Mr. Branson was successful in pointing out two or three instances where matters, which were not admissible in evidence, have been admitted by the learned Sessions Judge. Of these matters, the only instance which, we think, calls for particular notice is the testimony of the witnesses Mahamadsha, Sheikh Faizalla and Maulabuksh *valad* Vazirkhan (Exhibits 293 and 294). The learned Counsel has contended that their testimony should not have been received upon the record inasmuch as they were examined in Calcutta in the absence of the accused who at that time were under arrest in Koregaon. The Government Pleader has admitted his inability to defend the admission of this evidence, and we must, therefore, lay it out of our consideration. Apart from that, we do not think that anyting has been admitted which, being inadmissible, is likely to have any effect in the decision to be pronounced.

It must be observed that the evidence in this case is cumulative, or to vary the simile, it converges from various points to the one conclusion which the prosecution seek to establish.

Speaking quite generally, the effect of the evidence which the prosecution have called is this: that these appellants, members of the Bhamta tribe as described, and residents in the villages of Satara and Poona, are found associated in remote parts of India, moving about in disguise as Marwari merchants, giving false names and carrying with them the usual implements of Bhamta gang-thieves, that is to say, special canvas bags for the receipt of stolen property, together with knives, scissors and packing needles, such as would be useful in first rifling and then repairing the bags in which the Indian Railway travellers are accustomed to carry about their moveable property.

So far, we think, we have said nothing which Counsel for the appellants has doubted or contested. And the point which we wish to make is that no explanation whatever is offered by these appellants as to their expatriation in those distant parts of India or the manner of their livelihood there.

[After discussing the evidence in detail, their Lordships proceeded:—]

It appears to us upon this evidence that the prosecution have very satisfactorily established that there was an association between these accused persons, probably including also other members of their tribe, and that the object of that association was to live by committing thefts principally in Railway trains.

If further support for this view were desired, it is, we think, afforded by the monotonous record of convictions which the accused's previous history supplies.

* * * * * * *

It appears to us that all this evidence, which I have done my best to summarise, leads to the irresistible conclusion that these accused persons were associated for no other purpose than to prey upon society by petty thieving. The only alteration which it seems to us desirable to make in the learned Sessions Judge's order is in regard to the sentence of transportation for life which he has passed upon the accused No. 22, Mari

Parsu. As we have said, against this accused there is only one conviction of theft and that occured in March 1910. It appears very doubtful whether that conviction should be used for the purpose of calling in aid the provisions of section 75. But in any case, we think that this accused's history does not warrant the imposition of so severe a sentence. We, therefore, alter his sentence to one of seven years' rigorous imprisonment under section 401, Indian Penal Code, and in all other respects, we dismiss these appeals and confirm the convictions and sentences recorded by the learned Sessions Judge.

We wish to say in conclusion that we are much indebted to the learned Government Pleader for the impartial and thorough-going manner in which he has laid before the Court this somewhat difficult and complicated case.

We are also of opinion that the result of this case reflects very great credit on the Police Officers who were entrusted with the laborious task of its investigation

Convictions and sentences with one exception confirmed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 95 OF 1911.

December 13, 1911.

Present:—Mr. Crouch, A. J. C.

EMPEROR—OPPOSITE PARTY

versus

BECHAR SON OF JESSA—APPELLANT.

Penal Code (Act XLV of 1860), s. 498—Enticing away a married woman—Essential ingredients—Evidence—Proof of marriage—Statement of complainant.

The two essential ingredients of an offence under section 498 of the Penal Code are that the woman enticed away is the wife of the complainant and that the fact of marriage is known to the accused.

The mere statement of the complainant that the woman is his wife is not sufficient evidence of marriage.

Queen-Empress v. *Dal Singh*, 20 A. 166; *Imperator* v. *Peters*, 2 S. L. R. 22; 10 Cr. L. J. 235, followed.

Queen-Empress v. *Subbarayan*, 9 M. 9, distinguished.

Mr. *P. V. McInerny*, for the Appellant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—In this appeal, Mr. McInerny has taken the objection that there is no legal proof of the marriage; this objection must, I consider, be allowed.

Two essential ingredients of an offence under section 498, Indian Penal Code, are that the woman enticed away is the wife of the complainant, and that the fact of the marriage is known to the accused. In the judgment, these two points should have been clearly laid down for determination and decisions should have been given thereon. But both facts were assumed, and there is no finding or discussion on either. The judgment is clearly bad.

The Public Prosecutor, however, contends that the irregularity has caused no failure of justice for the evidence on record is sufficient to establish both the marriage, and the accused's knowledge of it. The following are the passages to which the Court has been referred as constituting proof of these points:—

Jiwa (complainant), Exhibit 1, "My marriage took place 30 or 35 years ago in my country." * * * "I have known Bechar, accused, from my youth before my marriage. He knew that Jumna was my wife."

Dhana, Exhibit 3, age 30, "I know Jumna. She is Jiwa's wife."

Dharamsey, Exhibit 6, age 23, "When he (complainant) went away, he left his wife in the house."

Makanji Exhibit 7, age 30, "I know Jumna who is Jiwa's wife."

Jetho, Exhibit 8, age 30, "I know Jiwa and his wife, Jumna."

Walji, Exhibit 9, age 25, "I know Jumna, who is Jiwa's wife."

Bhaga, Exhibit 10, age 60, "I know Jiwa and also his wife, Jumna." * * * "I have known Jiwa for four or five years."

Dhana, Exhibit 21, age 45, "Jiwa's wife was then here."

Now, it is clear from the above extracts that the only witness, who even purports to have any personal knowledge of the marriage, is complainant himself and his statement amounts to no more than an assertion on oath of the mixed proposition of law and fact which he had undertaken to prove. The statement of the other witnesses cannot, by themselves, be treated as proof that Jumna was wife of complainant (section 50, Evidence Act).

The Public Prosecutor has cited the case of *Queen-Empress* v. *Subbarayan* (1), where it was held that the statements of the husband, the wife herself, and the wife's mother, that

(1) 9 Mad. 9.

EMPEROR *v.* CHHOTALAL BABAR.

the parties had been married so many years before, was sufficient proof of the marriage, there having been no cross-examination as to the fact or validity of the marriage. But, in the present case, we have only the statement of the complainant himself, and it was held, in *Queen-Empress* v. *Dal Singh* (2), that the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman. In the case of *Imperator* v. *Peters* (3), Pratt, J. C., held that statements by the complainant and the woman's father that she was married to complainant, were not sufficient to comply with the strict rule of proof, even though the woman had herself given evidence and described herself as wife of the complainant.

I must, therefore, hold that the marriage has not been proved.

The Public Prosecutor suggests that there should be a remand, but I do not consider it necessary. The accused has already been in jail nearly two months, and it is admitted that it would be a long and difficult matter to prove a marriage that had taken place 35 years ago in Kathiawar.

I reverse the conviction, and acquit the appellant, and order him to be set at liberty.

Conviction reversed.

(2) 20 A. 166.
(3) 2 S. L. R. 22; 10 Cr. L. J. 235.

BOMBAY HIGH COURT.
CRIMINAL APPEAL No. 103 OF 1912.
March 14, 1912.
Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.
EMPEROR—OPPOSITE PARTY
versus
CHHOTALAL BABAR—ACCUSED.

Accomplice—Evidence—Corroboration, nature of—Penal Code (Act XLV of 1860), ss. 109, 467—Forgery—Abetment—Conspiracy—Fellow conspirator acquitted—Conviction of other conspirator.

Before a conviction can be sustained on the evidence of an accomplice, there must be corroboration in material particulars by means of independent testimony.

The degree of amount of corroboration required depends upon the facts of each case.

The position, connection and general conduct of an accused cannot be taken as affording sufficient corroboration; nor can the circumstances elicited in the accomplice's evidence be held in themselves as affording sufficient corroboration.

A. and *B*, who were partners, conspired to make a false *khata*. In furtherance of the conspiracy, *B.* went to a professional forger, *C.*, who prepared the false *khata*.

A. and *B.* were both tried for abetment of forgery. *B.* was acquitted on the ground that the only evidence against him was the uncorroborated testimony of an accomplice. *A.* was convicted under sections 467, 109 of the Penal Code. On appeal, *A.* contended that as *B.* had been acquitted, the charge of conspiracy failed and *A.* was entitled to an acquittal:

Held, that the charge against *A.* was that he abetted *C.*'s offence of forging the *khata*, and, if that abetment is proved against *A.*, he must be convicted of that charge, even although the prosecution were not successful in establishing the particular means or instrument selected by *A.* for the abetment of *C.*'s offence.

Appeal from conviction and sentence recorded by the Additional Sessions Judge of Ahmedabad.

FACTS:—Chhotalal Babar and his partner Ambalal Jethalal were tried at one trial on charges under sections 467 and 109 of the Penal Code. Ambalal was convicted of the offence.

Ambalal's appeal to the High Court was accepted by the following

JUDGMENT.

"CHANDAVARKAR, J.—Dealing with the appeal of Ambalal Jethalal, who was accused No. 2 in the Sessions Trial, we cannot agree with the learned Sessions Judge in the conclusion at which he has arrived, namely, that he is guilty, and the reasons that he has given for that conclusion.

The evidence as against the appellant rests solely upon the evidence of Somnath, the pardoned approver. His being the evidence of an accomplice, there must be corroboration in the material particulars by means of independent testimony before the conviction can be sustained. Such corroboration there is absolutely none in the present case. The learned Sessions Judge seems to have thought that there was corroboration afforded by the position, connection and general conduct of accused No. 2, the appellant before us. The learned Judge is right so far as a matter of law, that the degree of amount of corroboration required depends upon the facts of each case. But when he goes on to observe that in a case like the present, where the utmost secrecy must have been observed, the position, connection and the general conduct of accused No. 2 in doing Chhotalal's business

EMPEROR v. CHHOTALAL BABAR.

afforded a sufficient corrobration, I think that view of the law cannot be accepted. If there was any secrecy, then, it only means that there is no corroboration by means of independent evidence; that we are left to conjecture so far as any evidence to corroborate Somnath is concerned, and that the prosecution has not been able to bring forward the evidence of circumstances by means of independent witnesses to support the story of Somnath. It is difficult, it seems to me, to understand what the learned Sessions Judge had definitely in mind when he thought that the very fact that the appellant worked in secrecy afforded independent corroboration. When we examine the evidence with reference to what the learned Sessions Judge calls the position, connection, and the general conduct, of accused No. 2, I find that there again there is nothing which fulfils the requirements of law so far as corroboration is concerned. All that is alleged and proved is that the appellant was a partner of Chhotalal, and that he used to visit Umreth. It is only upon that point that we have anything like independent testimony. But on the question whether the appellant visited Umreth for the purpose of getting the document, charged as forgery, there is no witness whatever beyond Somnath. The learned Government Pleader has been compelled to rest the case for the Crown upon circumstances elicited in the evidence of Somnath himself for the purpose of finding corroboration. But the learned Sessions Judge's judgment itself shows that practically he was resting his conclusions upon the testimony of Somnath while supposing that the circumstances elicited in Somnath's evidence afforded material corroboration. What the law requires is corroboration in respect of material particulars by means of independent testimony. In the present case, Somnath stands self-condemned. He is a notorious forger, and, being an accomplice, it would be dangerous to rest the conviction upon his testimony exclusively.

For these reasons, I am of opinion that the conviction and sentence must be reversed and the accused directed to be set at liberty.

BATCHELOR, J.—I agree. It seems to me that in this case, it is incumbent on the prosecution to prove two propositions, *First*, that a forgery was brought about in the manner alleged on behalf of the Crown; and, *secondly*, that the person, who instigated or brought about that forgery, was this particular individual, the present appellant.

As to the first proposition, I am quite ready to concede that it has been abundantly established. But that is no concern of the present appellant until some connection has been shown between him and the offence. It is here that, in my opinion, this prosecution fails. For, when the record is examined, it appears that the only evidence to connect the present appellant with the abetment of this forgery is the approver Somnath. And it is clear, both upon authority and upon the merest ground of common sense, that a man like Somnath has no claim whatever to the confidence of the Court unless his evidence can be materially corroborated *aliunde*. It was said that there was evidence to show that the present appellant was a partner of Chhotalal's, for whose benefit this forgery must be assumed to have been committed, and that the appellant was frequently in Umreth in the prosecution of his lawful business. I quite concede these two circumstances, but they appear to me to be far too remote and inconclusive to serve the turn of prosecution in this case. Upon the ground that the only real evidence against the present appellant is the statement of the approver Somnath, I agree that the conviction ought to be set aside."

A question arose as to whether the British Court had jurisdiction to try Chhotalal Babar. The High Court judgment on this point is printed as 14 Ind. Cas. 970, where it was decided that the British Court had jurisdiction to try Chhotalal.

Chhotalal was thereupon convicted of the offence.

He contended that as Ambalal had been acquitted, he was also entitled to acquittal on the principle of law that on a charge of conspiracy between any two persons, when one of them was acquitted, the other must also be acquitted.

The accused Chhotalal appealed to the High Court.

Mr. *L. A. Shah*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

EMPEROR v. CHHOTALAL BABAR.

JUDGMENT.

BATCHELOR, J.—The appellant in this case, Chhotalal Babar, has been convicted under sections 467 and 109 of the Indian Penal Code of the abetment of the forgery of a valuable security, namely, a *khata*. The allegation is that employing the services of a professional forger, named Somnath, with whom he entered into communication through his partner and agent Ambalal, the appellant procured the preparation of a false *khata* intended to show that the daughter of a certain other man, named Ambalal, had been promised to the appellant in marriage.

On a separate appeal, which was preferred by the appellant's partner Ambalal, we were constrained to reverse Ambalal's conviction on the ground that it had been recorded solely on the uncorroborated evidence of the accomplice Somnath.

Mr. Shah for the appellant here has contended, in the first place, that his client is entitled to an acquittal inasmuch as the charge against him was one of conspiring with Ambalal, and Ambalal has, by the order of this Court; been acquitted, it follows from that, says the learned Pleader, that no conviction can be sustained against Ambalal's fellow-conspirator, the present appellant. It appears to me that whatever force that argument might have in England, where conspiracy is a substantive offence, it has no force in India, with respect to the particular charge upon which the appellant was indicted.

The charge against him was that he abetted Somnath's offence of forging a *khata*, and if that abtement is proved against the appellant, he must be convicted of that charge, even although the prosecution were not successful in establishing the particular means or instrument selected by the appellant for the abetment of Somnath's offence.

Next, it was contended by Mr. Shah, that inasmuch as this Court has reversed the conviction of Ambalal, the consideration of this appeal must proceed upon the footing of the total exclusion of the possibility that Ambalal may have been the agent deputed by the appellant to instigate Somnath to commit the forgery. It appears to me, however, that this argument overstates the matter. Ambalal was acquitted, as our judgment shows, in pursuance of the rule of parctice whereby the Courts hold it unsafe to record a conviction on the uncorroborated evidence of an accomplice. Ambalal was undoubtedly entitled in law to that acquittal. But Ambalal is no longer an accused person before us, and the question of his conviction does not arise. The accused person before us is the present appellant, and, it seems to me, that we must consider all the evidence against him as it stands upon the record, and that in considering that evidence the Court is not bound to say that the prosecution of Chhotalal must fail by reason of the impossibility of the view that Ambalal was the deputed agent. The question whether Ambalal was or was not the deputed agent, will invite slightly different answers, accordingly as it is considered with reference to the conviction of Ambalal himself, or as a detail in the whole body of evidence tending to the conviction of another person.

When that whole body of evidence is in this case considered, it appears to me that we need have no hesitation in saying that the prosecution is by no means weakened owing to that part of its case which asserts the agency of Ambalal.

In regard to the merits of the case, I am of opinion that there can be no doubt of the appellant's guilt. Mr. Shah has not felt himself able to contest the forged character of this impugned document. We have it, therefore, that this *khata* was forged by Somnath, whose business in life was forgery. Somnath, therefore, had no private interest to serve in committing this forgery beyond earning the wages of him who had employed him. To ascertain who it was who employed him, it is reasonable to consider whose interest the forgery was made to serve. And there can be no doubt, and there has been no doubt, that the only individual whose interests were served by this particular forgery was the appellant Chhotalall. The inference arising from this circumstance is further strengthened by other parts of the evidence, and the result of all is, in my opinion, a clear conviction that the appellant is guilty of the offence charged against him. I think, therefore, that the appeal should be dismissed.

CHANDAVARKAR, J.—I concur.

Appeal dismissed.

MAHADEO RAI *v.* RAGHU NAIK RAI.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 159 OF 1910.
June 25, 1912.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.
MAHADEO RAI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAGHU NAIK RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), *ss.* 111, 112 *—Partition—Question of proprietary title which ought to and might have been raised*—Res judicata—*Jurisdiction.*

A party to a Civil suit cannot raise a question of proprietary title which he ought to and might have raised in partition proceedings under the Land Revenue Act.

First appeal from the decision of the Subordinate Judge of Ghazipur, dated 19th April 1910.

The Hon'ble Dr. *Sunder Lal* (with him Dr. *Satish Chandra Banerji* and Mr. *Govind Prashad*), for the Appellants.

Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought under the following circumstances. Inderdeo Rai and others applied for partition of *Mahal* Sherpur which included 57 *bighas*, 14 *biswas* and 14 *dhurs* of land, which is the subject-matter of the present suit. The plaintiffs in the present suit, or those whom they represent, made an application also for partition and asked that the 57 *bighas*, 14 *biswas* and 14 *dhurs* might be made into a separate *mahal*, claiming that this property belonged to them absolutely. The Assistant Collector entertained these applications and as a result, there were partition proceedings before him which involved a partition of the property in dispute and other property. The Assistant Collector proceeded to make an order which was in the following terms: "In view of the above, I think representatives of Gopi Rai and Sheopal Rai should remain in possession as they are of these 58 *bighas* and the plot should be included as *Mauza* Jagadana of Sahdeo Rai and others. But the entry in the *khewat* against these 58 *bighas* should continue in the names of all the other co-sharers along with Sahdeo Rai and others as it is in other villages. The other co-sharers must get lands of similar quality from Sahdeo Rai and others at the time of partition in lieu of these 58 *bighas* of *Mauza* Judagana of Nagdilpur from the shares of Sahdeo Rai and others according to law." An appeal against this order was preferred by the party of the plaintiffs in this suit to the District Judge, who held that no question of proprietary title was raised and, therefore, no appeal lay to him. On second appeal to this Court, the decree of the District Judge was confirmed and the judgment proceeds in the following words:—"In the true sense of the word, there was no question of proprietary title raised at all." It may, perhaps, be urged that although the learned Assistant Collector did not proceed in the manner laid down by section 111 of the Land Revenue Act, he did in fact entertain the question of proprietary title. However that may be, it is now too late to contend that a question of proprietary title was raised having regard to the decree of this Court just now quoted. It is satisfactory to know that the real question between the parties, *viz.*, whether or not the party of the plaintiffs had been in adverse possession of the property in dispute, was heard out on the merits before the Collector and the Commissioner. The plaintiffs-appellants urge that this question of proprietary title has never been decided and that, therefore, this present suit is maintainable. On behalf of the defendants, it is contended that having regard to the fact that partiton proceedings involving the partition of this property had been instituted in the Revenue Court, no suit could be instituted in the Civil Court unless it came within the provisions of section 111 or section 112 of the Land Revenue Act. It is clear that the present suit is not a suit coming within the provisions of either of these sections. We think that the result of the decree of the High Court to which we have referred is a decision that the party of the plaintiffs in the partition proceedings did not raise the question of title. If this view is correct, it is clear that the party of the plaintiffs cannot now raise a question which they ought to and might have raised in the partition proceedings. It may appear a somewhat hard case upon the plaintiffs; at the same time, we are glad to say, after hearing the appeal very fully and the long history of the litigation which commenced in the year 1893, that no real injustice has been done and that in the end the partition proceedings in the Revenue Court will work no injustice to any of the parties. We think that it would be a very unfortunate result if

we had to allow the present appeal which would have the effect of re-opening the entire partition proceedings and re-embarking a very large number of persons on a fresh sea of litigation.

We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 763 OF 1910.

January 25, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

NATHUBHAI DHIRAJRAM—APPELLANT

versus

BAI HANSGAVRI—RESPONDENT.

Easement—Right of way—Indivisibility—Passage common to two houses—Partition of houses—Presumption of law—Hindu Law—Mitakshara—Maynkha—*Easements Act* (V *of* 1882)—*Appellate Court bound to decide points raised.*

Both according to the *Mitakshara* and the *Mayukha*, rights of way and rights to well and water belonging to a joint family are indivisible. If there is no evidence that at partition of the family estate, such rights were divided, the law will hold that they continued to retain their indivisible character having regard to the nature of the rights in question.

In the absence of anything to show that on the partition of a joint estate, a certain passage was allotted to either one party or the other exclusively, the presumption is that it continued to be joint and undivided even after the partition. This is a presumption of Hindu Law and can only be rebutted by clear proof that the passage was not reserved as joint but was divided and allotted to one of the parties exclusively as his share.

If two houses were common and a certain right of way belonged to the parties, the passage being common then, under the Easements Act, it must be presumed, in the absence of any express agreement between the parties, that at partition, the passage was reserved for common enjoyment.

An Appellate Court is bound to consider and dispose of a point distinctly raised by the parties and dealt with by the Court of first instance and not abandoned at the hearing before the Appellate Court.

Second appeal from the decision of the District Judge of Broach, Appeal 101 of 1908, reversing the decree passed by the Subordinate Judge of Broach, in Civil Suit No. 375 of 1907.

Mr. *L. A. Shah*, for the Appellant.

Mr. *Ratanlal Ranchhoddas*, for the Respondent.

JUDGMENT.—The suit was brought by the present appellant for a perpetual injunction to restrain the respondent from interfering with his right of way over a certain passage.

The Subordinate Judge who tried the suit looked at the question of the plaintiff's right in two aspects, *first*, as a right by way of implied reservation, *secondly*, as a right by way either of easement or prescription. On both these points, he came to the conclusion that the plaintiff had established his right to the passage in question. Accordingly a decree as prayed for was made.

But in appeal, the learned District Judge has held that the appellant-plaintiff has failed to prove that he has used as of right the passage in dispute for the statutory period required for an easement or prescriptive right.

It is contended in support of this second appeal that the learned District Judge has not applied himself to the question of implied reservation to which the learned Subordinate Judge had very carefully addressed himself. That contention of the appellant's Pleader must be allowed.

It is urged by Mr. Ratanlal, for the respondent, that the plaint and the pleadings did not raise a title based on implied reservation. The plaint and the pleadings show it is not so. The plaintiff's case all along has been that at one time the plaintiff's and defendant's houses were commonly enjoyed by them; that this passage which is now in dispute was also a common way for the members of the family. It was upon that basis that the Subordinate Judge dealt with the case. And if the case of a right by way of implied reservation was distinctly raised by the parties, and dealt with by the Court of first instance, the Appellate Court was bound to consider it and dispose of it unless the plaintiff had at the hearing of the appeal abandoned it, expressly or impliedly. There is nothing on the record of the lower Appellate Court to show that it was abandoned.

No doubt from the fact that the District Judge has dealt with the plaintiff's case as it concerned the right of easement or prescription, it may be inferred that that was the only case relied upon by the appellant in resisting the appeal in the lower Court. But that inference would be obviously out of place here, because the main facts found by the

learned District Judge of themselves are sufficient in law to raise the question of a right by way of implied reservation. And those facts must be presumed to have been found by the Judge on argument by both or either of the parties.

Now, what are those facts found by the Judge on the evidence ?

He finds that the plaintff's and defendant's houses belonged originally to a common owner, their grandfather Vasantrai, whose sons divided the properties, that the plaintiff admits that the right of way was not expressly reserved by his father, when the partition was effected; and that the partition took place in *Samvat* 1914, *i. e.*, A. D. 1858.

These facts are sufficient in law to raise the presumption that the passage in dispute was reserved as the common or joint property of the parties at the time of partition. That is a presumption of Hindu law. In the absence of anything to show that at the partition the passage was allotted to either one party or the other exclusively, the presumption is, that it continued joint and undivided even after the partition. That presumption of Hindu law must be rebutted by clear proof by the party who alleges that the passage was not reserved as joint but was divided and allotted to him exclusively as his share. This presumption of law has not been borne in mind by the learned District Judge in the Court below. Whether according to the *Mitakshara* or the *Vyavahara Mayukha*, rights of way and rights to wells and water belonging to a joint family are *indivisible* ; and if there is no evidence that at a partition of the family estate they were divided, the law will hold that they continued to retain the character of indivisibility attached to them by law, having regard to the nature of the rights in question (*Vyavahara Mayukha*: Mandlik's Edition, page 70, lines 13 to 15, and page 71, lines 11 and 12).

If that is so, then the burden of proof lay upon the respondent to show that the appellant-plaintiff did not possess the right claimed, or having possessed at one time, *i. e.*, at the time of partition, he has since lost it, either by the adverse possession of the respondent or in some other way recognized by law. So also under the Easements Act, the appellant's right is clear. If these two houses were common, and the right of way belonged to the parties, and the passage was common, then it must be presumed, in the absence of any express agreement between the parties, that at the partition the passage was reserved for common enjoyment.

Therefore, from whichever point of view we look at the question, whether from the point of view of Hindu Law, or the law as laid dow in the Easements Act, the plaintiff's right is *prima facie* established. And the question is whether the respondent has discharged the onus which lay upon him. Now, under the new Code of Civil Procedure, where the Appellate Court has omitted to decide any question of fact, which arises upon the appeal, and which is necessary for the settlement of the dispute between the parties, this Court sitting in second appeal has jurisdiction to dispose of the question of fact for itself. Dealing with this question of fact, we think, the Subordinate Judge's conclusion must be accepted. He has pointed out circumstances which show that this passage has been used as a way and that both the defendant and the plaintiff have been enjoying the right. It is unnecessary to go into the reasons which the learned Subordinate Judge has given after considering the evidence upon the record, but it is sufficient to say that this Court accepts his appreciation of the evidence.

The District Judge's decree must be reversed and the Subordinate Judge's decree restored with costs both of this second appeal and of the appeal in the lower Court on the respondent.

Decree reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 47 OF 1909.

October 20, 1911.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

KHANCHAND JAVHERSINGH— APPELLANT

versus

KODUMAL JAVHERSING AND OTHERS —RESPONDENTS.

Arbitration—Award—Valid award, effect of—Extinc-

KHANCHAND v. KODUMAL.

tion of original cause of action—Bar to suit—Limitation—Setting aside award—Limitation Act (XV of 1877), Sch. II, Art. 91—Award when a nullity—Fraud or dishonesty—Omission to decide all matters—Award not enforced—Award when abrogated.

A valid award ordinarily operates to merge and extinguish all claims embraced in the submission. After the award has been made, the submission and the award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original cause of action.

Bhajahari Saha Banikya v. *Beharylal Bisak*, 33 C. 881; 4 C. L. J. 162; *Krishna Panda* v. *Balaram Panda*, 19 M. 290 and *Laldas* v. *Bai Lala*, 11 Bom. L. R. 20; 1 Ind. Cas. 105; 5 M. L. T. 226, relied upon.

In order that a person, who was a party to a submission and award, may sue on the original cause of action, he must first have the award set aside, if the award is not a nullity but is only voidable at the instance of the party, and the suit to set aside the award must be brought within the period of three years under Article 91 of the Limitation Act.

Harihar Ojha v. *Dasarathi Misra*; 33 C. 257 at p. 265; 9 C. W. N. 636; 1 C. L. J. 498, relied upon.

Rees v. *Walters*, 16 M. & W. 253, 4 D. and L. 567, referred to.

Fraud or dishonesty on the part of arbitrator is not sufficient to vitiate his award as a nullity.

When an arbitrator has jurisdiction to make an award, fraud or dishonesty on his part does not deprive him of such jurisdiction; such conduct merely amounts to misconduct and may afford good cause for a competent Court to set aside the award.

Where a party has omitted to take steps to get an award set aside within the prescribed period of limitation, he cannot be allowed to object to the award on the ground of fraud or dishonesty of the arbitrator or his failure to decide all the matters in dispute.

Malkarjun v. *Narhari*, 25 B. 337 at p. 347; 27 I. A. 216; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927, referred to.

An arbitrator is not bound to determine a matter not notified as a matter in difference or which is merely a collateral question, though it may be necessary to dispose of it with a view to deciding the main dispute.

Rees v. *Walters*, 16 M. & W. 263; 4 D. and L. 567 and *Keene and Atkinson*, (1847) April 16 Exch, relied upon.

In order to deprive an award of its binding effect, it is not enough that it was not enforced or that even both parties objected to it, but there must be positive evidence that both parties agreed that the former state of things should be restored.

Krishna Panda v. *Balaram Panda*, 19 M. 290 and *Laldas* v. *Bai Lala*, 11 Bom. L. R. 20; 1 Ind. Cas. 105; 5 M. L. T. 226, followed.

Appeal against the decision of the Sub-Judge, first Class, Hyderabad.

Mr. *Laichand Chuharmal*, for the Appellant.

Mr *Gopaldas Jhamatmal*, for Respondent No. 1.

Mr. *Wadhumal Odharam*, for Respondent No. 2.

Mr. *Hirdaram Mewaram*, for Respondent No. 3.

The Hon'ble Mr. *Harchandrai*, and Rai Bahadur *Tekchand*, for Respondent No. 4.

JUDGMENT.—The appellant brought a suit against his four brothers (respondents) for partition of the family property. This claim is disputed by respondents Nos. 1 and 2. The main defence set up was that the suit is barred by an award passed on the 14th April 1903 by three arbitrators (of whom respondent No. 2 was one) to whom the parties had submitted their differences regarding the partition by an agreed reference, dated 11th March 1903; and that so far the plaintiff sought to set aside that award, the suit is time-barred under Article 91 of the Limitation Act. The lower Court, after a full consideration of the reported decisions bearing on the point, held that (1) plaintiff's claim to partition had merged into the submission to arbitration and the award, so that the present claim could not lie unless and until the award was set aside, and (2) as plaintiff had omitted to sue to set aside the award within the period of three years allowed by Article 91 of the Limitation Act, he could not now challenge or ignore its operation or effect. The first class Sub-Judge, accordingly, rejected his claim with costs.

The appellant appeals on various grounds, of which the only one argued may be summarized as follows:—the lower Court should have found (1) that the award was absolutely null and void; (2) that it had never been acted upon and (3) that in any case, the setting aside of it was merely ancillary to the claim of partition, which was the main and the only relief sought, so that Article 91 of the Limitation Act imposes no bar to the suit.

Taking the last point first, numerous decisions have been referred to, which we have duly considered. Many, however, including most of those relied on by appellant's Pleader, are cases of instruments, not executed by the plaintiff or any person through whom he claims, but by a third party, or of *benami* deeds, not intended to be operative and of a fraudulent nature. In such cases, there is no doubt that the plaintiff is not bound to sue to set aside the instrument, and Article 91 does not operate to restrict the period of limitation otherwise available. Here what

the plaintiff wants is, as was said in *Muhammed Baqar* v. *Mango Lal* (1), merely "a declaration that the shadow cast upon his title may be dispersed," which can properly be treated as incidental to the main relief asked. But we agree with the general rule, deduced from the decisions of the Privy Council, etc., by Woodroffe, J., in *Harihar Oja* v. *Dasarathi Misra* (2), that "there can be no doubt that when a person seeks to recover property against an instrument executed *by himself or one under whom he claims*, he must first obtain the cancellation of the instrument, and that the three years' rule enacted by Article 91 applies to any suit brought by such person." As there stated, "the reason why a party seeking to recover property against his own instrument must show that it is voidable or void, as for instance for fraud, is that as long as an instrument creating a later title is not invalid, his former title cannot prevail," and it is accordingly essential for him to sue to set aside such instrument before he can rely on his former title.

In the present case, it is true that the instrument in the plaintiff's way is not a deed of assignment or other transfer executed by himself, but is a private award. This award was, however, made as a consequence of a reference to arbitration, to which he was a consenting party; and the general rule mentioned above applies *a fortiori* in such a case. For, as ruled in *Bhajahari Saha Banikya* v. *Beharylal Basak* (3), a valid award ordinarily operates to merge and extinguish all claims embraced in the submission and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand: see also the cases of *Krishna Panda* v. *Balaram Panda* (4) and *Laldasjibhai* v. *Bai Lala* (5). The view taken by the lower Court on this point was, therefore, in our opinion, correct.

It remains to consider the question whether the award was a mere nullity so as to need no setting aside, in which case, of course, neither the award nor Article 91 will be a bar to the plaintiff's suit. Two grounds were urged for so treating it, *viz.*, (1) alleged fraud and dishonesty on the part of one of the arbitrators (*viz.*, respondent No. 2) in making the award, and (2) alleged omission of the arbitrators to decide all the matters referred to them for determination. The first, however, clearly affords no good ground for treating the award as a mere nullity. The arbitrators admittedly had jurisdiction, and fraud or dishonesty on the part of an arbitrator does not destroy such jurisdicton, but merely amounts to misconduct on his part, which may afford good cause for a competent Court setting it aside. And the plaintiff, having omitted to take steps to get it set aside within the prescribed period of limitation, cannot now be allowed to object to the award on this ground. In other words, the general rule already referred to operates to bar this plea. The second ground might also be held to be one which the plaintiff is precluded from urging for the same reason. But in any case it is clearly not substantiated. Even admitting that, if a private award does not extend to all matters submitted to the arbitrator, it is wholly void, there does not appear to be any real omission on the part of the arbitrators to decide any of the matters referred to them. It was stated that item 6 of the property specified in the submission to arbitration [page 34 (b)] had not been dealt with by the arbitrators, so far as regards a portion of the sale-proceeds referred to (*Cf.* pages 52, 54). But there is a distinct award as regards "the saving out of the sale-proceeds" in question in para. 6 of the award [page 34 (e)] and respondent No. 2 explains that the remaining money was not partitioned, as it had been spent (which is not disputed) and all the brothers told him that the money had been used for joint purposes (pp. 8, 15). Whether the latter statement be true or not, the omission to deal with the spent portion of the sale-proceeds is not one which can in any way be held to invalidate the award. The arbitrators had, [to use the language of Lord Hobhouse in *Mallarjun* v. *Narhari* (6)], "jurisdiction to decide wrong as well as right" on the point, whether such portion had to be accounted for by any of the parties or not.

(1) 22 A. 90 at p. 93.
(2) 33 C. 257 at p. 265, 9 C. W. N. 636; 1 C. L. J. 408.
(3) 33 C. 881; 4 C. L. J. 162.
(4) 19 M. 290.
(5) 11 Bom L. R. 20; 5 M. L. T. 226; 1 Ind. Cas. 105;
(6) 25 B 337 at p 347; 27 I. A. 216; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927.

This clearly falls within the authority given to the arbitrators by the submission to decide "what, which and how much (property) has to be divided and how and in what manner it should be divided," and there is nothing left undecided as regards these sale-proceeds, so as to bring the case within the authorities regarding the invalidity of an award for want of finality. In all such cases, there is a clear omission either to decide a difference referred to arbitration at all or to decide it in a manner which finally determines it. Thus, in the leading case of *Randall* v. *Randall* (7), the omission was to ascertain the rent to be paid by the plaintiff, which was a point expressly referred to the arbitrators. Similarly in *Dandekar* v. *Dandekars* (8), there was an omission to determine one of the principal subjects of dispute, *viz.*, to make a division of certain fields. Again, in *Hewitt* v. *Hewitt* (9) and *Ross* v. *Boards* (10), there was a failure to determine *finally* the point referred. On the other hand, an arbitrator is not bound to determine a matter not notified as a matter in difference or which is merely a collateral question, though it may be necessary to dispose of it with a view to deciding the main dispute, *Rees* v. *Walters* (11) and *Keene and Atkinson* (12) cited in Russell on Arbitration, 7th Edition, page 263.

The other cases of alleged omission on the part of the arbitrators to determine matters referred to them merely amount to an omission on their part to take into account certain properties, values or monies in making their award; and they are nothing more than alleged mistakes on their part which, for the reasons already given, do not affect the jurisdiction of the arbitrators or the validity of the award.

The last point is whether the award has not been acted upon, as alleged by appellant. On this point, we see no reason to differ from the view taken by both the Bombay and Madras High Courts that, in order to deprive an award of its binding effect, it is not enough that it was not enforced or that even both parties objected to it, but there must be positive evidence that both parties agreed that the former state of things should be restored; *Laldas* v. *Bailal* (5) and *Krishna Panda* v. *Balaram Panda* (4). In this case, there is no such evidence.

On the contrary, the evidence shows that the award has been carried out, at any rate, in regard to defendant No. 4 making a private stair-case to his house instead of using a passage of defendant No. 2 as he had previously done [pages 12, 16, 18 and 34 (*d*)]. This objection, therefore, affords no ground for treating the award as nullity.

It is true there is no finding by the Sub-Judge on the questions whether the award was a nullity or had not been acted on, but admittedly evidence was recorded on issue 4, which covered these points (see paras. 2 and 3 of the memo. of appeal) and the evidence is sufficient to enable us to decide them, without a remand, under Order XLI, rule 24 of the Civil Procedure Code.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(7) 7 East 81; 3 Smith 90; 8 R. R. 601.
(8) 6 B. 663.
(9) 1 Q. B. 110; 55 R. R. 219; 4 P. & D. 598.
(10) 8 Adol. & Ellis 290; 47 R. R. 590; 3 N. P. 382; 1 W. W. & H. 376; 7 L. J. (N. S.) Q. B. 209; 2 Jur. 567.
(11) 16 M. & W. 263; 4 D. & L. 567.
(12) (1847) April 16 Ex. Ch.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 126 OF 1911.
January 3, 1912.
Present:—Sir N. G. Chandavarkar, Kt., Judge, and Mr. Justice Batchelor.
NARHAR RAGHUNATH NAPHAD—APPELLANTS
versus
KRISHNAJI GOVIND NADGAVANDI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48—Execution of decree—Limitation—Twelve years' period to commence from the date when decree is capible of execution.

Before the execution of a decree can be held barred under section 48 of the Code of Civil Procedure, it must be shown that the decree was in all its parts ripe for execution on the date from which the period of twelve years is to be computed.

The execution and application contemplated by the section relate to a decree which is executable on the date of the decree in respect of the application made and execution sought, and 'the order for execution' contemplated by the provisions of the section refers to

an order which the Court could have made and enforced in obedience to the terms of the decree.

A decree was passed on 14th December 1892 and provided, *inter alia*, that if there should be 'any deficit or any just and legal obstruction of whatever nature' to the mortgaged property being sold, the decree-holder should recover the deficiency or whatever might be due from the judgment-debtor personally and from his other property.

There was default in the payment of the decretal money. A part of the mortgaged property was sold. But as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, the decree-holder was about to bring to sale the rest of the mortgaged property when the Collector intervened in 1908, and had the impending sale stopped on the ground that it was *vatan* property

On the 19th of December 1910, the decree-holder applied to have the personal remedy enforced against the judgment-debtor:

Held, that the application of 19th December 1910, was not barred under section 48, Civil Procedure Code, as the 12 years' period must be counted from 1908.

Muhammad Suleman Khan v. *Muhammad Yar Khan*, 17 A. 39, *Rahim Ali Khan* v. *Phul Chand*, 18 A. 482, relied upon.

First appeal from the decision of the First Class Subordinate Judge of Satara, in *Darkhast* No. 625 of 1910.

Mr. *Coyaji* with him Mr. *K. H. Kelkar*, for the Appellant.

Mr. *Shortt*, with him Mr. *M. V. Bhat*, for the Respondent.

JUDGMENT.—In holding the execution of the decree in the *darkhast* before us barred under section 48 of the Code of Civil Procedure, the lower Court has overlooked the important consideration that the decree contemplated by the section should have been in all its parts ripe for execution on the date from which the twelve years' period of limitation is computed.

The decree in the present case was passed on the 14th of December 1892 and the present *darkhast* was presented on the 19th of December 1910. The decree consisted of four parts. In the first place, it directed that its holders should be put in possession of certain land, mortgaged to them by judgment-debtors, and that the former should enjoy the profits of the land for twenty years in satisfaction of the amount due on the mortgage. The second part ordered the judgment-debtors to pay to the decree-holders a certain amount of money annually in the nature of cash allowance. The third part directed that if in any year the judgment-debtors should fail to make the payment, the decree-holders should bring to sale the mortgaged land and get the money debt satisfied out of the sale-proceeds. Lastly—and this is the part of the decree with which we are now concerned for the purposes of the twelve years' limitation under section 48—the decree provided that if there should be "any deficit or any just and legal obstruction of whatever nature" to the mortgaged property being sold, the decree-holders should recover the deficiency or whatever might be due in respect of the cash allowance from the judgment-debtors "personally and from their other property."

The judgment-debtors made default in the payment of the cash allowance in 1893 with the result that the decree-holders, in compliance with the terms of the third part of the decree, brought the mortgaged property to sale under an order of the Court in execution. A part of the land was sold; but as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, they were about to bring to sale the rest of the mortgaged property when the Collector intervened and had the impending sale stopped on the ground that it was *vatan* property.

It was at this point—in the year 1903—that the decree became, for the first time, capable of execution in respect of the personal remedy given to the decree-holders in the fourth and last part. Until then, in respect of that part and that remedy, the decree was merely ancillary and provisional. The decree-holders could not, till that point of time, make any application for execution which it was in the power of the Court to grant, because till then there was no decree ripe for execution, so far as the personal remedy was concerned.

When section 48 of the Code provides that "where an application to execute a decree, not being a decree granting an injunction, has been made, no order for execution of the same decree shall be made upon any fresh application after the expiration of twelve years from the date of the decree sought to be executed," the execution and application contemplated relate to a decree which is executable at that date in respect of the application made and execution sought, and the "order for the execution" contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree. This construction is supported by the ruling of the Allahabad High Court in *Muhammad Suleman*

Khan v. *Muhammad Yar Khan* (1), on the interpretation of Article 179 of the Limitation Act of 1877. The 1st paragraph of that Article provided for the execution of the decree three years' limitation "from the date of the decree". It was held that the paragragh must necessarily apply only where there is a decree or order which can at its date be executed.

In the present case, the decree-holders were not in a position to make any application for the execution of the decree against the judgment-debtors personally until there had been an arrest of the enforcement of the remedy given to them by the third part of the decree. Nor was the Court competent to grant the personal remedy until that arrest. When that contingency happened, the personal decree, which had been till then provisional and ancillary, became effective, and the application to enforce the personal remedy took the place of, as having been ancillary to, the previous proceedings in execution under the third part of the decree, rendered abortive by the Collector's order under the Vatan Act: *Rahim Ali Khan* v. *Phul Chand* (2).

On these grounds, the decree appealed from must be reversed and the *darkhast* remitted to the Court below to be disposed of on the merits according to law. The respondents must pay to the appellants the costs of this appeal. Other costs of the *darkhast* to abide the result.

Decree reversed.

(1) 17 A. 39.
(2) 18 A. 482.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 132 OF 1909.

October 25, 1911.

Present:—Mr. Crouch, A. J. C.

ASANAND JEYRAMDAS AND ANOTHER—PLAINTIFFS

versus

TULSANBAI WIDOW OF LAKHUMAL AND OTHERS—DEFENDANTS.

Interest—Damdupat, *rule of*—*Applicable to mortgages and interest after decree*—*Transfer of Property Act (IV of 1882), ss. 86, 87*—*Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 4*—"*Interest on the mortgage*."

The rule of *damdupat*, which is nothing more than a rule of limitation having a religious origin, is not abrogated by the Transfer of Property Act or by Civil Procedure Code, Order XXIV, rules 2 and 4. A mortgagor is, therefore, entitled to the benefit of the rule.

Surya Narainsingh v. *Jogendra Narain Roy Chowdhury*, 20 C. 360; *Jeevanbai* v. *Manordas Lachmandas*, 12 Bom. L. R. 992; 8 Ind. Cas. 619; 35 B. 199, relied upon.

Ramconnoy Audicarry v. *Johur Lall Dutt*, 5 C. 867, 7 C. L. R. 204, referred to.

Madhwa Sidhanta Onakini Nidhi v. *Venkataramanajulu Naidu*, 23 M. 662, dissented from.

The words "interest on mortgage" refer to the rate of interest provided by the mortgage, if it be a rate to which no valid legal objection can be taken.

The rule of *damdupat* applies to interest after decree.

Ramchandra Mankeshwar v. *Bhimrav Ravji*, 1 B. 577 at p. 580, *Ram Kanye Adhicarry* v. *Cally Churn Dey*, 21 C. 340, followed.

JUDGMENT.—Defendants claim advantage of the rule of "Damdupat." Plaintiffs, while not disputing that the rule applies in ordinary cases to debts between Hindus in this Province, contend that under Order XXXIV, rules 2 and 4, they are entitled to interest as stipulated in the bond, in spite of the rule of "Damdupat." Reliance is placed on the case of *Madhwa Sidhanta Onakini Nidhi* v. *Venkataramanjulu Naidu* (1), where it was held that the "Damdupat" rule is inapplicable to cases of mortgages governed by the Transfer of Property Act. The learned Judges, in that case, argued that under sections 86 and 87 of Transfer of Property Act, the mortgagee is entitled to interest as contracted for, and that the general rule of law laid down in that Act must be held to abrogate the special rule of law obtaining among Hindus. The words of section 86 relied on are:—"If the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage." But, surely, no greater force can be attached to these words than was allowed by the Court in the case of *Surya Narainsingh* v. *Jogendra Narain Roy Chowdhury* (2), wherein the Judges expressed the opinion that "Section 86 binds the Court to give a decree at the rate of interest provided by the mortgage if it be a rate to which no valid legal objection can be taken," that is to say, the mortgagee is, *prima facie*, entitled to enforce the strict terms of his contract, but the defendant is not debarred from showing that he is legally entitled to

(1) 26 M. 662.
(2) 20 C. 360.

relief against them. The rule of "Damdupat" is nothing more than a rule of limitation [*Ramconnoy Audicarry* v. *Johur Lall Dutt* (3)], having a religious origin, obtaining among Hindus; and, in my opinion, section 86 of the Transfer of Property Act and rule 2 of Order XXXIV cannot be fairly construed so as to abrogate this rule. In *Jeevanbai* v. *Manordas Lachmandas* (4), it was held that the Transfer of Property Act had not affected the application of the rule of "Damdupat" in the case of a Hindu mortgagor, and there is no reported case from this side of India supporting the view expressed by the Madras High Court. I hold, therefore, that the rule applies.

It is further contended for plaintiffs that the rule does not, at any rate, apply to interest after date of decree; but on this point, I feel bound to follow the decisions in *Ramchandra Mankeshwar* v. *Bhimrav Ravji* (5) and *Ram Kanye Audhicarry* v. *Cally Churn Dey* (6) and to hold that the rule does apply to such interest. Plaintiffs are, therefore, entitled to Rs. 1,500 as interest and no more.

(3) 5 C. 867; 7 C. L. R. 204.
(4) 12 Bom. L. R. 992; 8 Ind. Cas. 649; 35 B. 199.
(5) 1 B. 577; at p. 580.
(6) 21 C. 840.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 13 OF 1911.

November 1, 1911.

Present:—Mr. Pratt, J. C.

In re MOSSAJI ISMAILJI LOTIA *Ex parte* FORBES, FORBES, CAMPBELL AND Co.

Provincial Insolvency Act (*III of* 1907), *ss.* 24, 25, 28 —*Claims on forward contracts—Contingent debts—Proof in insolvency—Creditor's affidavits—Duty of official Receiver.*

Claims in respect of forward contracts are demands in the nature of unliquidated damages arising out of contract. They are contingent debts capable of being fairly estimated and can be proved, under the Insolvency Act, before the due dates for the performance of the contracts have arrived.

Hardy v. *Fothergill*, 13 A. C. 351 at p. 358; 58 L. J. Q. B. 44; 59 L. T. 273; 37 W. R. 177; 53 J. P. 36, referred to.

Where different creditors file affidavits before the Official Receiver in proof of such debts, it is his duty to inquire into the matter and to determine a uniform rate for the purpose of making a fair estimate or valuation of these debts. The creditors' affidavits should not be accepted without question, as the affidavits can only disclose the chance of liability, and are nothing but the creditor's estimate and opinion as to the present value of the debt. A creditor's estimate is no part of the proof of such a debt.

Re Dodds, Ex parte Pritchard, 25 Q. B. D. 529 at p. 533; 59 L. J. Q. B. 403; 62 L. T. 837; 39 W. R. 125; 7 Morrell, 199, relied upon.

Mr. *T. G. Elphinston*, for the Applicant.

Mr. *Rupchand Bilaram*, for the Insolvents.

JUDGMENT.—This is an appeal by Messrs. Forbes, Forbes, Campbell & Co. against an order of the Official Receiver rejecting proof of their debt and refusing to enter it in the schedule of creditors and debts of the insolvent firm of Mossaji Ismailji Lotia.

The adjudication order was made on the 29th March and the property of insolvents was vested in the Official Receiver.

Several of the creditors had made forward contracts with the insolvents for the sale of sugar and of these the appellants were creditors for the largest sum. They tendered proof by affidavit on the 2nd June and assessed damages at the rates at which they could on the 26th May have sold the sugar for delivery on the contract dates.

The Official Receiver called a meeting of creditors on the 5th July at which some of the creditors suggested that the contracts should be sold and damages assessed accordingly, while Mr. Rupchand for the insolvents contended that the damages should be assessed either in that way or by the rates prevailing at the date of breach. No rate, however, was fixed and nothing was effected beyond a definite intimation which the Official Receiver gave to the creditors that he would not accept delivery on behalf of the insolvents.

The Official Receiver appears to have been under the impression that he could not fix the rate because he had not been authorized under section 20 (*c*) to (*i*) of the Provincial Insolvency Act. He applied to the Court for these powers and they were conferred upon him on the 19th July.

By that date sugar had begun to rise in price and one of the creditors, Messrs. E. D. Sassoon & Co., who had re sold at the lower rates of April, May and June, represented that the appellants should be required to re-sell or that the higher rate of the

day should be considered in assessing their damages.

The Official Receiver communicated on this subject with Messrs. Forbes, Forbes, Campbell & Co., but they consistently took up the position that they had rescinded the contracts on the 5th July and that their damages should be assessed at the rates of that day.

Ultimately, the Official Receiver admitted proof and entered in the schedule the debts of the other contracting firms, *i. e.*, Messrs Graham, Volkart, Ralli and Sassoon—but as to Forbes, gave them the option of either re-selling and having their damages assessed on the basis of such re-sales or of waiting till the dates of delivery so as to have actual damages calculated.

Now, the Official Receiver was in error in thinking that he could not fix the rate for damages without being empowered under section 20 (*c*) to (*i*). The only clauses which could be imagined to apply are paras. (*c*) and (*h*). Para. (*c*) refers to power to carry on the business of the insolvent so far as it may be necessary for the beneficial winding up of the estate. The Official Receiver was not exercising that power, for when he intimated that he would not take delivery, he elected not to carry on that business. Para. (*h*) refers to the compromise of debts, claims and liabilities on such terms as may be agreed upon. But this power is, under the terms of the section, to be exercised for the purpose of realizing the property of the insolvents. It refers, therefore, to compromise with persons who are under a liability to the insolvents' estate—and it is doubtful if it refers to creditors whose claims would be decided either by inclusion in the schedule for the purpose of dividend or by composition under section 27. But I need not discuss this point further, for, as I shall presently show, the Official Receiver had jurisdiction to decide the matter without resorting to a compromise.

The claims of the firms who held forward contracts were demands in the nature of unliquidated damages arising out of contract. The Act admits such claims—for section 28 (2) only excludes those not arising out of contract or breach of trust. Again, these claims are contingent debts—that is, they are contingent not only on non-performance by the Receiver, but also on the rates at the due dates being lower than the contract rates. Contingent debts are proveable under the Act subject only to the proviso to section 24 (1) that they are not incapable of being fairly estimated.

The Official Receiver has authority under section 52 (*b*) to frame schedules and to admit or reject proofs of creditors. He, therefore, had jurisdiction to say of a debt whether it can be fairly estimated or not—and if it could be fairly estimated, he had jurisdiction, and it was his duty, to make such estimate. The jurisdiction is expressly conferred on the Official Receiver by the Presidency Towns Insolvency Act, 1909, section 46 (4). Compare also section 37 of the English Bankruptcy Act, 1883.

The Official Receiver failed to exercise this jurisdiction and I think also that he erred in treating the affidavits of the other contracting firms as proof of their debts. Under section 25, a debt may be proved by an affidavit containing an account supported if possible by vouchers. But this evidence could only amount to proof in respect of debts that are certain. Here the affidavits could only disclose the chance of a liability—but as to the amount or present value of the debt there was nothing but the creditors' estimate. That is merely the creditors' opinion and it has, therefore, been held that a creditor's estimate is no part of the proof—see in *Re Dodds, Ex parte Pritchard* (1). The Official Receiver, therefore, instead of accepting the affidavits of the other creditors without question, should have applied his mind to the matter and, on the basis of those affidavits, should have determined a uniform rate for the purpose of making a fair estimate or valuation of the contingent debts.

Mr. Rupchand for the insolvents contends that the appellants are only entitled to get such actual damages as may accrue to them when the due dates arrive. This is directly opposed to his contention before the Official Receiver on the 5th July and it does not consist with his raising no objection to the rates allowed to Messrs. Graham, Volkart, Sassoon and Ralli. These debts have been valued at various rates prevailing at various dates in February, April, May and June. Moreover, the contention is manifestly opposed

(1) (1890) 25 Q. B. D. 529 at p. 535; 59 L. J. Q. B. 403; 62 L. T. 857; 39 W. R. 125; 7 Morrell. 199.

to the policy of the Act. The object of the Act is that all debts and liabilities, present or future, certain or contingent, should be proved and the insolvent discharged in respect of them. If contingent debts could not be proved until the event on which they were contingent arrived, some debts could never be proved at all. For instance, the claim of a life annuitant would depend for its value on the life of the claimant. He, therefore, according to Mr. Rupchand's contention, could not claim at all until he was dead.

No doubt, there are cases in which the admission of contingent debts to proof may work a hardship on some and confer an unfair benefit on others. This was referred to by the Earl of Selbourne in *Haray* v. *Fothergill* (2) and I read his remarks:—

"For the principle of the old bankrupt laws, which did not admit to proof any claims for liabilites contingent at the time of bankruptcy, much might perhaps be said. It might be a hardship upon the creditors, to whom debts were then due, that a merely possible future liability, which might never have matured into a debt at all, should be valued and admitted to proof, and to participation in dividends. In most cases, if any substantial dividend were paid, this would be a benefit to the person interested in the performance of the contract under which such liability would arise if the contingency happened; but there might also be cases in which it would be a hardship upon him to be compelled to prove such a claim, so valued, at a time when the estate of the bankrupt might be inadquate to pay any substantial dividend, instead of waiting for the occurrence of the contingency (if it ever should occur) and then taking his legal remedies against such property as the debtor might at that time possess, whether previously bankrupt or not. But the Legislature, for whatever reason, has gone at least far enough to exclude from the consideration of the present question *a priori* arguments of that kind."

So here we have to carry out the Act and not to criticise its policy. Some of the firms, *e. g.*, Sassoon and Volkart, re-sold. I would observe that they did this before the rescission on the 5th July and did so at their own risk for the Official Receiver might possibly have claimed delivery. The insolvents authorized Forbes to re-sell the day before they filed their petition. This authority was of no effect after the adjudication order was made; and I do not find that the Official Receiver authorized a re-sale at any time prior to the rescission on the 5th July. But even if he had, such re sale would in no way assist in the valuation of the debt for the daily rates are well known. And after rescission, I do not understand how the Official Receiver or any one else can dictate to Forbes what they should do with their sugar.

I have dealt now with the legal aspect of the case and have disposed of the arguments adduced in support of the order. My conclusion is that on the 5th July when the Receiver intimated that he would not accept delivery, he should have proceeded to make a fair estimate of the claim of the appellants. If he had done so, I have no doubt he would have taken as his basis the rates of that day. I shall take the same basis without regard to the rise of rates since then, for the delay is attributable to the action of an officer of the Court and the maxim applies that an act of the Court shall prejudice no man. But having elected to keep the sugar, the appellants cannot be allowed brokerage or commission.

I accordingly vary the order of the Receiver and direct him to estimate the claim on this basis and to enter the debt so estimated in the Schedule.

I allow the appeal with costs. Costs to come out of the estate.

Appeal allowed.

(2) 13 A. C. 351 at p. 358; 58 L. J. Q. B. 48; 59 L. T. 273; 37 W. R. 177; 53 J. P. 36.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 912 OF 1910.

January 8, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

DAGDU ANANDRAM—APPELLANT

versus

MIRASAHEB TANHAJI—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2 (2)—Agriculturist—Minor son of agriculturist—Earning livelihood by agriculture.

MATHRADASS *v.* SECRETARY OF STATE.

The minor son of an agriculturist is not an agriculturist within the meaning of the definition in section 2 clause (2) of the Dekkhan Agriculturists' Relief Act.

Dependence for livelihood upon another who is an agriculturist is not the same thing as *earning livelihood* for oneself by agriculture. To earn livelihood by agriculture is to obtain the means of livelihood by it.

Dwarkojirav Baburaw v. *Balkrishna Bhalchandra*, 19 B. 255, followed.

Second appeal from the decision of the District Judge of Ahmednagar, in Appeal No. 94 of 1909, confirming that passed by the Subordinate Judge of Shevagaon, in Civil Suit No. 215 of 1908.

Mr. *K. H. Kelkar*, for the Appellants.

Mr. *D. A. Khare*, for the Respondents.

JUDGMENT.—The minors concerned in this case, it is found, were not agriculturists at the time of the suit. But the Courts below have given them the benefit of the provisions of the Dekkhan Agriculturists' Relief Act under the second definition of section 2, clause (2), of the Act. According to that section, we must see what the definition of 'agriculturist' was at the time the liability was incurred. That definition was the same in 1893 that it is now, and, therefore, we have to see whether the minors concerned, either by themselves, or by their servants, or by their tenants, "earned their livelihood" wholly or principally by agriculture. It is found as a fact by the learned District Judge that at the time the liability was incurred, these were minors depending for their support on their father who was an agriculturist at that time, and, therefore, their income, if they can be said to have had an income, was chiefly derived from agriculture. That was because they depended upon their father for their livelihood. But dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture. To earn livelihood by agriculture is to obtain the means of livelihood by it: *Dwarkojiraw Baburaw* v. *Balkrishna Bhalchandra* (1). Upon the ground that there is no evidence whatever to show that the minors earned their livelihood by agriculture at the time the liability was incurred, the decree must be reversed and the case sent back to the Subordinate Judge to be dealt with on the merits according to law with reference to the observations in this judgment.

(1) 19 B. 255.

Costs hitherto incurred to be costs in the cause.

Decree reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 28 OF 1909.

November 3, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

MATHRADASS RAMDASS—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Practice—Sind Judicial Commissioner's Court Rules, 23, 24, 27—Remand order—Inclusion of Pleader's fees in costs—Failure to file certificate of fee—Review of taxation after success in lower Court—"Successful party", meaning of.

Under Rule 27 of Rules of the Court of the Judicial Commissioner in Sind, no application for review of taxation of costs is allowable unless made before the decree is signed.

When a case is remanded for fresh decision and costs of appeal are directed to be costs in the cause, the lower Court when passing its decree has no power to alter the order of the Appellate Court as to costs and to allow costs not shown in the order of the Appellate Court.

The expression "successful party" in rule 23 of the rules of Court means the party who, as a result of the Court's judgment, is entitled to formulate a claim for costs against other party; it does not include a party obtaining success in proceedings before another Court.

Where the final incidence of the burden of costs is left for the decision of the lower Court, as in the case of remand, a party desiring his Pleader's fees to be included in the costs must file the usual certificate of fees in the Appellate Court before the decree of that Court is signed.

Application for review of taxation of costs.

Mr. *Kimatrai Bhojraj*, for the Appellant.

Rai Bahadur Mr. *Tekchand Oodhavdas*, for the Respondent.

JUDGMENT.—In this case, this Court reversed the order of the lower Court dismissing the suit, and remanded it for trial; the order as to costs was "costs of this appeal to be costs in the cause." Appellant submitted a bill of costs including Pleader's fee accompanied by the usual certificate, in accordance with rules 23 and 24 of Chapter VII. Respondent filed no bill and no certificate. Pursuing the ordinary practice of this Court, the costs of both sides were taxed and entered in the decree, but in the

case of the respondent, they were taxed on the materials supplied by the record, and no Pleader's fee having been certified, none was allowed. On remand, the lower Court dismissed the suit with costs, including those reserved as costs in the cause by the Appellate Court. Respondent filed an application praying that the Court would "allow him Rs. 50 on account of Pleader's fee for the Appellate Court and include the same in the decree," but the Court held that it had no power to alter the Appellate Court's decree and to allow costs not shown therein. Respondent now applies to have the taxation reviewed.

There can be no doubt that this order of the lower Court was correct. This is clear from the terms of Order XLI, rule 35, Civil Procedure Code, and the point was discussed and settled as far back as 1870 in the case of *Nubo Kristo Mookerjee* v. *Parbutty Churn Bhuttacharjee* (1).

To the present application for review of taxation, rule 27 of this Court seems to afford a complete answer—for, under that rule, no application for review of taxation is allowed unless made before the decree is signed.

But Mr. Tekchand contends that, under rule 23, it is only the successful party who is bound to submit a bill of costs, and that, therefore, (1) he infringed no rule by omitting to file a bill when the Court made the adverse order of remand, and (2) having won in the lower Court, he is entitled, as a successful party, to file a bill of costs now.

But it is not sought to penalize the respondent for infringing a rule; it is merely contended that he failed to take advantage of an opportunity. Though rule 23 makes it obligatory on a successful party to submit his bill, it is always open to the unsuccessful party to present a bill also if he wish any costs not appearing on the Court record to be included in the decree. Nor can "successful party" be given so wide a construction as to include success in proceedings before another Court. The expression obviously means the party who, as a result of the Court's judgment, is entitled to formulate a claim for costs against another party. Where the final incidence of the burden of costs is left for the decision of the lower Court, each party will be well advised to submit his bill for the question of the amount of each party's costs in appeal is conclusively determined by the decree of the Appellate Court.

We dismiss the application with costs.

Application dismissed.

(1) 13 W. R. 23.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 11 OF 1911.

January 9, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

BHAGWANT RAMCHANDRA—PLAINTIFF

versus

KAJI MAHAMAD ABAS—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 48—Execution of decree—Decree obtained by person under no disability—Limitation—Minor heir—Effect of subsequent disability on the running of limitation—Limitation Act (IX of 1908), s. 9.

When once the period of 12 years prescribed by section 48, Civil Procedure Code, has begun to run from the date of the decree, such period must be computed from that day.

Where a decree-holder, who is not under any disability, obtains a decree and thereafter dies leaving a minor son as his heir, the minority of the son cannot arrest the running of the period of 12 years prescribed by section 48, Civil Procedure Code, which must be computed from the date of the decree irrespective of the son's minority.

Civil Reference made by the Judge of Small Causes Court at Poona, in *Darkhast* No 4319 of 1910.

Mr. *Nilkanth Atmaram* (*amicus curiæ*), for the Plaintiff.

Mr. *S. S. Patkar* (*amicus curiæ*), for the Defendant.

JUDGMENT.—We are indebted to each of the Pleaders for appearing in this Reference as *amicus curiæ*. Mr. Nilkanth has placed before us all the available authorities on the point and argued the Reference in support of the plaintiff. But we are of opinion that our answer to the Reference must be that the claim is barred by the law of limitation prescribed in section 48 of the Code of Civil Procedure. We agree with the Subordinate Judge in the view he has taken, namely, that the decree having been obtained by the plaintiff's father and time having once begun

to run under section 9 of the Limitation Act, no subsequent disability, that is, the minority of the plaintiff, could arrest it. Once the limitation began to run from the date of the decree, the twelve years' period must be computed from that day. The point is practically decided by this Court in *Jivraj* v. *Babaji* (1). With this answer, the Reference must be returned to the Subordinate Judge.

Reference returned.

(1) 29 B. 68; 6 Bom. L. R. 639.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 6 OF 1910.

November 10, 1911.

Present:—Mr. Crouch, A. J. C., and Mr Hayward, A. J. C.

GHANSHAMDAS NEBHANDAS—APPELLANT

versus

Musammat VISHINDEVI AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), *s.* 6—*Jurisdiction—Insolvency petition by debtor arrested or imprisoned—"Or", construction of.*

A debtor, who has been arrested or imprisoned in execution of a decree, may present an insolvency petition to the Court having jurisdiction either in the local area where he is in custody or where he resides or carries on business.

The word 'or' in section 6 of the Provincial Insolvency Act is used in the sense of giving the debtor an alternative choice. It does not restrict the debtor to present his insolvency petition only to the Court within whose jurisdiction he is in custody.

Appeal against an order of the Joint Judge, Sukkur-Larkana.

Mr. *Isarsing Hazarising*, for the Appellant.

JUDGMENT.—We consider that where a debtor has been arrested, or imprisoned, he is not limited in the presentation of his insolvency petition to a Court having jurisdiction in the local area where he is in custody.

The word "or" ordinarily connects a series of words, marks alternatives and gives choice of either alternative. The words "if he has been arrested or imprisoned" between "or" and "where he is in custody" in the last line of section 6 (2) of the Provincial Insolvency Act, merely limit or explain the application of the last alternative. We see no reason to suppose that the word has not been used in its ordinary sense through the sub-sections.

We cannot accept the construction placed on the section by the lower Court without giving to the word where, last used, a disjunctive sense, a sense quite different to that in which it is obviously twice used earlier in the section. Were the word intended to be used in a disjunctive sense, we should expect it to mark the commencement of a fresh sentence. In this case there is no fresh sentence. Had the Legislature intended that the word should be interpreted in a disjunctive sense, we should have expected a much clearer indication of such intention.

We reverse the order of the lower Court and direct that the petition be disposed of according to law. Costs to be costs in the insolvency proceedings.

Order set aside.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 94 OF 1911.

January 12, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

RAMCHANDRA SHIVJIRAM—APPELLANT

versus

TAMA RAGHO MANGLYA—RESPONDENT.

Transfer of Property Act (IV of 1882), *s.* 107—*Lease for more than a year—Registration—Admissibility—Oral evidence—Admission of relationship of landlord and tenant—Estoppel—Practice—Compensation for use and occupation—Lease of salt-pan legal without Collector's sanction—Admissibility of landlord's receipt.*

A.'s one-third interest in certain salt-pans was leased to *B.*, for a period of three years at Rs. 500 a year during *A.*'s minority by her guardians and co-sharer, who owned the remaining two-thirds share.

On attaining majority, *A.* leased her share for two years more to *B.* on a rental of Rs. 1,000 a year.

A. sued *B.* to recover the rent of the last two years at the rate of Rs. 1,000 a year and Rs. 653 as rent due on the previous lease.

The rent-deed was not registered but *B.* admitted *A.*'s ownership of the salt-pan and also his tenancy under her and her co-sharer; *B.*, however, alleged that he had been in possession from the beginning under a lease for five years and not three years:

Held, (1) that *A.* could not be allowed to rely on the lease set up by her, as it was unregistered; nor could she be allowed to give oral evidence of that lease;

Ardesir Bejorji Surti v. *Syed Sirdar Ali Khan*, 33 B. 610; 10 Bom. L. R. 1146; 4 Ind. Cas. 804, followed.

RAMCHANDRA SHIVJIRAM v. TAMA RAGHO MANGLYA.

(2) that as *B.* admitted *A.*'s ownership and that he was her tenant, proof of the relation of landlord and tenant became unnecessary, the admission of *B.* acting as an estoppel to the production of any evidence contradicting the admission;

Burjorji Cursetji Panthaki v. *Muncherji Kuverji*, 5 B. 143 at p. 152, followed.

(3) that *A.* could only recover the money as for use and occupation for the two years of the tenancy and as the amount claimed by her was not shown to be excessive, she was entitled to it.

The lease of a salt-pan is not illegal merely because the sanction of the Collector of Salt Revenue has not been obtained thereto.

Per Batchelor, J.—Receipts for rent granted by a landlord are admissible in evidence, not as proving the terms of the contract of letting, but as proving from the conduct of the parties what would be a fair rent for the admitted tenancy.

Second appeal from the decision of the Assistant Judge of Thana, in Appeal No. 152 of 1910, reversing that passed by the Joint Subordinate Judge at Thana, in Civil Suit No. 182 of 1909.

Mr. *G. S. Rao*, for the Appellants.

Mr. *Robertson*, with him Mr. *D. A. Khare*, for the Respondent.

JUDGMENT.

CHANDAVARKAR, J.—The plaintiff (who is respondent in this second appeal) alleged in her plaint that the salt-pan in dispute, in which she had interest to the extent of one-third, had been leased away during her minority to the appellants for a period of three years on a rental of Rs. 500 a year by her guardians and one Dharman, who owned the remaining two-thirds share, that on the expiry of that period, she, having obtained the age of majority, let her interest for two years to the appellants on a rental of Rs. 1,000 a year. She sought to recover the rent of those two years at that rate and also Rs. 653 as rent due on the previous lease.

The appellants in their written statement admitted the respondent's ownership of the salt-pan and also their tenancy under her and Dharman, but they contended that they had been in possession from the beginning under a lease for five years, not three years as alleged in the plaint.

Section 107 of the Transfer of Property Act requiring that "a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument," the respondent could not be allowed to rely on the lease set up by her, because it was not registered: *Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan* (1). Nor could she be allowed to give oral evidence of that lease (section 91 of the Indian Evidence Act).

But the appellants having admitted in their written statement the ownership of the respondent and that they were in as her tenants, proof of the relation of landlord and tenant became unnecessary. "A Court in general has to try the questions on which the parties are at issue, not those on which they are agreed," and "admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them." *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (2).

The only question then at issue, was the amount of rent payable. So far as the agreement set up by either party was concerned, it was inadmissible in evidence and no oral evidence could be given of it. The respondent could only recover as for use and occupation for the two years of the tenancy admitted.

We have evidence in the case to show that at the beginning of the two years' tenancy, admitted by the appellants, one merchant was ready to take the salt-pan on a higher rent than Rs. 5,000, which they had paid till then; that another merchant was willing to pay a rent of Rs. 7,000 per annum, and that the appellants were paying at the date of the suit Rs. 6,100. The lower Appellate Court has believed this evidence, and the rent claimed in the plaint and awarded by that Court cannot be regarded as excessive for the appellant's use and occupation of the salt-pan.

Two other points were urged before us in support of the appeal—one that the lease of the salt-pan was illegal because it had not the sanction of the Collector of Salt Revenue, and the other that the report of the guardians of the plaintiff made to the District Judge was inadmissible. We agree with the lower Courts that the lease was not illegal, and that the report was admissible.

The decree is confirmed with costs.

BATCHELOR, J.—I agree. In my opinion the receipts issued by the plaintiff for payments made to her were rightly admitted in

(1) 33 B. 610; 10 Bom. L. R. 1146; 4 Ind. Cas. 804.
(2) 5 B. 143 at p. 152.

evidence, and, if that is so, the decree under appeal must be affirmed. It seems to me that these receipts are admissible, not as proving the terms of the contract of letting, but as proving from the conduct of the parties, what would be a fair rent for the admitted tenancy. Reference may also be made to illustration (*e*) of section 91, Evidence Act.

Decree confirmed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 117 OF 1911.

November 15, 1911.

Present:—Mr. Pratt, J. C.

TOPANRAM NATHURAM—PLAINTIFF

versus

TEKCHAND AND OTHERS—DEFENDANTS.

Jurisdiction—Decree against dead man—Void—Exception—Civil Procedure Code (Act V of 1908), O. XX, r. 6—Defendant dying after close of hearing but before judgment—Execution of decree—Power of execution Court to decline to execute decree passed without jurisdiction—Power to consider question of jurisdiction.

A Court has no jurisdiction to make a decree against or in favour of a person deceased. Such a decree is void and incapable of execution.

Imdad Ali v. *Jagan Lal*, 17 A. 478 and *Vishvanath Danzanoba* v. *Lallu Kabla*, 11 Bom. L. R. 1070, 4 Ind. Cas. 137, followed.

The only exception to the rule is the case of a defendant dying between the conclusion of the hearing and the pronouncement of judgment; in such an event, the Court may deliver judgment *nunc pro tunc*.

A decree passed without jurisdiction is incapable of execution and the Court to which such decree is transferred for execution is competent to decline to execute it.

The Court charged with the execution of a decree can consider the question whether the Court which passed the decree had jurisdiction to pass it unless the decree itself precludes that question.

Haji Musa Haji Ahmed v. *Purmanand Nursey*, 15 B. 216 and *Imdad Ali* v. *Jagan Lal*, 17 A. 478, followed,

Chagalal v. *Trueman*, 7 B. 481, *Kasturshet Javershet* v. *Rama Kanhoji*, 10 B. 65; *Chintaman Vithoba* v. *Chintaman Bajaji Deb*, 22 B. 475, *Malkarjan* v. *Narhari*, 25 B. 337; 27 I. A. 216; 10 M. L. J. 368; 5 C. W. N. 10; 2 Bom. L. R. 927; *Trimbakrao* v. *Balwantrao*, 30 B. 101; 7 Bom. L. R. 659; *Maharaja of Bharatpur* v. *Rani Kanno Dei*, 23 A. 181 at p. 190; 5 C. W. N. 137; 3 Bom. L. R. 51; 28 I. A. 35, distinguished.

Mr. *Kalumal Pahlumal*, for the Plaintiff.

Mr. *Harchandrai Vishindas*, for Defendant No. 1.

JUDGMENT.—This is an application for execution of decree passed by the Court of the first class Munsif at Lyallpur.

The decree has been transferred to this Court for execution under section 40, Civil Procedure Code.

Mr. Harchandrai for the first judgment-debtor's representative, Teckchand, objects that the first judgment-debtor died before the decree was passed. The decree is dated the 21st April 1908 and the first judgment-debtor or rather the 1st defendant died on the 4th January 1903. He urges that the decree as against him is void.

Mr. Kalumal argues that the Court of execution cannot question the jurisdiction of the Court which passed the decree. The rule relied upon by Mr. Kalumal was first laid down by the Bombay High Court in *Chagalal* v. *Trueman* (1). In that case, the Court of execution thought the cause of action on the *hundi*, which was the subject of the suit, arose in Poona and not in Nasirabad as held by the Court which passed the decree. But the question was not one of jurisdiction, for the trying Court had jurisdiction to decide where the cause of action arose and even if it came to an erroneous decision, that did not affect its jurisdiction or competence to pass the decree.

In the next case *Kasturshet Javershet* v. *Rama Kanhoji* (2), the decree was a decree passed by a Court of Small Causes against a defendant who afterwards claimed to be an agriculturist. Here, again, no question of jurisdiction was involved, for it was open to the defendant to waive his status; as he had not pleaded in the Court of Small Causes that he was an agriculturist, that Court had jurisdiction to make a decree against him. In *Chintaman Vithoba* v. *Chintaman Bajaji Deb* (3), the objections raised referred to the authority of the trustee who was party to the suit to represent the estate. This did not affect jurisdiction. The Court may have erred in holding that the trustee did represent the estate, but that would be an error within jurisdiction for the Court has jurisdiction to decide right as well

(1) 7 B. 481.
(2) 10 B. 65.
(3) 22 B. 475.

as to decide wrong: *Malkarjun* v. *Narhari* (4). The rule laid down in that case was that the Court of execution could not question the *validity* of the decree, and that I understand to mean the *legality* of the decree and not the competence or jurisdiction of the Court which made the decree. Batty, J., uses the word 'jurisdiction' in *Trimbakrao* v. *Balwantrao* (5). But the sentence in which the word is used is an *obiter dictum*. The Privy Council state the rule very clearly in *The Maharaja of Bhartpur* v *Rani Kanno Dei* (6).—"As there is no inconsistency, the duty of the executing Court is, as the High Court rightly points out, to carry the orders of the decree into effect, as being conclusive between the parties, whether it may or may not be disputable upon a point of law." These words do not include the case of a decree which is one which the Court is not competent to pass. Such a decree is not a decree at all and is, therefore, not susceptible of execution. This appears to have been the view of Farran, J., in *Haji Musa Ahmed* v. *Purmanand Nursey* (7), for he said: "If this Court were asked to execute the decree of a Mofussil Court directing land in Bombay to be delivered by the defendant to the plaintiff, or of a Mofussil Small Cause Court ordering the payment of such a sum as Rupees one lakh, it would rightfully, I consider, refuse the application." In *Imdad Ali* v. *Jagan Lal* (8), execution was sought against the representative of a defendant who had died before the decree was passed. It was held that the decree was void and incapable of execution. The Court said:—

"There can be no doubt, in our opinion, that the Court charged with the execution of a decree can consider the question as to whether the Court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question."

This I take to be good law—and the last clause would cover such a case as that of *Chogalal* v. *Truemon* (1), for where the Court has decided that it has jurisdiction over the subject-matter of the suit—that question is not to be re-opened in execution. In *Vishvanathe Danzanoba* v. *Lallu Kabla* (9), it was held that the Court has no jurisdiction to make a decree against or in favour of a person deceased; and an execution application based on such a decree was dismissed.

Order XXII, rule 6, however, makes an exception in the case of a defendant dying between the conclusion of the hearing and pronouncing of judgment for in such an event the Court may deliver judgment *nunc pro tunc*.

I accordingly adjourn this matter till 15th November to give the opponent an opportunity of producing a copy of the diary of the suit to show to what stage the suit had progressed by the 4th January 1908.

The execution application as against defendant No. 1 is dismissed with costs there being no valid decree against him.

Fresh notice to issue as against defendant No. 2.

(4) 25 B. 337: 27 I.A. 216; 5 C.W.N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927.

(5) 30 B. 101; 7 Bom. L. R. 659.

(6) 23 A. 181 at p. 190; 5 C. W. N. 137; 3 Bom. L. R. 51; 28 I. A. 35.

(7) 15 B. 216 at p. 219.

(8) 17 A. 478.

(9) 11 Bom. L. R. 1070; 4 Ind. Cas. 137.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No, 168 OF 1911.

June 12, 1912.

Present:—Mr. Lindsay, J. C.

BUDHU CHAUDHRI—DEFENDANT—APPELLANT

versus

Musammat HARDEI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, and O. XXII, r. 9—Hindu Law—Daughter's estate—Joint owners, effect of one suing for his share—Cause of action—Representation of estate.

A widow with two daughters, *H.* and *S.*, mortgaged the house left by her husband to the appellant, the deed of mortgage being attested by *S.*

On her death, *H.* sued for possession of half the house and was successful. *S.* then sued for her half share but she died during the pendency of the suit. Upon her death, *H.* sued the appellant for the remaining half share. The appellant contended that the suit was not maintainable in view of the fact that *H.* had sued only for a half share when she ought to have sued for the whole and that in the second litigation, *S.* represented the whole estate, and consequently, *H.* was now bound by the result of that litigation.

Held, (1) that the right to sue for the half share of *S.* accrued to *H.* only after the death of *S.* and that

when S. sued for her half share, she did not represent the whole estate so as to bind *H.*

Appeal against an order of the District Judge, Sitapur, dated 17th February 1911, reversing that of the Officiating Munsif of Sitapur, dated 18th August 1910.

Mr. *H. C. Dutt*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The facts of this case are shortly as follows. One Jia Lal, who owned a house and a shop, died leaving a widow, *Musammat* Radha, and two daughters, *Musammat* Hardei and *Musammat* Sitala. The widow, *Musammat* Radha, came into possession of her husband's property with the estate of a Hindu widow and while she was still alive, she mortgaged the property to one Budhu Chaudhri. The date of this mortgage was the 10th November 1899 and it is admitted that *Musammat* Sitala, one of the daughters, was an attesting witness to the mortgage. When *Musammat* Radha died, a suit was brought by her daughter, *Musammat* Hardei, claiming joint possession of the property with the mortgagee on the ground that the mortgage-deed was not for various reasons binding upon her. The result of this litigation was that *Musammat* Hardei got a decree for possession to the extent of her share in the property. After this, the other daughter, *Musammat* Sitala, filed a similar suit. This suit was dismissed in the Court of first instance and an appeal was filed during the pendency of which *Musammat* Sitala died. After her death, *Musammat* Sitala's son, one Ganga, was brought on the record as the legal representative of his mother. The case was fought out to this Court and the result of this litigation was that Sitala's suit was dismissed. After this, *Musammat* Hardei brought a suit against the mortgagee claiming the interest in the mortgaged property which had belonged to her sister, Sitala and it is this suit which has given rise to the present appeal. The Court of first instance dismissed the claim of *Musammat* Hardei on the ground that at the time when *Musammat* Sitala died during the pendency of her appeal, it was the duty of Hardei to have herself brought on the record as the legal representative of her sister and carry on the litigation. The Munsif was of opinion that having failed to do so, she was debarred from instituting the present suit under the provisions of Order XXII, rule 9 of the Code of Civil Procedure. In appeal, this decision was reversed by the District Judge and now the decree of the District Judge is attacked in this Court on the ground that the Munsif's decision was correct and should not have been disturbed. It is also contended here that even if the suit of *Musammat* Hardei be not bad for the reasons given by the learned Munsif, it was nevertheless not maintainable by reason of the provisions of Order II, rule 2. On this point, the argument is that as *Musammat* Hardei, when she brought her suit against Budhu Chaudhri for joint possession of his share, failed to make a claim in respect of the entire property, she is not entitled now to sue for that portion of the property which she omitted to claim in the previous litigation. These are the only points which are put forward for decision and after considering the argument of the learned Counsel and the facts of the case, I am of opinion that the decision of the learned Judge should be maintained. It is, no doubt, correct to say, as has been said by the appellant's learned Counsel, that when these two sisters *Musammats* Hardei and Sitala succeeded to the property on their mother's death, they took an estate in joint tenancy and there can be no dispute that the estate being of this nature; on the death of one of the sisters, her interest would pass by survivorship to the other. The position of the sisters in this case was the same as that of two widows who succeed jointly to the estate of their deceased husband. The nature of that estate is well described in Mayne's Hindu Law, 7th Edition, paragraph 554. The learned author says:—"Where several widows hold an estate jointly, or where one holds as manager for the others, each has a right to her proportionate share of the produce of the property, and of the benefits derivable from its enjoyment. And the widows may be placed in possession of separate portions of the property, either by agreement among themselves, or by the decree of Court, where from the nature of the property, or from the conduct of the co-widows, such a separate possession appears to be the only effectual mode of securing to each the full enjoyment of her rights. But no partition can be effected between them, whether by consent or by adverse decree, which could convert the joint estate into an estate in severalty, and put an end to the right of survivorship." Now it

may have been that when Hardei brought her first suit against this mortgagee, she could have made her sister a party to the case and brought a suit for recovery of the entire property in which both the sisters were joint owners. That we know was not done. At the same time, we have to take it that the Courts on that occasion gave *Musammat* Hardei a decree for joint possession with the mortgagee to the extent of her share. There seems to have been one reason at any rate on which the procedure of *Musammat* Hardei in that case might be held to be justified. It has been stated that her sister *Musammat* Sitala was an attesting witness to the mortgage executed in favor of Budhu Chaudhri by her mother, *Musammat* Radha. That fact is some evidence of consent on the part of Sitala to the mortgage transaction and it would probably have been very difficult for her to join as plaintiff in any suit against Budhu Chaudhri in which of necessity she would have had to raise the question of the validity of the mortgage transaction to which she herself had been a consenting party. In any case, it seems to me from the statement of the law which has been laid down above that the Court may in proper cases award one of the co-widows or one of two daughters such separate possession as appears to be necessary in order to secure her the full enjoyment of her rights. I am not prepared, therefore, to hold that it is a good plea that the present suit of *Musammat* Hardei is not maintainable merely because she omitted to make a claim in the first instance for the whole of the property. Obviously, she could not have made such a claim on her own behalf. She would have had to join either as co-plaintiff or as *pro forma* defendant her own sister Sitala, who was a joint owner with herself; and, in the circumstances already set out, this does not appear to have been possible. Then, it is argued that *Musammat* Hardei is bound by the decree passed against *Musammat* Sitala on the ground that the latter represented the estate and that, therefore, a decree obtained against her is binding on *Musammat* Hardei. I am unable to allow this argument to prevail. I do not see how *Musammat* Sitala, who was entitled only to a share in the estate of her deceased father, can be said to represent the whole estate; nor, again, can I see how it can be said that *Musammat* Hardei in any way represents her deceased sister so as to be bound by any litigation affecting the latter. *Musammat* Hardei has become entitled to her sister's interest in the property by right of survivorship. That right came into existence only on the death of *Musammat* Sitala and I can see no reason why *Musammat* Hardei is not entitled to enforce it. As for Order XXII, rule 9, that appears to me to have nothing whatever to do with the matter. The cause of action which *Musammat* Hardei is putting forward in this suit was not the cause of action which had been put forward by her sister Sitala. These are the only points advanced in support of this appeal. I decide them against the appellant. The appeal fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 170 OF 1909.

January 16, 1912.

Present:—Sir N. G. Chandavarkar, Kt., Judge, and Mr. Justice Batchelor.

VENKATRAMANBHAT SHANKARBHAT—APPELLANT

versus

PADMANABH PARAMBHAT—RESPONDENT.

Right to sue—Minor—Guardian—Contract by guardian—Suit on such contract.

It is open to a minor to either affirm or disaffirm contracts entered into by his guardian but not binding on him.

At the same time, it is the right of the guardian protecting the interests of the minor to sue on such contracts on his behalf.

When such a suit is brought, it is the duty of the Court to entertain it and dispose of it according to law and not on grounds of expediency, real or supposed. If the Court refuses to give relief on the ground that the suit can be brought by the minor after he has arrived at the age of majority, then the minor's interest may be seriously prejudiced by reason of important evidence disappearing by the time the suit is brought.

Second appeal from the decision of the District Judge of Kanara, in Appeal No. 170 of 1909, reversing that passed by the Subordinate Judge of Kumta, in Civil Suit No. 210 of 1908.

Mr. *K. H. Kelkar*, for the Appellant.

HEMANDAS RAMRAKHIOMAL *v.* CHELLARAM DALOOMAL.

Mr. *G. P. Murdeshwar*, for Respondents Nos. 1 and 2.

JUDGMENT.—The learned District Judge has clearly erred in law in holding that because it is competent for the minor either to disaffirm or to affirm the contract when he arrives at the age of majority, therefore, it is advisable to dismiss the present suit. The District Judge allows that, as a matter of law, the suit must be entertained, but on the grounds mentioned, he has non-suited the plaintiff. It is true that it is open to the minor to either affirm or disaffirm a contract entered into by his guardian but not binding upon him, but at the same time it is the right of the guardian protecting the interests of the minor to sue on such contracts on his behalf; when such a suit is brought, it is the duty of the Court to entertain it and dispose of it according to law and not on grounds of expediency, real or supposed. If the Court refuses to give relief on the ground that the suit can be brought by the minor after he has arrived at the age of majority, then the minor's interests may be seriously prejudiced by reason of important evidence disappearing by the time the suit is brought. In any case, the law allowing such suits to be brought on the minor's behalf, we must reverse the decree and remand the appeal for disposal by the District Court according to law.

The appellant must have his costs of this appeal.

Other costs to be costs in the appeal in the lower Court.

Decree reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 58 OF 1909.

December 5, 1911.

Present:—Mr. Pratt, J. C. and Mr. Hayward, A. J. C.

HEMANDAS RAMRAKHIOMAL—APPELLANT

versus

CHELLARAM DALOOMAL AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), ss. 23, 24, 65—Illegal contract—Part of consideration being stifling of criminal prosecution—Whole contract illegal—"Discovered to be void"—Restitution by party to illegal transaction.

The expression "discovered to be void" in section 65 of the Contract Act is appropriate only to cases where the agreement is void by reason of some fact not known to the parties at the time of making it.

Where the agreement is void for illegality, no suit for restitution will lie.

Dayabhai Tribhovandas v. *Lakhmichand Panachand*, 9 B. 358; *Ismailji Yusufali* v. *Raghunath Lachiram*, 11 Bom. L. R. 748; 33 B. 636; 3 Ind. Cas. 779, followed.

Jijibhai Laldas v. *Nagji Gulab*, 11 Bom. L. R. 693; 3 Ind. Cas. 761, not followed.

No relief can be obtained on a contract which is tainted with illegality. The reason for the rule is that the Court will not lend itself in any way to assist a person who has taken part in an illegal transaction.

A. agreed, in consideration of the withdrawal by *B.* of a suit against *A.*, to suffer an award to be proved as to payment of money and also to procure that one *C.* should drop an application for sanction to prosecute *B.* for perjury. *A.* performed his part of the agreement but *B.* failed to withdraw the suit. *A.* thereupon sued to recover the benefits conferred on *B.* by the agreement:

Held, (1) that the whole agreement was illegal as *A.* could not ignore the illegal part of the agreement;

(2) that no relief could be granted to *A.* on the illegal contract.

Appeal against the decision of the Additional Judicial Commissioner of Sind.

Mr. *Rup Chand Bilaram*, for the Appellant.

Mr. *Hirdaram Mewaram*, for the Respondents.

JUDGMENT.—The plaintiffs' trustees under the Will of Shewaram alleged that they had entered into a contract with the defendant whereby they were to suffer an award in defendant's favour of Rs. 2,125 in lieu of a claim to stables under the Will and for interest at 6 per cent. per annum on his legacy and the defendant in consideration for these benefits should withdraw a suit that he had filed for the removal of the plaintiffs from their office of trustees. They further alleged that the defendant had fraudulently omitted to carry out his part of the agreement and they sued to recover the benefits conferred on the defendant by the agreement.

The defendant in his written statement denied the agreement as pleaded by the plaintiffs and alleged that the agreement actually entered into was void as being contrary to public policy.

It is significant that in spite of this denial, the plaintiffs offered no oral evidence in support of the agreement. They evidently wished to put the defendant in the disadvantageous

position of having to allege the illegal purpose of the agreement. They, however, put in the judgment of this Court in First Appeal No. 15 of 1906, which related to the same agreement. This judgment was adopted by the lower Court as proof of the agreement and the finding of the lower Court on this point is not questioned before us. The agreement, therefore, was as recited in that judgment that plaintiffs should, in consideration of the withdrawal of the suit against them, not only suffer the award to be proved as to payment of money, but also procure that one Khimibai should drop an application for sanction to prosecute the defendant for perjury.

Now, the plaintiffs cannot ignore this illegal part of the agreement, for to do so would be to set up a new agreement and one which was never entered into. Nor can they obtain any relief on a contract which is tainted with illegality, for in such a case the maxim applies that *in pari delicto potior est conditio defendantis*. The finding of the lower Court appears to assume that the parties were not *in pari delicto*. It is difficult to see what grounds there can be for this assumption. Both parties must have known that it was illegal to stifle a prosecution and it is not suggested that the parties were not treating on equal terms.

Mr. Hirdaram argues that as no illegal consideration was to proceed from the defendant, there is no objection to confirming the agreement. This argument ignores the principle on which the rule of law is based. The reason for the rule is that the Court will not lend itself in any way to assist a person who has taken part in an illegal transaction. Here the plaintiffs have not only taken part in an illegal transaction, but have actually carried out the illegal promise.

The next contention is, that plaintiffs are entitled to compensation under section 65 of the Indian Contract Act. There are some remarks of Sir Basil Scott, Chief Justice, in *Jijibhai Laldas* v. *Nagji Gulab* (1), which imply that the section applies to a contract which is void for illegality. We are, however, unable to put this construction on the section. It was decided in *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (2) that the section did not apply to a contract of wager; and, as remaked by Pollock in his commentary, the expression "discovered to be void" in section 65 is appropriate only to cases where the agreement is void by reason of some fact not known to the parties at the time of making it. As, for instance, in *The Secretary of State* v. *Seth Jeshingbhai Hathi Sang* (3), an agreement to pay quit rent was held to be void by reason of a mistake both of Government and the *Inamdars* that the latter were superior holders of certain *vanta* lands; and the *Inamdars* were given a refund of quit rent under section 65 of the Contract Act. But where the agreement is void for illegality, no suit for restitution will lie. See, for instance, *Ismalji Yusufali* v. *Raghunath Lachiram Marwadi* (4). One of the parties to an agreement which was illegal under the Salt Act had made a deposit of Rs. 1,000 with the other party. His suit to recover this deposit was dismissed as the agreement was illegal.

So here the plaintiffs cannot succeed on an agreement which is illegal and their suit must fail. At the same time, we concur with the remarks of the lower Court as to the conduct of the defendant. He has taken advantage of plaintiffs' natural anxiety to avoid litigation and has, as the Judge says, played them a very dirty trick. We shall not allow him his costs.

We reverse the decree of the lower Court and dismiss the plaintiffs' suit. Exch party to bear his own costs.

Suit dismissed.

(1) 11 Bom. L. R. 693; 3 Ind. Cas. 761.
(2) 9 B. 358.
(3) 17 B. 407.
(4) 33 B. 636; 11 Bom. L. R. 743; 3 Ind. Cas. 779.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1814 OF 1909.
April 18, 1912.

Present:—Sir Ashutosh Mookerjee, Judge, and Mr. Justice Carnduff.

BECHA RAM SAHU—PLAINTIFF—APPELLANT

versus

CHAMRU URAON AND OTHERS—DEFENDANTS—RESPONDENTS

Res judicata—*Rent suit—Scope of issue—Incidents of tenancy—Not relating to claim for particular year—* Raikumat—*Legally recoverable if payable under custom*

BECHA RAM SAHU *v.* CHAMRU URAON.

—*Decision that* raikumat *payable, whether* res judicata.

The decision in a rent suit may operate as *res judicata*, where it is upon a question as to the incidents of the tenancy, not merely in relation to the claim for that particular year, but from a wider point of view.

Kali Kumar v. *Bidhu Bhushan*, 10 Ind. Cas. 382; 16 C. L. J. 89, *Joy Kali* v. *Hemangini*, 10 Ind. Cas. 363 and *Padmanund Singh* v. *Rodhe Singh*, 9 C. W. N. 469, relied upon.

Orjoon Sahoo v. *Anund Singh*, 10 W. R. 257 and *Woomesh Chandra Maitra* v. *Barada Das Maitra*, 28 C. 17, referred to.

Radha Prosad Singh v. *Bal Kowar Koeri*, 17 C. 725, explained.

Raikumat is legally recoverable if it is payable under a custom.

Bhudhna Orawan Mahtoon v. *Juggessur Doyal Singh*, 24 W. R. 4, relied upon.

Therefore, a decision that *raikumat* was payable, in a previous rent suit, involved, by implication at any rate, a decision that the *raikumat* claimed was payable under a custom; and the decision, being upon a mixed question of fact and law, operates as *res judicata*.

Appeal from the decree of the Judicial Commissioner of Chota Nagpur, dated May 14th, 1909, reversing that of the Deputy Collector of Ranchi, dated September 19th, 1908.

Babu *Bipin Bihari Ghosh* (Junior), for the Appellant.

Babu *Sarat Chandra Ghose*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for rent. The sole point in controversy between the parties is, whether the claim for recovery of *raikumats* is barred by the doctrine of *res judicata*. It appears that in a previous suit for rent against some of the present defendants, a claim was put forward by the plaintiff for the recovery of *raikumats*. The claim was resisted by the defendants and an issue was raised whether the defendants were liable to pay any *raikumat*. The Court came to the conclusion that *raikumats* were payable and made a decree accordingly. In the present litigation, the *raikumats* have been claimed again and the claim has been resisted. The Court of first instance allowed the claim but that decree has been reversed by the Judicial Commissioner on the authority of the decision in *Orjoon Sahoo* v. *Anund Singh* (1). In support of the appeal, it has been contended that the decision in a suit for rent may operate as *res judicata* and that the answer to the question whether the decision in a particular case does or does not operate as *res judicata* depends upon the scope of the issue raised and the determination thereon. In our opinion, there is no room for controversy that this contention is well founded. The cases of *Kali Kumar* v *Bidhu Bhushan* (2); *Joy Kali* v. *Hemangini* (3) and *Raja Padmanand Singh* v. *Radhe Singh* (4) support the proposition that, if in a suit for rent a question has been raised as to the incidents of the tenancy, not merely in relation to the claim for that particular year, but from a wider point of view, the decision thereon does operate as *res judicata*. The case of *Orjoon Sahoo* v. *Anund Singh* (1) is not opposed to this view. Nor is the case of *Woomesh Chandra Maitra* v. *Baroda Das Maitra* (5) an authority for the contrary proposition. In the case last mentioned, it was found that the question of the true character of certain sum claimed as rent was not raised in the previous litigation between the parties. In the subsequent suit, the question was raised and when it was contended that the question was *res judicata*, it was held that as there had been no previous adjudication, the earlier decision did not operate as *res judicata*. Nor could the doctrine of constructive *res judicata* apply, because the subject-matters of the two suits were different. Similar remarks apply to the case of *Ricketts* v. *Raneswar Malia* (6). It may be conceded that there are isolated observations in the decision of Sir Comer Petheram, C. J., in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (7), which may lend some apparent support to the contention that a judicial determination that a particular sum claimed as *abwab* is not payable because it is an *abwab*, does not operate as *res judicata*. It is difficult to believe, however, that the learned Chief Justice could have intended to lay down any such sweeping proposition and unquestionably it does not follow from the decision of the Judicial Committee in *Tilukhdhari Singh* v. *Chulhan Mahton* (8), to which he made reference. In the case before us, as we have already explained, the claim for recovery of

(1) 10 W. R. 257.

(2) 10 Ind. Cas. 382; 16 C. L. J. 89.
(3) 10 Ind. Cas. 363.
(4) 9 C. W. N. 469.
(5) 28 C. 17.
(6) 28 C. 109.
(7) 17 C. 726.
(8) 17 C. 131; 161 I. A. 152.

raikumats was disputed in the previous suit. Now, *raikumat* is legally recoverable if it is payable under a custom as is clear from the decision in the case of *Bhuzhna Orawan Mahtoon* v. *Juggessur Doyal Singh* (9). The decision, therefore, in the earlier suit that *raikumat* was payable involved, by implication at any rate, a decision that the *raikumat* claimed was payable under a custom; even if the decision be assumed to have been erroneous, it was a decision upon a mixed question of fact and law, and operates as *res judicata*. *Aghore Nath* v. *Kamini Debi* (10). Consequently, it is not open to such of the defendants, as were parties to the previous litigation, to contest the claim of the plaintiff in the present suit on the ground that a *raikumat* is not leviable under the law. No doubt, as regards the other defendants who were not parties to the previous litigations, it was open to the Judicial Commissioner to find, as he has found upon the evidence, that *raikumat* is not payable; but that determination is obviously of no benefit to the other defendants, who are bound by the decision in the previous suit. There is no anomaly involved in this position, because these defendants are in occupation of separate parcels, and a joint suit has been brought against them only by reason of the special provisions of the Chota Nagpur Tenancy Act. In fact, the suit is really in the nature of a composite suit for recovery of rent and *raikumat* against different defendants for different parcels of land.

The result is that this appeal is allowed, the decree of the Judicial Commissioner varied and a decree made for *raikumat* against those defendants only who were parties to the previous litigation. As regards the defendants who were not parties to the previous litigation, the decision of the Judicial Commissioner will stand confirmed. There will be no order as to costs.

Appeal allowed partly.

(9) 24 W. R. 4.
(10) 11 C. L. J. 461; 6 Ind. Cas. 554.

S. N. DAR, B.A. LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 3588 OF 1910.

June 25, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge.

KARIMULLAH—PLAINTIFF—PETITIONER

versus

Musammat KIMON AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884), s. 70 (a)—Onus *wrongly laid—Revision.*

A revision is not justified on the mere ground that the *onus* was placed on the wrong party.

Ram v. *Jowahir*, 64 P. R. 1885; *Hari Singh* v. *Dit Mal*, 22 P. R. 1886; *Sundar Singh* v. *Doru Shankar*, 20 A. 78; *Amir Hassan Khan* v. *Sheo Baksh Singh*, 11 C. 6; 11 I. A. 237, referred to.

Petition, under section 70 clause (1) (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the orders of the District Judge, Gurdaspur, dated the 31st May 1910, and 11th November 1910, reversing that of the Munsif, 3rd Class, Gurdaspur, dated 12th April 1910, decreeing plaintiff's suit.

Mr. *Badar Din Kureshi*, for the Petitioner.

Mr. *Fazal Ilahi*, for the Respondents.

JUDGMENT.—This is an application for revision under section 70 (1) (*a*) of the Courts Act and notice has been issued on the ground that the *onus* has apparently been wrongly laid in effect.

The suit is "unclassed" of the value of Rs. 99 and is for cancellation of a sale by a widow and for possession of the property sold. The issues were, whether the plaintiff was reversioner of Rahim Bakhsh, husband of the widow, whether the parties were bound by Customary Law or Muhammadan Law, whether the plaintiff was barred from suing, whether the purchase-money was used by the widow for a purpose specified in her husband's Will, and whether the alienation was for legal necessity and for consideration. The lower Appellate Court dismissed the suit on the ground that the plaintiff had not proved that the widow could not, under the Customary Law governing the parties, alienate the house in suit and the alleged error in imposing the burden of proof is with reference to this point.

The lower Appellate Court considered various rulings and arrived at the conclusion on those rulings that the burden of establishing a custom limiting the widow's power of alienating the property in suit, was on the plaintiff and had not been discharged. The lower Appellate Court did not ignore the

point and does not appear to have ignored any authority or instance cited.

In *Ram* v. *Jowahir* (1), Barkley and Spitta, JJ., held that interference in revision was not justified by an erroneous decision whether the plaintiff had a cause of action for the relief prayed for, provided that the Court below had jurisdiction to decide, and did decide, whether a cause of action existed.

In *Hari Singh* v. *Dit Mal* (2), Plowden, S. J. and Barney, J., held that interference in revision was not justified where a Court, having jurisdiction over a suit or other proceeding, had to consider the plea of limitation and did consider it and decided it erroneously.

In *Sundar Singh* v. *Doru Shankar* (3), Edge, C. J., and Banerji, J., decided that the fact that a Court, having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it afforded no ground for revision.

In each of the above cases, the ruling of their Lordships of the Privy Council in *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (4) was cited.

There is a very wide distinction between the powers of this Court under section 70 (1) (*a*) and 70 (1) (*b*) of the Courts Act prior to its amendment by Punjab Act I of 1912, and this distinction is apparently frequently lost sight of.

The counsel of perfection doubtless would be for every question of law to go to the highest Court in the Province, but considerations of the expense of the maintenance of a Court of sufficient strength to deal with every case, and of avoiding waste of time over petty cases by giving finality on questions of law to subordinate Courts in such cases, have resulted in the exclusion of certain cases from the provisions of section 70 (1) (*b*) and it is, in my opinion, absolutely illegal to apply section 70 (1) (*b*) to such cases in the guise of section 70 (1) (*a*). The question of *onus* consequently cannot, in my opinion, be touched in this case and the other points taken have no force.

The application is dismissed with costs.

Application dismissed.

(1) 64 P. R. 1885.
(2) 22 P. R. 1886.
(3) 20 A. 78
(4) 11 C. 6; 11 I. A. 237.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 12 OF 1911.

January 16, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge and Mr. Justice Batchelor.

JIVAJI SAMBHAJI KAMBLI—APPELLANT

versus

FAKIR SABAJI KAMBLI—RESPONDENT.

Bombay Hereditary Offices Act (Bom. Act III of 1874), s. 67(d)—Jurisdiction of Civil Court—Vatandar—Suit for declaration that plaintiff was head of Vatan family and entitled to certain share.*

A suit to obtain a declaration that the plaintiff is the head of a family of Vatandars and in consequence is entitled to a certain share in the Vatan belonging to the family, falls under the bar of section 67 (*d*) of the Hereditary Offices Act and, consequently, is not cognizable by a Civil Court.

Govind Sitaram v. *Bapuji Mahadeo*, 18 B. 516 and *Balkrishna Chimnaji* v. *Balaji Ramchandra*, 9 B. 25, explained.

Second appeal from the decision of the District Judge of Ratnagiri, in Appeal No. 647 of 1909, confirming that passed by the Subordinate Juge at Malvan in Civil Suit No. 241 of 1903.

Mr. *A. G. Desai*, for the Appellants.

Messrs. *S. S. Patkar* and *V. R. Shirur*, for the Respondents.

JUDGMENT.

CHANDAVARKAR, J.—The first question is, what is the relief which the plaintiff has asked for by his plaint in this suit and,

*The section runs as follows:—

In the register of lands and allowances in consideration whereof liability to serve still exists, the Collector shall specify:—

(*a*) the area of the lands, the names of the occupants, the survey number and assessments, the quit rent, if any, leviable, and the net revenue alienated by Government, the amount and nature of the cash or other allowances, the source from which they are payable, and the land and allowances assigned, for the remuneration of officiators:

(*b*) the names of the heads of families and of the representative Vatandars:

(*c*) whether the service is performed by one representative Vatandar or otherwise: if by several in successive periods, the order in which they are to succeed each other:

(*d*) the proportional share of the Vatan possessed by each head of family which may be expressed in annas or fractions of a rupee:

(*e*) the number of officiators required to perform the duties:

(*f*) the nature of the settlement of inferior village Vatans referred to in Part X: * * *

(*g*) such other particulars as Government may (from time to time) order to be recorded.

secondly, whether that relief is barred by the provisions of the Vatan Act.

It is urged before us by Mr. Desai that the Civil Court has jurisdiction to entertain the suit because what is asked by the plaintiff is not any relief which would be prohibited by section 67 of the Vatan Act, but a mere declaration that he is a member of Sambhu's branch, and that as such he has a two-thirds share in the Vatan belonging to that branch. We have had the plaint in the original read out to us and we have carefully considered its terms and its prayer. The summary of it as given by the Subordinate Judge in his judgment is substantially correct. In his plaint, the plaintiff complains that he belongs to Sambhu's branch of the Vatan family; that Sambhu was the head of that branch so long as he was alive; that he dealt with the Revenue Authorities, executed *kabulayats*, and owned a particular share; but that since Sambhu's death, the defendant has been successfully posing as the head of the Vatan entitled to deal with the Collector and to pass *kabulayats*, and, therefore, entitled to be put upon the record under section 67 as the head of the branch. It is for the purpose of getting the defendant out of the way and having his own name recorded as the head of the branch in the Collector's Register that the suit has been brought. That is substantially the nature of the suit, and so it has been treated by both the Courts below. But Mr. Desai relies in support of his argument on the decision of this Court in *Govind Sitaram* v. *Bapuji Mahadeo* (1), where Sargent, C. J., held that the duty of the Collector, as determined by section 67 of the Vatan Act, was confined to specifying the names of the heads of families and the proportionate part held by each head, but that he was in no way concerned with the rights of the members of a particular branch *inter se*. The meaning of that decision is that it is for the Collector, in the first instance, to determine who is the head of a particular branch of a Vatan family. Having determined that, it is also the sole function of the Collector under the Act to determine the proportionate part possessed by that head. But given the head and the proportionate part he possesses, as determined by the Collector in the exercise of his exclusive jurisdiction, the question what the rights of the members of that branch *inter se* are, with regard to their shares in the proportionate part so determined, is a question which (according to the decision cited) lies within the province of a Civil Court. The judgment in *Govind Sitaram* v. *Bapuji Mahadeo* (1) would at first sight seem to be in conflict with a prior decision of this Court to which Sargent, C. J., was also a party, *viz.*, *Balkrishna Chimnaji* v. *Balaji Ramchandra* (2). But a close examination of both the cases satisfies us that there is no conflict. What the plaintiff in the latter case sought was a declaration of his share in the Vatan and of his title to have his name entered in the Vatan Register. That was under section 97. If he had asked merely for a declaration of his share in the Vatan without any reference to his title as the head of the family and the proportionate part which he possessed as such head, it would have been held that the suit lay. Sargent, C. J. pointed out in his judgment that it was true that the Court could not make a declaration of his right to a one-fourth share of the Vatan, without first determining whether he is the adopted son of Chimnaji; but that "the declaration prayed for would be beyond the Court's jurisdiction." That declaration related to the question of headship and the share in respect of it. In the suit before us now, that is in substance the declaration prayed for.

For these reasons, the decree must be confirmed with costs. There must be separate sets of costs.

BATCHELOR, J.—I agree that this is a suit to obtain a declaration from the Civil Court to the effect that the late head of the family, Sambhu, being now dead, the present head of the family is one of the plaintiffs and not one of the defendants and that the plaintiffs are in consequence entitled to a proportional share of the Vatan. A suit of this character seems to me to fall directly under the ban of clause (*d*) of section 67 of the Hereditary Offices Act. The decision in *Govind Sitaram* v. *Bapuji Mahadeo* (1) can be of no assistance to the present plaintiffs who are not suing as Vatandars for the adjustment of any dispute between themselves as to their distributive shares in a total portion awarded by the Collector to the head of the family.

(1) 18 B. 516.

(2) 9 B. 23.

I agree, therefore, that this suit is not competent.

Decree confirmed

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 223 OF 1912.

June 21, 1912.

Present:—Sir Ashutosh Mookerjee, Judge, and Mr. Justice Beachcroft.

Thakur MADAN MOHAN NATH SAHI DEO—JUDGMENT DEBTOR—APPELLANT

versus

Maharaja PRATAP UDAI NATH SAHI DEO—DECREE-HOLDER—RESPONDENT.

Chota Nagpur Landlord and Tenant Procedure Act (I of 1879 B. C.), s. 123—Chota Nagpur Tenancy Act (V of 1908 B. C.), s. 208, sub-s. (1)—Bengal Rent Recovery Act (VIII B. C. of 1865), ss. 5, 16—Decree for rent of tenure—Exemption of portion of tenure by Commissioner in favour of maintenance grantees—Sale of unexempted portion of tenure in execution of decree for rent of tenure—Whether purchaser gets free of encumbrance or not—Sale proclamation, what to be stated in—Apportionment of rent of exempted and unexempted portion.

A decree for rent was obtained in respect of a tenure comprising several villages. The judgment-debtor tenure-holder had created, upon some of the villages, encumbrances by way of maintenance grants in favour of his dependents. When the decree-holder applied for execution of his decree by sale of the tenure, the maintenance grantees applied for exemption of the villages comprised in their grants under section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and an order of exemption was made by the Commissioner:

Held, (1) that, notwithstanding the order for partial exemption of the tenure from sale, the decree was to be executed as a decree for rent in respect of the unexempted portion, and the effect of a sale of the unexempted portion was to pass the property to the purchaser free of all encumbrances:

(2) that the decree-holder was not bound to apportion the rent that might be leviable from the exempted and unexempted villages respectively, and that he would comply with the provisions of section 5 of the Bengal Rent Recovery Act of 1865 if he stated in the sale proclamation the yearly rent payable in respect of the entire tenure together with a note that the villages named were exempted from sale under the order of the Commissioner.

Appeal from the order of the Deputy Collector of Ranchi, dated May 8th, 1912.

Babu *Bipin Chandra Mallik*, for the Appellant.

Babu *Jogesh Chandra Dey*, for the Respondent.

JUDGMENT.—This appeal raises a question of first impression as to the construction of section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. It appears that the respondent obtained a decree for rent against the appellant in respect of a tenure on the 19th April 1905. On the 28th November 1910, the application for execution now under consideration, was presented. The judgment-debtor, tenure-holder, had created, on a part of his tenure, encumbrances by way of maintenance grants in favour of his dependents. The properties of these maintenance holders were at the time under the charge of the Encumbered Estate Act Authorities. They applied for exemption of the villages comprised in the maintenance grants under section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Upon the recommendation of the Deputy Commissioner, the order of exemption was made by the Commissioner on the 30th March 1911. The question in controversy now is, what is the precise effect of this order of exemption.

Before we determine this question, it is necessary to consider, in the first instance, by what statutory provisions the matter before us is governed. The Commissioner made his order for exemption ostensibly under section 203 of the Chota Nagpur Tenancy Act, 1908. In our opinion, the order in question could not have been made under that section, but this does not affect the validity of the order inasmuch as it could have been made under section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Sub section (1) of section 208 of the Chota Nagpur Tenancy Act, 1908, shows that the provisions contained therein apply to cases of execution of decrees passed by the Deputy Commissioner under that Act. The decree now under execution was passed prior to the commencement of the Chota Nagpur Tenancy Act, 1908. Consequently, under section 8, clause (e) of the Bengal General Clauses Act, 1899, the provision applicable is that contained in section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and the effect of that section we now proceed to consider.

Section 123 provides that if the decree, of which execution is sought, for arrears of rent in respect of a tenure, the decree-holder may make an application for the sale of such tenure,

and the tenure may thereupon be brought to sale in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery Act, 1865, and all the provisions of that Act shall, as far as may be, apply. This is followed by a proviso to the effect that the Commissioner may by order in any case in which he may consider it desireable so to do, prohibit the sale of any tenure or portion thereof.

On behalf of the judgment-debtor, it has been contended that the effect of an order of exemption of a portion of a tenure by the Commissioner is to make it impossible for the decree-holder to execute the decree as a decree for rent under the Bengal Rent Recovery Act, 1865. It is plain that the effect of an order of exemption of a part of the tenure is not to deprive the decree-holder entirely of his right to execute the decree; for if that had been the consequence, the effect would have been the same as if the entire tenure had been exempted from sale. We take it, therefore, that notwithstanding the order for partial exemption, it is open to the decree-holder to execute his decree. The real question in controversy is, whether, on an order for partial exemption, the decree is to be executed as a decree for money or as a decree for rent. On behalf of the appellant, it has been argued that the order for exemption can be made in respect of a part of the tenure only where the decree-holder seeks to execute a decree for rent of a fraction of a tenure, and in support of this view, reference has been made to the case of *Dwarka Nath Chuckerbutty* v. *Dhun Monee Chowdrain* (1). That case, in our opinion, has no application; it merely shows that when a share of a tenure has been treated as an independent and self-contained tenancy, in an execution of a decree for rent due in respect thereof, the property may be sold as if it were an entire tenure. But it is plain that the provisions of section 123 cannot be restricted in the manner suggested, because if that was the only case where an order for partial exemption could be made, that would really be a case for application for sale of what constituted an entire tenure, and the prohibition would in substance be of the sale of such a tenure. Section 123 plainly covers a case of the description now before us, when an application is made for the sale of all the villages comprised in a tenure, but the Commissioner, for reasons sufficient in his opinion, directs the exemption of some of the villages from the sale. In such a case, it is plain that the sale of the unexempted portion is still to take place under the Bengal Rent Recovery Act of 1865; in other words, the restrictions in the proviso do not affect the provisions in the substantive part of the section for the sale of the property. Reliance, however, has been placed upon sections 4 and 16 of the Bengal Rent Recovery Act, 1865, to show that the Legislature contemplated that sales under that Act should be sales of entire tenures. It may also be conceded, as laid down by the Full Bench in *Shim Chand Mitter* v. *Juggut Chunder Sircar* (2), that, ordinarily, when a sale takes place of an entire tenure under the Bengal Rent Recovery Act, 1865, the purchaser acquires the property free of all encumbrances. But there is, in our opinion, no inconsistency between the proviso to section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and the provisions of the Bengal Rent Recovery Act, 1865. It was competent to the Legislature to lay down that a sale under section 123 would be a sale under the Bengal Rent Recovery Act of 1865, notwithstanding the fact that what was sold was not the entire tenure but only the unexempted portion thereof. This, we think, is the result of the legislative provisions on the subject. If the contrary view were maintained, the result would be that by an order of exemption, the landlord decree-holder would be practically deprived of his security for the rent. If the sale of the unexempted portion was merely the sale of the right, title and interest of the judgment-debtor, the property might not be saleable at all, and a purchaser might not be found willing to bid a sufficient sum for the satisfaction of the judgment-debt. The Legislature could not have intended that because, as in the case before us, an order of exemption is made for the benefit of persons whose title has been created by the defendant under circumstances which could not be controlled by the landlord, the landlord practically loses his security for the arrears of rent due to him. We hold accordingly that the effect of a sale, of the unexempted portion, is to pass the property to

(1) 15 W. R. 524.

(2) 22 W. R. 541.

the purchaser free of all encumbrances. When the purchaser has obtained the property, what his precise position will be, that is, whether he will be, jointly with the holder of the exempted portion of the property, liable for the whole rent is a matter which does not require consideration at this stage. It is conceivable that the purchaser may with good reason contend that as the landlord, though under compulsion, has brought to sale some only of the villages included in the tenure, he is bound to apportion the rent; the consequence of such a sale, if the view suggested is well founded, may be that the tenure is ultimately split up into two distinct tenures. These, however are matters which must be left open for consideration, if and when the contingency arises. It is sufficient for us to hold now that the entire decree may be executed as a decree for rent against the unexempted portion of the tenure, and that the auction-purchaser will acquire the status of a purchaser under section 16 of the Bengal Rent Recovery Act, 1865. The view put forward by the judgment-debtor appellant, therefore, cannot be accepted.

A minor question has been raised in the appeal and requires only a brief consideration. It has been suggested that the sale proclamation was not properly drawn up and that it was not competent to the decree-holder to set out in the sale proclamation the amount of rent that might be legitimately levied from the villages sought to be sold and the villages exempted respectively. Reference has been made in this connection to section 5 of the Bengal Rent Recovery Act, 1865. That section provides that "the notice of sale shall specify, in the words used in the plaint in the suit in which the decree was made, the name of the village, estate and *purgunnah* or other local division, in which the land comprised in the said under-tenure is situated, the yearly rent payable under the said under-tenure and the gross amount recoverable under the said decree." It is clear that in the case before us, the decree-holder was not bound to apportion the rent that might be leviable from the exempted and unexempted villages respectively. He would have strictly complied with the provisions of section 5, if, in the words of the section, he had stated yearly rent payable in respect of the entire tenure together with a note that the villages named were exempted from sale under the order of the Commissioner. The judgment-debtor, therefore, cannot reasonably complain of what has been done by the decree-holder. At any rate, as a new sale proclamation is to be issued, we direct that it be drawn up in strict conformity with section 5 of the Bengal Rent Recovery Act, 1865. The rent will not be apportioned, the rent payable annually in respect of the whole tenure will be stated together with a note that certain specified villages were exempted from sale.

The result is that this appeal fails and is dismissed with costs. We assess the hearing-fee at ten gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 739 OF 1910.

April 18, 1912.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

P. M. NARAYANA NAMBUDRI—APPELLANT

versus

MUHAMMAD AND OTHERS—RESPONDENTS.

Mortgage—Kanom—*Landlord and Tenant*—*Lease*—*Right of landlord to possession*—*Tenant, whether can dispute landlord's possession*—*Estoppel*—*Evidence Act (I of* 1872), *s.* 115.

A tenant, who has got into possession under a lease from the landlord, is bound to restore the landlord's possession before he can set up an independent title.

Where defendants got into possession under a *kanom* deed from plaintiff, and after the execution of the *kanom*, the plaintiff accepted quit-rent *pattahs* from Government in respect of some of the lands demised:

Held, that the arrangement between the plaintiff and Government did not bar plaintiff's right to possession from the defendants.

Muthuviayan v. *Sinna Samavaiyan*, 28 M. 526, 15 M L. J. 419, referred to.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 764 of 1909, presented against the decree of the District Munsif of Ponani, in C. S. No. 539 of 1908.

FACTS.—The facts of the case are clear from the following judgment of the lower Appellate Court :—

"Plaintiff sued to recover certain properties which had been demised on Kanom under

GHULAM ALI v. SHIV NATH.

Exhibit A to defendants Nos. 1—3 on 5th December 1904.

Plaint item No. 1 comprises plots A and A1, in the plan Exhibit M. Plaint item No. 2 comprises plots C and C1. The properties, which are Survey Nos. 102-1, 103-8, and 103-47 of Eramangalam amshom, had been originally demised to one Moosamu, 14th defendant, who assigned his rights to defendants Nos. 2 and 3 under Exhibits C and D in 1891 and 1894. Subsequently the Kychit, Exhibit A, was executed by defendants Nos. 1—3 to plaintiff.

2. Defendants Nos. 1—6, while admitting the execution of Exhibit A, contended that the plaint properties were not identical with those included in Exhibit A, and that they were not put in possession of the plaint properties. The Munsif found in plaintiff's favour on the first point, and that defendants were in possession on the date of Exhibit A.

3. It appears that subsequent to the settlement of the Ponnani Taluq, plaintiff claimed the *jenm* right to certain lands as against Government, and gave the Collector notice of his intention to file a Civil Suit; see Exhibit F. Subsequently, however, plaintiff abandoned his claim and accepted quit-rent *patta* Exhibit E in respect of the plaint properties from Government. Quit-rent *pattas* Exhibits II, III and IV for the same lands had, it appears, been previously granted to 2nd defendant, and two persons named Gopala Menon and Narayana Menon, who are in possession of the lands.

4. The question for decision is whether by the acceptance of the *patta*, Exhibit E, plaintiff has lost his *jenm* right to the lands. The *pattadars*, 2nd defendant, Gopala Menon and Narayana Menon, are in possession of the lands. It is not proved that the *pattas* were cancelled prior to the issue of a fresh *patta* to plaintiff. The *pattadars* are entitled to hold the lands so long as they pay the revenue properly leviable from them and they can only be ousted under legal process taken under Act II of 1864, see *Pullanappally Sankaran Nambudri* v. *Vittil Thalakat Muhamod* (1). It is clear, I think, that plaintiff is not entitled to recover possession of the properties.

In the plaint, plaintiff, while claiming the lands as the *jenm* of his Mana, alleged that he had also a quit-rent right. Then it is said that defendants are estopped under section 116 of the Evidence Act from denying plaintiff's title.

I agree with the Munsif that no question of estoppel arises in this case. Defendants Nos. 1 to 6 were in possession when they attorned to plaintiff and executed Exhibit A. After defendants had filed their written statements, plaintiff stated that he had only a quit-rent right and the plaint was amended accordingly. In order to enable plaintiff to succeed, he must, as the Munsif observes, show that he has a title superior to that of defendants.

The *patta*, Exhibit E, was obtained by plaintiff subsequent to the grant of *pattas* to defendants. Plaintiff's suit is not maintainable. I agree with the lower Court's findings on issues 1, 2, 8 and 9.

I dismiss the appeal with costs."

Plaintiff appealed to the High Court.

Mr. *K. P. M. Menon*, for the Appellant.

JUDGMENT.—We think that, as the defendants got into possession as Kanomdars under the plaintiff, they are bound to restore his possession before they can set up an independent title [Cole on Ejectment, page 216, *Muthuvaien* v. *Sinna Samavaiyan* (2)]. We must, therefore, set aside the decrees of the lower Courts and give the plaintiff a decree as prayed for. Improvements, according to the District Munsif's finding, shall be paid for. Plaintiff will have costs throughout from respondents Nos. 1 to 6 and Nos. 13 to 15. Time for redemption will be six months from this date.

Appeal allowed.

(1) 28 M. 505 at p. 507; 15 M. L. J. 416.

(2) 28 M. 526; 15 M. L. J. 419.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 12 OF 1911.

June 21, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Rattigan.

Sheikh GHULAM ALI—PLAINTIFF—APPELLANT

versus

Diwan SHIV NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Trusts Act (II of 1882), s. 63—Following trust property—Liability of third person—Civil Procedure Code (Act V of 1908), s. 151—Several appeals—Some lying to the lower Court of Appeal—Some lying to

GHULAM ALI v. SHIV NATH.

the Chief Court—Same questions involved in all appeals —Power of Chief Court to direct all appeals to be heard in the Chief Court without presentation to the lower Appellate Court.

Trust property may be followed into the hands of any one in whose hands it can be identified. The only person, who can escape liability for trust property in his possession, is a *bona fide* transferee for value without notice of the trust, or a transferee from him.

By two deeds, one *L.* vested his property in trust in order that his debts might be liquidated and appointed *P.* and *H* as trustees. One of the two deeds was attested by *S.* the son of *L.* *P.* and *H.*, as trustees, executed certain promissory-notes in favour of certain creditors of *L.* After *L.*'s death, his son *S.* repudiated the trust. Soon after, the District Judge released the original trustees, *P.* and *H.*, and appointed in their place *G.* and *R.* as trustees. Thereafter, *S.* sued *G.* and *R.* for possession of the trust property but this suit was dismissed on compromise on the understanding that all the property had been restored to the plaintiff *S.* As a matter of fact, however, some property remained with the trustees *G.* and *R.*, while some was restored to *S.* The creditors sued *S*, *G.* and *R.* on the footing of pro-notes which had been executed by *P.* and *H.*, the original trustees. The first Court dismissed the suits as against *S.* on the ground that he was no party to the pro-notes:

Held, that *S.* was equally liable with *G.* and *R.*

Where the question involved in several appeals is the same but only some of those appeals lie of right to the Chief Court, it is competent to the Chief Court to direct that all the appeals should be heard in the Chief Court, without going through the formality of presenting those appeals, which lie in the lower Court of Appeal, to that Court and then transferring them to its own file.

First appeal from the order of the District Judge, Lahore, dated the 31st October 1910, dismissing plaintiff's claim.

The Hon'ble Mr. *Shadi Lal*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The question involved in the seven appeals No. 12 to 18 of 1911 is precisely the same, and they will be disposed of by one judgment.

The appeal lay of right to this Court in cases Nos. 12 and 13, in each of which the amount involved is over Rs. 5,000. In the remaining five cases, the amounts were under Rs. 5,000 and the appeals would ordinarily have been to the Divisional Court, but as it was desirable that all should be dealt with together, the Judge by whom these appeals were admitted, acting under section 151, Civil Procedure Code, directed that these five appeals also should be heard in the Chief Court without going through the formality of presentation to the Divisional Court in order that orders of transfer might be immediately passed.

A preliminary objection has been made by Counsel for the respondent, Diwan Shib Nath, that this procedure is irregular. We have overruled this objection, as we consider that it would be a manifest abuse of Court process to put the appellants to the unnecessary trouble of going first to the Divisional Court, where there is no intention of permitting that Court to take any action beyond registering the appeals as duly presented. Section 151, Civil Procedure Code, gives us ample powers to meet the technical difficulty set up. It could, if necessary, be disposed of by making over the appeals even now to the Divisional Court with instructions to transfer them at once to the Chief Court immediately after registration, and under section 5 and section 14, Limitation Act, no question of limitation would be listened to, but we decline to make any such ridiculous order and hold that the appeals are properly before us for decision.

The essential facts of these appeals are very simple. By two deeds, dated 21st March and 20th April 1903, the latter attested by Diwan Shib Nath, his father, the late Diwan Lachman Das, made over his property in trust to Mr. Parker and Mr. Herbert in order that his debts might be liquidated. On the 25th May 1903, the trustees executed the promissory notes, on which these suits are based, in favour of certain creditors for comparatively small sums making them payable on the 26th January 1904, pages 30, 32 of the paper-book.

On the 1st January 1904, Diwan Lachman Das died and his son, three days later, gave notice repudiating the trust, to which he had previously consented (page 32). On the 21st April 1904 (pages 50—52), the District Judge released the original trustees and appointed in their place two other persons now represented by defendants Nos. 2 and 3.

On the 1st August 1907, Diwan Shib Nath instituted a suit against the second trustees for possession of the trust property. This suit was dismissed on the 20th May 1909 on compromise (pages 53 and 54) on an understanding that all the property had been restored to the plaintiff, but it has transpired that the restoration has been in fact incomplete. This is the finding of the lower Court, based on Diwan Shib Nath's pleas (pages 56,

59 and 61) and as there was no dispute on the point, the issues of the present suits (page 64) do not go into the question how much of the property is still in the hands of the second trustees and how much in those of Diwan Shib Nath.

The present suits by the creditors, based on the promissory-notes of 1903, were instituted in January 1910 as against (1) Diwan Shib Nath and (2) the second trustees. The lower Court has given decrees against the latter only, and these appeals are by the plaintiffs to enforce the joint liability of Diwan Shib Nath. None of the facts as given above are disputed.

The lower Court has dismissed the suits as against Diwan Shib Nath on the technical ground that he was no party to the promissory-notes sued on. This is a singularly unconvincing ground as defendants Nos. 2 and 3 were also no parties to the pro-notes, and yet they have not contested liability. Where the lower Court has gone wrong, however, is in overlooking the well known legal principle that trust property can be followed into the hands of any one in whose hand it can be identified. This is laid down in section 63, Indian Trusts Act, II of 1882, read with the illustrations thereto, and in the body of English case law of the Court of Chancery in its Equitable Jurisdiction upon which the Indian Act is framed. The question is discussed in Lecture X of Agnew's Law of Trust in British India, 1832, being the Tagore Law Lectures of 1881. The principle may be summarised by saying that the only person who can escape liability for trust property in his possession is a *bona fide* transferee for value without notice of the trust or a transferee from him. There is no attempt to make an allegation that Diwan Shib Nath can be brought into this category. His Counsel felt unable to argue either (1) that the trust was void, or (2) that Diwan Shib Nath had no notice, and (3) that he had no trust property in his possession. Under these circumstances, his joint liability is clear.

There is also no answer to a further plea of the plaintiffs-appellants that the interest allowed by the District Judge at 6 per cent. should have been made payable to the date of realisatioon instead of the dato of decree.

The appeals are accordingly accepted. The decrees of the lower Court are varied by making Diwan Shib Nath, defendant No. 1, liable equally with defendants Nos. 2 and 3 for the amounts decreed, and further by making the interest allowed at 6 per cent. payable from the date of institution of the suits till realisation of the amounts by the plaintiffs. The amounts will be realisable from such property only as is found in execution proceedings to be in the possession of the various defendants as property included in the trust. The decrees will carry costs throughout against all the defendants.

Appeals accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1798 OF 1908.

July 4, 1912.

Present:—Mr. Justice Sharfuddin and Mr. Justice Richardson.

Rani HEMANTA KUMARI DEBI—PLAINTIFF—APPELLANT

versus

KULSAMANNESSA BIBI—DEFENDANT—RESPONDENT.

Enhancement of rent—Raiyat *under separated shares of tenure—Purchase of one share by plaintiff—Suit for enhancement of rent by plaintiff without joining owners of other shares of tenure, whether maintainable—Bengal Tenancy Act (VIII of* 1885), *ss.* 3 *cl.* (9), 30, 188—*Joint landlords—Holding.*

The purchaser of one of two separated shares of a tenure is not entitled to bring a suit for enhancement of his share of rent against a *raiyat* who holds under the owners of the two separated shares, without joining the owner of the other separated share as a plaintiff.

Hurry Churn Bose v. *Raja Runjit Singh*, 1 C. W. N. 521; 25 C. 917 and *Baidya Nath De Sarkar* v. *Sheikh Jhin*, 2 C. W. N. 44, 25 C. 917, relied upon.

A purchaser is not the landlord of a holding within the meaning of section 30, and the owners of the separated shares of the tenure are still joint landlords within the meaning of section 1.

Appeal from the decree of the first Sub-Judge of Mymensingh, dated June 12th, 1908, affirming that of the Munsif of Jamalpur, dated March 4th, 1908.

Babus *Kishori Lal Sirkar* and *Debendra Nath Bagchi*, for the Appellant.

Maulvi *Nuruldin Ahmed*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for enhancement of the defendant's rent. The plaintiff is the present owner of a separated 10-anna share of a certain estate. This 10-anna share was in the

year 1885 carved out of a separated 12-annas share of the same estate, the latter share and the 4-annas share having been formed into separate estates in the year 1344 as the result of a partition by metes and bounds. Subject to the estate, there was a tenure and it may be conceded that when the separated 12-annas share of the estate was divided into two parts, the separated 12-annas share of the tenure subordinate to it was also divided into two tenures, so that five-sixths of the whole 12-annas came to be held as a separate tenure under the 10-annas proprietor and the remaining one-sixth as a separate tenure under the 2 annas proprietor. In 1335, the 10-annas proprietor brought a suit against the holders of the five-sixths share of the tenure for rent. He obtained a decree and had their share sold and purchased it himself. The defendant is a *ryot* holding as such certain land which she formerly held under the owners of the two separated shares of the tenure. The plaintiff seeks to enhance her rent without joining in the suit the owner of the one-sixth share of the tenure. Both the lower Courts have held that such a suit is not permissible under the provisions of the Bengal Tenancy Act. The lower Appellate Court says: "There is, however, no authority to hold that even if those shares of the *taluq* be considered two separate *taluqs*, the plaintiff as owner of the five-sixths share by virtue of her auction purchase is entitled to enhance the rental of five-sixths share of each of the *ryoti* holdings under the entire *taluq*. This proposition of the plaintiff does not at all seem to me equitable. Where the lands of the *taluq* have not been divided representing the aforesaid shares of it, one and all the *ryoti* holdings within it shall be taken as held under the entire body of landlords owning the whole *taluq*. As the entire body of landlords have not joined in bringing this suit, the plaintiff, being only the owner of it to the extent of five-sixths share, cannot maintain this suit for enhancement." We think that the view of the law on which the lower Appellate Court has acted is supported by the cases to which that Court has referred, namely, the case of *Hurry Churn Bose* v. *Rajah Ranjit Singh* (1) and the case of *Baidya Nath De Sarkar* v. *Sheikh Jhin* (2), as we conceive, the law applied in those cases is now well-settled and ought to be well known. The question depends in the first place on the meaning of the word "holding" as used in section 30 of the Bengal Tenancy Act, which again depends on the definition of the word in clause (9) of section 3. What has been held is that the word "holding" as used in the Tenancy Act, with reference to a *raiyat*, means an entire parcel or parcels of land and that a landlord who is only entitled to a fractional share of the landlord's interest in the land is not entitled under section 30 of the Act to sue alone for enhancement of rent. Reference was made to section 188 of the Act and it was argued that the owners of the two separated shares of the tenure are not joint landlords within the meaning of that section. Obviously, the division of the 12-annas share of the tenure for the purpose of the division of the same share of the proprietary interest, unaccompanied by a partition of the land by metes and bounds, does not necessarily involve a division of the *raiyati* holdings under the tenure and if the *raiyats* have agreed to pay or have paid their rent separately to the owners of the separated shares of the tenure in proportion to those shares it does not follow that they have agreed to the division of their holdings for any other purpose. For the present purpose, as we conceive, the owners of the separated shares of the tenure are still joint landlords. But we need not insist on that, because, as we have shown, the question depends not only on section 188, but also on the terms of section 30 and the plaintiff is not the landlord of a holding within the meaning of that section. The suit, having been brought under the Tenancy Act, is clearly subject to its provisions whether the defendants' holding came into existence before the passing of the Tenancy Act or not. It is really unnecessary to advert to what has been said in the Courts below.

The result is that the appeal fails and must be dismissed with costs.

Appeal dismissed.

(1) 1 C. W. N. 521; 25 C. 917.
(2) 2 C. W. N. 44; 25 C. 917.

POHKAR SINGH *v.* RAM DIN.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1252 OF 1911.
June 27, 1912.
Present:—Mr. Justice Piggott.
POHKAR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
RAM DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bundelkhand Encumberd Estates Act (I of 1903), —Benefi tunder the Act claimed only by some mortgagors —Integrity of mortgage broken.

The failure of the mortgagee to make any claim against some of the mortgagors, who had obtained the benefits of the Bundelkhand Encumbered Estates Act, in a case in which some of the mortgagors had, while others had not, obtained this benefit, cannot put the mortgagee in a worse position than he would have occupied if he had allowed the integrity of the mortgage to be broken up by permitting the holder of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. In such a case, the mortgagee is entitled to proceed against the share of the mortgagors, who have not obtained the benefit of the Act, for a proportionate share of the mortgage-money.

Makund Rai v. *Janki Bai*, 30 A. 141; A.W.N. (1908) 43; 5 A. L. J. 132, relied upon.

Second appeal from the decision of the District Judge of Jhansi, dated the 28th of July 1911.

Mr. *D. C. Banerji*, for the Appellant.
Mr. *Sawhny*, for the Respondents.

JUDGMENT.—This was a suit for foreclosure on a mortgage, dated the 21st of May 1877. The first defendant, Ram Din, was impleaded as heir of the mortgagor, and there were some 19 other defendants impleaded as subsequent transferees. For the purpose of the appeal now before me, it is sufficient to say that Mahadeo and Bhairon, defendants Nos. 13 and 14, have acquired the equity of redemption in one half of the property originally mortgaged while the remaining defendants are interested in the other half. The property in question is situated in the district of Jalaun and it has been found that Mahadeo and Bhairon took advantage of the provisions of Bundelkhand Encumbered Estates Act (I of 1903). No claim was preferred against them in respect of the mortgage now in suit and there is no doubt that they are entitled to the benefit of the provisions of section 12 of the said Act; that is to say, every claim against them in respect of this deed must be deemed for all purposes and at all times to have been duly discharged.

The Court of first instance, having found against the defendants on a number of other points raised, dismissed the suit as against the defendants Mahadeo and Bhairon, but held the remaining one half of the property to be liable for one half of the mortgage-debt and framed a decree accordingly. The remaining defendants, when appealing to the District Judge on other points, did not raise any plea to the effect that the failure of the plaintiffs to bring any claim under the Bundelkhand Encumbered Estates Act against Mahadeo and Bhairon had the effect of extinguishing the entire mortgage, and so making it impossible for the plaintiff to recover anything under its terms, even from those defendants who had never applied for, or obtained, the benefit of the Encumbered Estates Act. The learned District Judge, however, allowed this plea to be taken before him in argument, and I do not think that in so doing, he acted outside the discretion vested in him by law. He found against the plaintiffs on the point and, on this ground alone and without determining any of the other questions raised before him in appeal, he has dismissed the plaintiff's suit altogether. The same question was before me in the case of *Amar Chand* v. *Tulshi Ram*, S. A. No. 858 of 1911, decided by me on the 17th May 1912. I there expressed the opinion that the failure of the mortgagee to make any claim against those of his mortgagors, who obtained the benefit of the Bundelkhand Encumbered Estates Act, in a case in which some of the mortgagors had while others had not, obtained this benefit, could not put the mortgagee in a worse position than he would have occupied if he had, allowed the integrity of the mortgage to be broken up by permitting the holders of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. I am still of the same opinion. The failure of the plaintiffs in this case to make any claim as against Mahadeo and Bhairon, has the same effect in law as if the plaintiffs had accepted from these two defendants their proportionate share of the mortgage-debt and had handed over their share of the property freed from the encumberance. The mere fact that the plain-

tiffs as mortgagees might have held the share in the possession of Mahadeo and Bhairon liable for the entire mortgage-debt and left it to these defendants to proceed against the remaining persons interested in the mortgage property for contribution, does not, I think, affect the question now before me. The Special Judges under the Bundelkhand Encumbered Estates Act had very wide equitable jurisdiction; and, as a matter of fact, a special return was furnished by them showing the difference between the sums awarded by them and the sums which would have been decreed by a Civil Court in respect of the same claims. In the present case, if the plaintiffs had taken notice of the proclamation of Mahdeo and Bhairon under the Bundelkhand Encumbered Estates Act, and had brought forward their claim, it would have mattered very little whether they formally claimed the entire debt or voluntarily split up the mortgage. The award of the Special Judge would have been based upon their equitable claim to one-half of the mortgage-debt against one-half of the security. For these reasons, I hold the conduct of the mortgagees, in failing to bring any claim under the Bundelkhand Encumbered Estates Act, has had the effect of breaking up the integrity of the mortgage and that they are now entitled to proceed against one-half of the mortgaged property for recovery of one-half of the debt. I am confirmed in my opinion by the decision of this Court in the case of *Mahand Rao* v. *Janki Bai* (1). The learned District Judge endeavours to distinguish this case, and points out that the particular question now in issue was rather taken for granted than formally decided in that case. It is abundantly clear, however, that if the learned District Judge is right in his decision in the present case, then the reported case above referred to was wrongly decided I accept this appeal and, setting aside the decree of the lower Appellate Court, remand this case under Order XLI, rule 23 of the Code of Civil Procedure, for a decision on the merits on the pleas actually taken up by the contesting defendants in their memorandum of appeal to that Court. Costs will abide the event.

Case remanded.

(1) 30 A. 141; A. W. N. (1908) 43; 5 A. L. J. 132.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 534 OF 1910.

March 4, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

SHEKH ADAM HASANALI—APPELLANT

versus

CHANDRASHANKAR PRANSHANKAR

RESPONDENT.

Registration Act (III of 1877), s. 17 (e)—Construction of document—Composition deed—Test—Transfer of property to trustees for payment of debts—Registration.

The essential test of a composition deed is that there ought to be a compounding of debts due.

A deed, by which the owner of certain property transferred it to trustees for the purpose of enabling them to pay off his creditors, and in which there was nothing whatever to show that there was any composition, any settlement with the creditors, that the debtor should pay less than he owed to them and that they agreed to accept that composition, is not a composition-deed but merely a conveyance or a trust-deed and is compulsorily registrable.

Second appeal from the decision of the District Judge of Surat, in Appeal No. 101 of 1908, confirming that passed by the Subordinate Judge at Surat, in Civil Suit No. 254 of 1905.

Messrs. *Inverarity* and *Weldon*, with them Mr. *N. K. Mehta*, for the Appellants

Mr. *H. C. Coyjee*, with him Mr. *K. N. Koyajee*, for Respondents Nos. 1 & 2.

JUDGMENT.—It is clear upon the terms of Exhibit 67 that it cannot be regarded in law as a composition deed. All that appears from its recitals and terms is that the owner of the property transferred it to the trustees for the purpose of enabling those trustees to pay off his creditors. There is nothing whatever in the language of the deed to show that there was any composition, any settlement with the creditors that the debtor should pay less than he owed to them and that they agreed to accept that composition. The essential test of a composition deed is that there ought to be a compounding of debts due. Of that there is no trace whatever so far as the language of this document is concerned. It might be regarded as a conveyance or as a trust-deed, *i. e.*, a trust made by the debtor for the purpose of enabling the trustee to pay off his creditors. Form either point of view, it was compulsorily registrable, and not having been registered, it could not be admitted in evidence.

On these grounds, the decree must be reversed and the suit dismissed with costs throughout upon the respondents.

Decree reversed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1343 OF 1911.

June 29, 1912.

Present:—Mr. Justice Chamier.

BHAGWATI SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SARUP SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of deed—Bond—Simple mortgage—Charge—Limitation Act (IX of 1908), s. 31, Sch. I, Art. 132.

A. executed a usufructuary mortgage in favour of *B.* in 1880. In 1887, *A.* executed a bond in favour of *B.* which contained the following provisions: "If I do not pay on due date then when I come to redeem the land mortgaged, I shall pay this money with interest. Until I pay this money with interest, I shall not pay the mortgage-money.....When I pay, I shall pay the mortgage-money in a lump sum and redeem the fields...On these conditions I have written this *dastawez makfuli*:"

Held, that the bond was not a simple mortgage although it may have effected a charge.

Suits governed by Article 132 of the Limitation Act are not entitled to the benefit of section 31 of that Act.

When the construction of a deed is in question, rulings on the construction of deeds couched in different language are of very little use.

Second appeal from the decision of the District Judge of Jaunpur, dated the 13th June 1911.

Mr. *Gokal Prasad*, for the Appellants.

Mr. *Purushottam Das*, for the Respondents.

JUDGMENT.—This was a suit by the appellants upon a document executed in favour of their ancestor, Sheo Mangal Singh, by the first respondent, Sarup Singh, on September 20th, 1887. The appellants contended that the document was a simple mortgage and they claimed a decree for sale of certain land in two villages. The suit was resisted by the respondents on the ground that the document effected neither a mortgage nor a charge. The Munsif held that it effected either a mortgage or a charge and he gave the appellants a decree for sale of a part of the property, the rest of the property having passed into the hands of a purchaser for value without notice of the document in question. On appeal, the District Judge held that the document effected neither a mortgage nor a charge and he dismissed the suit. Before stating the terms of the document in question, it is necessary to point out that in 1880, the executant of the document had made an usufructuary mortgage of the land now sought to be sold in favour of the ancestor of the appellants and placed him in possession and the mortgagee was in possession at the date of the document no win question. This document, after reciting that the executant had taken Rs. 49 from Sheo Mangal Singh, contains a promise to re-pay the money with interest on or before June 23rd, 1883. Then follows this provision:—"If I do not pay on due date, then when I come to redeem the land mortgaged in *Mouzas* Ramnagar and Mohinidpore, I shall pay this money with interest. Until I pay this money with interest, I shall not pay the mortgage-money..... ..... When I pay, I shall pay the mortgage-money in a lump sum and redeem the fields ..... On these conditions, I have written this *dastawez makfuli*."

I have been referred to a number of rulings on the construction of different deeds but it appears to me that rulings on the construction of deeds couched in different languages are of very little use in a case of this kind. The rulings referred to are chiefly useful as showing that it has been for many years understood that certain words are used to denote a mortgage or a charge. It appears to me that the use of the words "*dastawez makfuli*" probably indicates an intention to make either a mortgage or a charge. But taking all the terms of the document together, I am unable to hold that it amounts to a mortgage. If it is a mortgage at all, it must be a simple mortgage. It seems to me it is not a simple mortgage for there is no express or implied agreement that in any event the creditor shall be entitled to bring the property to sale. On the contrary, the provision restricting the right to redeem the usufructuary mortgage upon payment of the amount of this document indicates that a sale was not contemplated. Nor is it likely that the executant of this document would have agreed that the equity of redemption in the mortgaged property should be liable to be sold at the end of one

year in case the money was not paid. After the passages set out above, there is a passage in which it is agreed that if the money is not paid, the creditor shall be entitled to recover the money from the executant and from his moveable and immoveable property. If a mortgage had been intended, I should have expected to find this clause giving the creditor a right to sell some specific porperty. But it does nothing of the kind. In my opinoin, this document is not a mortgage. It may have effected a charge. But if so, the suit is barred by limitation, for the cause of action accrued as long ago as 1883 and the present suit was not brought till 1910. The relevant Article of the Schedule to the Limitation Act would be Article 132 and suits governed by that Article are not entitled to the benefit of section 31 of the Limitation Act of 1908. Another possible view suggested by the decision in *Mahabir Prashad* v. *Durbijai Rai* (1) is that the appellants may have a right of suit hereafter if the usufructuary mortgage is redeemed and the money due on this document is not paid. I am of opinoin that the present suit was rightly dismissed by the lower Appellate Court. The appeal fails and is dismissed with costs including fees on the higher scale.

Appeal dismissed.

(1) 8 A. L. J. 233; 9 Ind. Cas. 482.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 795 OF 1911.

July 15, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr Justice Sadasiva Aiyar.

MUKKAMMAL *alias* KUPPAMMAL—APPELLANT

versus

KALIMUTHU PILLAY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 1—Withdrawal of claim by plaintiff—Right of plaintiff to resile from withdrawal before Court acts on the withdrawal petition.

Per Sundara Aiyar, J.—A mere petition withdrawing a suit would not debar the party making the petition from prosecuting the suit unless, in the meanwhile, the suit has been dismissed by the Court. He would have a *locus penitentiæ* until his petition is acted upon by the Court.

Per Sadasiva Aiyar, J.—A plaintiff, after he makes a petition withdrawing a suit, cannot withdraw this petition except on good grounds, nor can he be allowed to play fast and loose with the litigation launched by him at his sweet will and pleasure.

Second appeal against the decree of the Subordinate Judge of Tinnevelly, in A. S. No. 630 of 1909, preferred against that of the Additional District Munsif of Tinnevelly, in O. S. No. 44 of 1908.

Mr. *M. B. Doraiswmy Iyengar*, for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—The plaintiffs are two legatees under the Will of one Peramu Ammal. The defendant is the widow of Peramu Ammal's son. Peramu Ammal was entitled to half the property of her son and the defendant to the other half. The plaintiffs instituted this suit to recover from the defendant the property which they claimed to be entitled to under Peramu Ammal's Will. Both Courts have found that the Will executed by Peramu Ammal was a valid testamentary disposition and disallowed the defendant's plea that Peramu Ammal was of unsound mind and not competent to execute a Will.

It is urged in second appeal, with reference to the finding on the question of Peramu Ammal's testamentary capacity, that the lower Appellate Court ought to have received in evidence certain documents which would establish the defendant's plea. The lower Courts, relying on the evidence of plaintiff's witnesses and disbelieving the evidence adduced by the defendant, arived at the conclusion that Peramu Ammal was in a sound and disposing state of mind at the time she executed the Will, Exhibit A. Amongst the reasons given for disbelieving the defendant's evidence, is one that Peramu Ammal was not treated for insanity by the Hospital Assistant of the place where she was living. The documents, which, it is stated, ought to have been received in evidence, are intended to show that, as a matter of fact, she was treated by the Hospital Assistant as an out-patient. An application was put in the lower Appellate Court supported by one affidavit which

stated that the documents tendered in the Appellate Court were found to be missing in the Court of first instance when they were required. No attempt seems to have been made in the District Munsif's Court for getting an adjournment to enable the defendant to find out the missing documents. The defendant concluded his case by examining witnesses to prove Peramu Ammal's state of mind. I cannot hold that the Subordinate Judge was wrong, in the circumstances, in refusing to receive these documents in evidence in appeal. Nor would the documents show anything more than that Peramu Ammal was suffering from melancholia, a fact which would not go sufficiently far to establish the defendant's plea that she was of unsound mind. I must, therefore, hold that the finding is not open to any legal objection.

The next point urged by the learned Vakil for the appellant is, that the 1st plaintiff, who was entitled to half of the property sued for, under Peramu Ammal's Will, put in, before the suit came on for hearing, a petition withdrawing his claim and that the Munsif was bound consequently to dismiss the 1st plaintiff's claim and had no right to accept his withdrawal of the petition without holding an inquiry. As to the question whether there were good grounds for allowing him to withdraw, the Subordinate Judge finds that the Munsif had proper reasons for allowing the plaintiff to withdraw from the withdrawal of his claim. Whether it was so or not, it is clear that, when the suit was called on for hearing, the 1st plaintiff wished and was ready to prosecute his suit. It is argued that he was not at liberty, without good grounds, to resile from his withdrawal. Order XXIII, rule 1 of the Civil Procedure Code entitles the plaintiff to withdraw or abandon his suit or any portion of his claim, and, if he does so, the Court is empowered to direct him to pay the costs of the defendant. But the question is "can the 1st plaintiff be said to have withdrawn his suit or plaint in this case?" Before the Munsif acted upon the petition, the 1st plaintiff expressed a desire to prosecute the suit. There is nothing in the Code which would entitle the defendant to insist that a petition of withdrawal not acted upon by the Court must be enforced as against the party putting it in. I am inclined to hold that a mere petition of withdrawal would not debar the party putting it in from prosecuting the suit unless, in the meanwhile, the suit had been dismissed by the Court. He would apparently have a *locus penitentiæ* until his petition is acted upon by the Court. I must, therefore, overrule this contention also. I dismiss the second appeal without costs.

SADASIVA AIYER, J.—I am inclined to hold that a plaintiff, after he puts in a petition for withdrawing a suit, cannot withdraw his withdrawal petition except on good grounds and cannot be allowed to play fast and loose with the litigation launched by him at his sweet will and pleasure. But, in the present case, the Subordinate Judge finds that the Munsif allowed such withdrawal on good grounds; and nothing has been urged before us showing that the Munsif had no such good grounds for allowing the withdrawal of the withdrawal petition. Even the grounds 1 and 3 of the appeal memo. do not raise the contention that there were no such good grounds and merely allege that the Court has no power at all to allow the withdrawal of a withdrawal petition. I would also dismiss the second appeal without costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 235 OF 1912.

June 21, 1912.

Present:—Mr. Justice Chamier.

MUTSADDI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD HANIF AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Assignment of mortgagee's right—Registration—Transfer of Property Act (IV of 1882), ss. 8, 54—Intangible property.

The interest of a simple mortgagee is plainly an intangible thing within the meaning of section 54 of the Transfer of Property Act, 1882, and the transfer of such interest must be made by a registered instrument.

Subramaniam v. *Perumal Reddi*, 18 M. 454; *Ramasami Pattar* v. *Chinnan Asari*, 24 M. 449; 11 M. L. J. 132, referred to.

Second appeal from the decision of the Additional Judge of Saharanpur, dated 17th November 1911.

Mr. *A. P. Dube*, for the Appellants.

Mr. *Nihal Chand*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of Rs. 249 on the basis of a simple

mortgage made on the 19th of August 1885. The mortgagees transferred all their rights under the mortgage to the plaintiffs by an unregistered deed of sale, dated the 2nd of December 1898. The present suit was instituted in August 1910. If by the assignment only a right to proceed against the mortgagors personally passed to the plaintiffs, the suit is admittedly barred by limitation. The question for decision is whether the unregistered deed was sufficient to pass to the plaintiffs the interests of the mortgagees under the deed of August 19th, 1885. If the decision in *Subramaniam* v. *Perumal Reddi* (1) is correct, this question must be answered in the affirmative. But that decision was disapproved by Bhashyam Ayyangar, J., in the later case of *Ramasami Pattar* v. *Chinnan Asari* (2). The remarks of the learned Judge may have been, as contended by the Counsel for the appellants, no more than *obiter dicta*, but, in my opinion, his view of the law is correct and the earlier decision in *Subramaniam* v. *Perumal Reddi* (1) is erroneous. In the earlier case, the Court relied on section 8 of the Transfer of Property Act. It appears to me that that section cannot be read so as to override the provisions of section 54 of the same Act. The interest of a simple mortgagee is plainly an intangible thing within the meaning of section 54 and the transfer of it can be made only by a registered instrument. The result is that the plaintiffs by the assignment in their favour acquired no right to sue as mortgagees. In my opinion, the decisions of the Courts below are correct. I dismiss this appeal with costs.

Appeal dismissed.

(1) 18 M. 454.
(2) 24 M. 449 at p. 463; 11 M. L. J. 132.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 8C OF 1912.
July 2, 1912.
Present:—Mr. Justice Chamier and
Mr. Justice Rafique.
BADRI DAS—DEFENDANT—APPELLANT
versus
JIWAN LAL AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Vendor and purchaser—Money left with purchaser for payment to a prior mortgagee—Amount due to mortgagee in excess of that deposited with the purchaser—Redemption.

Where a sum of money is left in the hands of a purchaser for payment to a prior mortgagee, the purchaser is not bound to redeem the mortgage if the amount due under it is in excess of that deposited with him.

Muhammad Siddiq Khan v. *Muhammad Nasir-Ullah Khan*, 21 A. 223; 26 I.A. 453; 3 C.W.N. 201, followed.

Second appeal from the decision of the District Judge of Mirzapur, dated the 13th of September 1911.

Mr. *P. L. Banerji* (with him Mr. *Bajpai*), for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Vishnu Ram Mehta*), for the Respondent.

JUDGMENT.—On June 9th, 1908, the plaintiffs sold half a village to the defendant, Badri Das, for Rs. 6,900, of which Rs. 1,400 were paid in cash to the plaintiffs and the balance Rs. 5,500 was left in the hands of the defendant on account of the amount due on a prior mortgage of the whole village held by one Kanhya Lal. On the 18th of June 1908, the defendant deposited Rs. 5,500 in Court under section 83 of the Transfer of Property Act. By this time, Kanhya Lal had died leaving an infant heir. The child's guardian refused to accept the money saying that a larger sum was due on the mortgage and the plaintiffs put in an application stating that the whole of the sum deposited was not due to the mortgagee, but that accounts should be taken and the amount found due paid to the mortgagee and the balance paid to the plaintiffs. The Courts below have found that there was no agreement between the plaintiffs and the defendant that they would go to the mortgagee and settle accounts with him and the defendant would re-pay the balance, if any, remaining in his hands to the plaintiffs. Kanhya Lal's heir sued upon the mortgage impleading both the present plaintiffs and the defendant. The latter did not defend the suit. The present plaintiffs and the mortgagee entered into a compromise according to which Rs. 5,556 were agreed to be due on account of the mortgage-money and a further sum on account of costs and in default of payment, the amount was to be recovered in the first instance by sale of that half of the village which had been sold to the defendant. A decree was prepared accordingly and in execution of that decree, the defendant's half share in the village was sold for Rs. 3,000.

The plaintiffs applied to have the sale set aside, but they subsequently abandoned the application and they brought the present suit in July 1910 for the recovery of Rs. 2,500 being, as they alleged, the balance of the amount still due from the defendant, the amount of costs incurred by them in the previous suit and the amount of revenue paid by them for the defendant's half share of the village and interest making a total of Rs. 3,849 odd. The Court of first instance decreed the claim and the lower Appellate Court confirmed that decree with a slight modification.

In second appeal, it is contended on behalf of the defendant, that under the sale-deed in his favour, he was not bound to find more than Rs. 5,500 for the redemption of Kanhya Lal's mortgage, that he had done all that was required of him when he deposited this sum in Court under section 83 of the Transfer of of Property Act and that he was not bound to discharge the decree obtained by Kanhya Lal's heir as the amount due under the decree exceeded Rs 5,500, that under the sale-deed in favour of the defendant, it was the duty of plaintiffs vendors to give a clear title to the 8-annas share which they sold to the defendant and all that they could do was to call upon the defendant to contribute the sum of Rs. 5,500 towards the redemption of Kanhya Lal's mortgage. The defendant has relied upon a decision of the Privy Council in *Muhammad Siddiq Khan* v. *Muhammad Nasir-Ullah Khan* (1) which, he says, exactly covers this case. The plaintiffs-respondents, on the other hand, contend that under the sale-deed the defendant was bound to redeem the mortgage held by Kanhya Lal even if he had to pay a sum exceeding Rs. 5,500 in order to do so and they rely upon the second clause in the sale-deed which is to the effect that if any further charge were found to exist on the property and the defendant had to pay more than Rs. 5,500, he would be entitled to recover the balance from the vendors, and the plaintiffs contend that this case is distinguishable from the case decided by the Privy Council. It seems to us impossible to hold that the second condition in the sale-deed made it incumbent on the purchaser to redeem Kanhya Lal's mortgage even if he had to pay more than the sum left in his hands by the vendors for the purpose. The clause in question gives him only the right which he would have had if this clause had not been inserted in the deed. As a purchaser of the property, said to be free of all incumbrances except one for Rs. 5,500, he would have been entitled, if he paid a larger sum in order to clear the title, to claim the balance from his vendors. We have referred to the printed record of the case decided by the Privy Council and we are unable to distinguish that case from the present one. Pandit Sundar Lal endeavoured to distinguish the two cases on the ground that in that case, both this Court and the Privy Council held that it was part of the contract between the parties that the vendors should pay off the mortgages and he relied on the fact that oral evidence of such an arrangement was given at the trial. On referring to the record, we find that this Court held that the vendors had agreed to discharge the mortgages, not on the strength of the oral evidence, the admissibility of which seemed doubtful, but on the terms of the sale-deed itself. The Privy Council, in their judgment, confirmed the finding of this Court. Whether the Privy Council proceeded upon the oral evidence or not, we think that this case is not distinguishable from that case. There, as here, a sum of money was left in the hands of the purchaser for the purpose of redeeming the prior mortgage. It turned out that the amount due was far in excess of the amount left in the hands of the purchasers. There, as here, it was the duty of the vendors to give a clear title to the purchaser subject only to the payment by the purchaser of the sum left in his hands. In the present case, the difference between the amount left in the defendant's hands and the amount found due on the mortgage is small but the decision should be the same whether the difference is great or small. Pandit Sundar Lal declined to argue that the defendant in this case would have been bound to find a sum of say Rs. 10,000 for the redemption of Kanhya Lal's mortgage. The plaintiffs, after a decree had been passed on Kanhya Lal's mortgage, should have paid into Court the difference between the amount due and the amount left in the hands of the defendant and then have called on the defendant to pay the sum which was in his hands. They did nothing of the kind. It was their duty to give the defendant a clear title and it was their fault that

(1) 21 A. 223; 26 I. A. 45; 3 C. W. N. 201.

the defendant's property was sold. In our opinion, the suit should have been dismissed. We allow the appeal, set aside the decrees of the Courts below and dismiss the suit with costs.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 42 OF 1912.

June 28, 1912.

Present:—Mr. Justice Chamier.

CHANDAN SINGH—PLAINTIFF—APPLICANT

versus

BIDHYA DHAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 75—Instalment-bond—Default of payment—Waiver—Limitation.

An instalment bond provided that in case of default in payment of any instalment, the whole amount of the bond should be paid at once. None of the instalments were paid. The creditors, after the lapse of more than 3 years from the date of the first default, brought a suit to recover some of the instalments:

Held, that, in the absence of waiver, the suit was barred by limitation.

Aiudhiya v. *Kunjal*, 30 A. 123, A. W. N. (1908) 36; 5 A. L. J. 72, distinguished.

Radha Bai v. *Kamod Singh*, 30 A. 38; A. W. N. (1907) 276: 4 A. L. J. 696, *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty*, 31 C. 297, referred to.

Revision against the decree of the Small Cause Court, Jhansi, dated 23rd of January 1912.

Mr. *Purushotam Das Tondan*, (for Mr. *Dmodar Das*), for the Applicant.

Mr. *Parmeshwor Dyal* (for Mr. *Haribans Sahai*), for the Respondents.

JUDGMENT.—This was a suit by the applicant on an instalment-bond, dated October 28th, 1895, for the recovery of instalments said to be due for the *Sambat* years 1965, 1966, 1967 and 1968. The applicant alleged that the instalments had been regularly paid from the date of the bond up to and including 1964 *Sambat*, that is to say, from 1952 to 1964 *Sambat*. It has been found, however, by the Court below that no instalments have ever been paid. The question is whether the suit is barred by limitation. The Court below has held that it is barred relying on the decisions in *Radha Bai* v. *Kamod Singh* (1) and *Jadab Chandra Bakshi* v. *Bhairab Chandar Chuckerbutty* (2). On behalf of the applicant, it is contended that the case is not governed by the decision of this Court just mentioned, and that the decision of the Calcutta High Court is inconsistent with the decision of this Court in *Aiudhiya* v. *Kunjal* (3). In the last mentioned case, a bond payable by instalments contained a provision that in default of payment of any one instalment, it would be in the power of the creditors to sue for the whole amount due under the bond (*Mahajan mazkur ko akhtiyar hogi*). It was held that this provision did not mean that the creditor was bound to sue for the whole in case of default of one instalment and that he was at liberty, notwithstanding that provision, to sue for the instalments as they fell due. The bond in the present case provides that in case of default in payment of any instalment, the debtor will pay the whole amount of bond at once. In the course of the judgment in the case last mentioned, Knox and Aikman, JJ., observed:— "It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred. The bond with which we have to deal is not so worded." The decision appears to me to amount to this; that Article 75 of the first Schedule to the Limitation Act does not apply to a case where only an option is left to the creditor to sue for the whole amount of the bond. The Calcutta High Court, in the case above-mentioned, has held that Article 75 does apply even where the creditor is not bound to sue for the whole amount of the bond but is entitled to do so if he pleases. The bond in the present case appears to me to fall within Article 75, for it provides that if default be made in payment of any instalment, the whole amount of the bond shall be paid. It does not merely give the creditor an option to sue. It seems to me that when a bond is found to fall within Article 75, that Article must be applied subject, of course, to the provision as to waiver in the third column of the Schedule. In the Court below, it was not suggested that there had been any waiver in this case. In this Court, it was suggested that the institution of the present suit was a waiver of the benefit of the

(1) 30 A. 38; A. W. N. (1907), 276; 4 A. L. J. 696.

(2) 31 C. 297.

(3) 30 A. 123; A. W. N. (1908) 36; 5 A. L. J. 72

provision in the bond. I cannot accept this contention, for when this suit was instituted, the whole amount of the bond had been due for over ten years. A creditor cannot avoid the effect of Article 75 by bringing a suit for instalments many years after the whole amount of the bond has become payable. In my opinion, the Court below was right in holding that this suit was barred by limitation. The case appears to be covered by the decision of this Court in *Radha Bai* v. *Kamod Singh*(1). This application is dismissed with costs.

Petition dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 9 OF 1912.

June 28, 1912.

Present:—Mr. Stuart, A. J. C.

HABIBULLAH SHAH—PLAINTIFF—APPELLANT

versus

SURJI—DEFENDANT—RESPONDENT.

Landlord and tenant—Lease—Forcible re-entry, right of landlord to—Oudh Rent Act (XXII of 1886), s. 138—Bona fide payment of rent—Inquiry, scope of—Parties—Lessor when to be impleaded in lessee's suit against tenants—Appeal, second—Question of law—Determination of legal right.

A *talukdar* leased the collection of rents of a certain village to the plaintiff for a certain period and it was provided in the lease that in case of breach of certain terms of the lease or of the expiry of the term fixed, the *talukdar* would have a right of re-entry.

Before the expiry of the term, the *talukdar* took forcible possession of the village and began to collect rent from the tenants. The lessee then sued the tenants for the rent:

Held, (1) that the lessee was entitled to obtain decrees, inasmuch as the relation of landlord and tenant had not ceased between the lessee and the tenants inasmuch as the lessee had not been, in due course of law, ejected and the lease only provided for re-entry in case the lessee agreed to give up the possession and not for re-entry by force;

(2) that section 138 of the Oudh Rent Act had no application to the facts of the case, and the *talukdar* had no right to be joined as a defendant in the plaintiff's suit.

The inquiry contemplated by section 138 of the Rent Act is an inquiry relating to a period prior to that for which rent is claimed.

Shah Hamid Ahmed v. *Baij Nath*, Rent Act Ruling (1893) No. 66, followed.

The question whether a legal right had determined is a question of law and not of fact and a decision on such point is open to second appeal.

If a lease reserves to the lessor the right of entry in case of a breach of a covenant, the result of the breach is at best to confer upon the lessor the right of re-entry, and not to entitle the lessor to make a forcible entry. If the lessee resists the exercise of the right to re-enter, the lessor's only remedy is to enforce his right to re-enter by a suit in ejectment.

A license by a tenant to a landlord to eject him without process of law is void and can be no answer to a charge of forcible entry.

Appeal against an order of the District Judge of Gonda, dated 15th December 1911, upholding that order of the Assistant Collector, Bahraich, dated 12th October 1911.

Messers. *St. G. Jackson* and *Samiullah Beg*. for the Appellant.

Syed *Wazir Hasan*, for the Respondent.

JUDGMENT.—Rent Appeals Nos 9 to 24 of 1912 have been heard together. They can be decided by the same order. The facts are as follows. Raja Maneshur Bakhsh Singh, *Talukdar* of Mallanpur, executed a *theka* of the village of Sheopur in the Bahraich District in favour of Habuibullah Shah. The *theka* was executed for the *Fasli* years 1313 to 1319 inclusive. On the 3rd May 1911, Raja Maneshur Bakhsh Singh instituted a suit for arrears on the basis of this *theka* in the Court of the Deputy Commissioner of Bahraich against Habibullah Shah. The 4th July 1911 was fixed for evidence. On the 20th June 1911, Raja Maneshur Bakhsh Singh died, and was succeeded by his son Raja Debi Bakhsh Singh, the present *Talukdar*. Owing to the fact that the name of Raja Debi Bakhsh Singh was not brought on the record, the suit was dismissed for default, but was eventually reinstated by an order of the Deputy Commissioner. An application was filed against the order of the Deputy Commissioner to the Court of the Judicial Commissioner. The Judicial Commissioner reversed that order. A review was allowed against the order of the reversal but the reversal was subsequently confirmed. Raja Debi Bakhsh Singh has since obtained leave to appeal to the Privy Council against the dismissal of the suit. Under the authority of the *theka*, Habibullah Shah instituted eight suits for arrears of rent against eight tenants of the village. The arrears were for the *Kharif* and *Rabi* of 1318 *Fasli* except in the case of a certain Beni, against whom arrears were claimed in addition for 1316 *Fasli*. These suits were instituted in the

HABIBULLAH SHAH *v.* SURJI.

Court of Syed Zain-ul-Ibad, Assistant Collector of Bahraich, on the 21st July 1911. Written statements were filed on the 16th August 1911. It was pleaded in the written statements that from the beginning of the *Rabi* 1318, the *Talukdar* had been in possession of the village and that these eight tenants had paid him the rents in question for 1318 *Fasli*. On 23rd August 1911, Raja Debi Bakhsh Singh applied to be made a party, asserting that his father had taken possession of the village in February 1911, that he had dispossessed the *thekadar*, and had collected the rents for 1318 *Fasli*. The plaintiff opposed the application on the 9th September 1911, on the ground that the term of his *theka* had not expired, that no mutation had taken place, and that he was still in possession. On the 9th September 1911, the *Talukdar* was made a party. The following issues were framed:—

(1). Whether the plaintiff is entitled to rent for the whole of 1318 *Fasli* or only up to the *Kharif*?

(2). Whether the defendant has paid the whole amount of rent due by him?

(3). Whether Raja Debi Bakhsh Singh *Talukdar* has realised in good faith the rent in respect of *Rabi* 1318 *Fasli* from the defendant?

(4). What is really due from the defendant?

(5). Whether the plaintiff was legally ejectd by the Mallaupur estate and when?

Evidence was taken and judgment delivered on 12th October 1911. The first issue was decided in the plaintiff's favour. On the second issue, the following decision was arrived at, which covers the ground raised in the fifth issue although the fifth issue is never mentioned in the judgment. It was decided that the *Talukdar* had ejected the plaintiff in 1318 *Fasli* bat that the ejectment was illegal and that, therefore, the defendants were still liable to pay their rents to the plaintiff. The same ground is covered by the decision on the third issue, in which it was decided that Raja Debi Baksh Singh had not received any rent in good faith. On the 4th issue, certain sums were found due against individual defendants. Decrees were passed accordingly. Against these decrees, 16 appeals were filed to the District Judge of Gonda. The learned District Judge decided these appeals upon one point only. He stated in his judgment that the primary question for determination was whether the *Talukdar* was legally entitled to resume possession of the village and make collections. He continued that the fact that he had regained possession was not open to doubt. He found the *Talukdar* was entitled to resume possession under the terms of the *theka* and that he did resume possession, and that the *thekadar* had no rights subsisting under the *theka* with regard to the suits in question. He accordingly dismissed all the suits. I note that, although he refers to the point in his judgment, he overlooked in his final order the fact that a decree had been passed against Beni for a small amount relating to the arrears of 1316 *Fasli*, a period not covered by his order. The present 16 appeals have now been filed against the learned District Judge's decision.

Mr. St. G. Jackson, who appears for the appellant, states that he does not press the appeals in respect of sums greater than the sums awarded by the Assistant Collector and that he will be satisfied if decrees are granted to his client as granted by the Assistant Collector. I find that the lower Courts should not have applied the provisions of section 138 of the Oudh Rent Act. The facts clearly establish that the third party, that is to say, the Raja, had not been actually and in good faith receiving and enjoying the rents up to the time of the commencement of the suit. The inquiry contemplated by section 138, Local Act XXII of 1886, is an "inquiry relating to a period prior to that for which rent is claimed by the plaintiff. In a suit in which the tenant has not paid the rent sued for to the third person, the inquiry directed by section 138 obviously must relate to such period, and, therefore, in a suit in which the tenant has paid such rent to the third person, the inquiry must relate to the same period. It cannot be that in the one case, the inquiry is to relate to one period and in the other case to another period." The above is a quotation from the decision of this Court in *Shah Hamid Ahmed* v. *Baij Nath* (1). In these circumstances, the Raja had no right to be joined as a defendant in these suits under

(1) Rent Act Ruling (1893) No. 66.

section 133. The defence put up in all the cases was a denial of the plaintiff's right to receive the rents on the ground that the relationship of landlord and tenant previously existing between the parties had determined; and it was upon the defendants to establish their plea by some affirmative proof. The issue was whether the right of the plaintiff to receive rents ceased to exist. If it had, the suits were bound to fail, otherwise the plaintiff was entitled to succeed. The question whether a legal right had determined, is a question of law and not of fact, and as such is open to decision in second appeal. All that appears is that early in the *Rabi* season of 1318 *Fasli*, the Raja gave notice through his agents to the tenants not to pay their rents to the plaintiff and the explanation of this action on the part of the Raja is that, under the terms of his agreement with the plaintiff, he was entitled to re-enter on breach of some of the covenants contained in the lease. It was alleged that the lessee had committed a breach of the covenant to pay the rent and that the Raja had re-entered without seeking the intervention of the Court in the manner above described. I do not find that these acts amounted to an extermination of the plaintiff's right to collect the rents. Even assuming that there was on the part of the lessee a breach of the covenant as alleged, (I am not satisfied upon the evidence that there had been any such breach), the result was at the best to confer upon the lessor the right of re-entry. He could only obtain a right to have re-vested in himself the same estate as was vested in him at the time of granting of the lease. The lessee might have submitted to the lessor's exercise of the right to re-enter, but the evidence shows that he obviously did not do so. The lessor was certainly not entitled to make a forcible entry. If the lessee resisted the exercise of the right to re-enter, the lessor's only remedy was to enforce his right to re-enter by a suit in ejectment. Had the lease in the present case, instead of being a lease of the right to collect rents, been a lease of lands, possession of which had been delivered to the lessee, the lessor would certainly have not had the right to re-enter forcibly. A license by a tenant to a landlord to eject him without process of law is void, and can be no answer to a charge of forcible entry. The ground is that such a license is contrary to public policy as being calculated to lead to a breach of the public peace. The same principle applies to the present case. The lessee's right must be deemed to continue, until it is terminated in one or other of the methods which the law recognizes as legitimate to that Act. Thus in all these cases, the defendants have failed to establish that the relation of landlord and tenant between the plaintiff and themselves has determined and this being so, the first Court properly decreed the claims.

I restore the decrees of the first Court in so far as they have been disturbed by the orders of the learned District Judge. These appeals are decided accordingly. Costs to follow the result.

Appeals allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 114 OF 1911

April 25, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

VEMULA JAMBALAYA—APPELLANT

versus

ISKALA RAJAMMA—RESPONDENT.

Remand—Remand by Appellate Court not on a preliminary point, validity of—Settlement out of Court, inquiry into—Evidence not placed on record—Remand for re-trial.

An order of remand may, in some cases, be made by an Appellate Court, even where the disposal has not been on a point which can be strictly called a preliminary point.

Kuppelan v. *Kunjuvalli*, 9 M. L. T. 373, 2 M. W. N 199; 9 Ind. Cas. 790, followed.

In an inquiry as to whether a dispute between the parties was settled out of Court, the Munsif looked at a receipt and, without exhibiting it in evidence or taking other evidence, decided that there had been a settlement out of Court. On appeal, the District Judge remanded the suit for re-hearing and disposal:

Held, that the District Judge had power to order the remand.

Appeal against the order of the District Court of Kurnool, in A. S. No. 148 of 1908, presented against the decree of the District Munsif of Kurnool, in O. S. No. 767 of 1907.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

Mr. *K. Parthasarathy Iyenger*, for the Respondent.

GOPI NATH *v.* GUR PRASHAD.

JUDGMENT.—The District Munsif appears to have looked at a receipt and construed it as a settlement out of Court, and upon it determined the issue whether the settlement after suit is true but he did not exhibit it in evidence in the suit or take any other evidence. It is not now alleged that this course was taken by consent of the parties or that the parties agreed that the matter should be disposed of on the construction of the receipt alone.

The District Judge appears to have seen the receipt and considered that it is not a record of the terms of a settlement between the parties and, holding that the plaintiff should be allowed to prove that the document represented only a partial settlement, has remanded the suit for re-hearing and disposal.

Before us it is contended that the District Munsif, having determined the issue as to the settlement, has not disposed of the suit on a preliminary point and that, therefore, the District Judge had no power to order a remand.

But the decision in *Kuppelan* v. *Kunjuvalli* (1) is an authority for holding that there are cases in which an order of remand may be made even where the disposal has not gone on a point which can strictly be called a preliminary point, and this, we think, is one of those cases. Here there seems to have been no regular hearing of the matter and the evidence on which the disposal was made was not placed on the record. This procedure is so irregular that we think an order for a complete re-trial is required, and on that ground, we confirm the decision of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 9 M. L. T. 373; 2 M. W. N. 199; 9 Ind. Cas. 799.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 26 AND 27 OF 1911.

April 18, 1912.

Present:—Mr. Lindsay, J. C., and Rafique, A. J. C.

GOPI NATH—CREDITOR—APPELLANT

versus

GUR PRASAD—INSOLVENT—AND OTHERS RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16 (2), 31—Civil Procedure Code (Act V of 1908), s. 64—Secured creditors, rights of—Mortgages effected during the course of attachment, validity of, in insolvency proceedings—Procedure to be followed in the case of secured creditor—Assets, realized by sale, right of secured creditors to proceed against.

Certain mortgages were executed by an insolvent judgment-debtor during the continuance of an attachment of the mortgaged property by certain decree-holders, who contended in insolvency proceedings that the mortgages were void against them under section 64, Civil Procedure Code:

Held, (1) that according to the provisions of section 16(2) of the Provincial Insolvency Act, the claims, which the creditors were able to enforce under the Civil Procedure Code, ceased to be enforceable upon the making of the order of adjudication and the creditors could only work out their remedy under the conditions laid down in the Insolvency Act and they could not, therefore, claim that the mortgages were void against them;

(2) that if the property were sold up, the mortgagees would have the same remedy against the assets realized by sale as against the property itself;

(3) that in all such cases where claims were set up by the mortgagees, the provisions of section 31 of the Insolvency Act must be strictly complied with.

An attaching creditor has no lien or charge upon the debtor's property which he attaches and is not entitled to rank as a secured creditor.

It is expedient in the interest of all the creditors that the Court should be allowed to bring the insolvent's mortgaged property to sale and give the mortgagee the same remedy against the sale-proceeds as he had against the property itself.

The rights of secured creditors are not affected in any way by the passing of an order of adjudication.

Appeal against an order of the District Judge, Lucknow, dated 12th April 1911.

Babu *Gokul Prasad*, for the Appellant.

Messrs. *Jagmohan Nath Chak*, *Hargobind Das*, holding brief of Mr. *Ishri Prasad*, for the Respondents.

JUDGMENT.—These appeals arise out of certain orders passed by the District Judge of Lucknow in insolvency proceedings. One Gur Prasad presented a petition in insolvency on the 23rd August 1910, and an order of adjudication was made on 28th October in the same year.

GOPI NATH *v.* GUR PRASHAD.

The Court appointed a Receiver and the creditors were directed to appear before him and offer proof of their debts in order that a schedule might be prepared. Various creditors came before the Receiver and filed affidavits in support of their claims with the result that a list of debts, twenty in all, was prepared and laid before the Judge for orders.

The Judge considered the list and the Receiver's report and ultimately framed a schedule and gave orders as to the manner in which the various debts were to be paid.

The appeals now before us are directed against the scheme of liquidation prepared by the Judge.

The assets available for distribution consisted of some Rs. 8,000 odd realised by sale of immoveable property of the insolvent. One of the items making up the total was a sum of Rs. 5,601-9, proceeds of a sale of certain immoveable property carried out by the Additional Subordinate Judge of Lucknow. This property had been attached long before the insolvent filed his petition by Baldeo Das and Basant Lal (two of the appellants in Appeal No. 27) in execution of a decree amounting to Rs. 1,484 odd. The Additional Subordinate Judge, under the orders of the District Court, sold the entire property so attached and remitted the net proceeds to the Judge.

The other properties of the insolvent were sold by the Receiver under the orders of the Court.

One of the points raised in these appeals is in connection with four mortgage-debts due to four creditors, Jugal Kishore, Ram Prasad, Dowarka and Gopi Nath Khattri. It is stated that these mortgages were effected after the date of the attachment made by Baldeo Das and Basant Lal and it is argued that the mortgages are void as against the attaching creditors as having been made at a time when the insolvent was hopelessly involved. It is admitted that these transactions do not fall within the purview of section 36 of the Provincial Insolvency Act so they cannot be held to be void under that section. It was suggested that they were void as against the attaching creditors under section 64 of the Code of Civil Procedure, but we do not think this argument can be accepted, for according to the provisions of section 16 (2) of the Provincial Insolvency Act, the claims, which the creditors may have been able to enforce under the Civil Procedure Code, ceased to be so enforcible upon the making of the order of adjudication. The creditors could only work out their remedy under the conditions laid down in the Provincial Insolvency Act. We do not think, therefore, that it is open to these attaching creditors to claim in these insolvency proceedings that the mortgages in question were void as against them.

It is not contended, nor indeed could it be contended, that the attaching creditors have any right to preference in the distribution of the insolvent's assets. An attaching creditor has no lien or charge upon the debtor's property which he attaches and is not entitled to rank as a secured creditor.

A second point taken in these appeals is that the mortgagees mentioned above were not entitled to participate at all in the dividends because they failed to comply with the provisions of section 31, sub-section 6 of the Act.

Under section 31, a secured creditor has the option of following any one of three courses. He may realise his security and prove for the balance of his debt, if any. He may relinquish his security and prove for his whole debt. Or he may assess the value of his security and ask for a dividend in respect of the balance.

No doubt these mortgagees did not in the present case comply strictly with the letter of the law. The Court sold the property of its own motion and so deprived the mortgagees of all opportunity of realising their securities themselves. But they did not offer to relinquish their securities nor did they make any valuation of them.

The fact appears to be that neither the creditors nor the Court were aware of, or understood, the procedure laid down in the Act and it is a pity that when these mortgagees appeared with proofs of their debts, they were not asked which particular course they desired to follow.

The Judge treated them as if they had applied to be allowed to realise their securities and to prove for the balance of their debts and, in a way, has allowed them the same remedy against the sale-proceeds, as they might have pursued against the property itself which constituted their securities. The Act, it is said, does not recognise this mode of procedure but it does not appear to us to have been irregular or unlawful.

Obviously, procceedings in insolvency would be greatly protracted if the Court had to wait till the mortgagees had brought suits against their mortgagors and got decrees to enable them to bring the property to sale and it is expedient in the interests of all the creditors that the Court should be allowed to bring the property to sale and give the mortgagee the same remedy against the sale-proceeds as he had against the property itself. This procedure is recognised in England where the Court may direct inquiry into the claim of a mortgagee and may, if satisfied, that there ought to be a sale of the property, direct a sale to be made and apply the sale-proceeds in discharge of the debt. The mortgagee is then entitled to prove for the balance of his debt and to receive dividends rateably with other creditors. (*Cf.* Rules 73, 74, 75 of the Bankruptcy Rules, 1886 and 1890).

We think, therefore, that the principle adopted by the Judge was a correct one, though it was not correctly applied, for he appears to have withdrawn from the fund available to the mortgagees the sum of Rs. 1,484 odd.—the amount due under their decree to the attaching creditors, Baldeo Das and Basant Lal. The only other point urged is that the attaching creditors should have been allowed to realise their debts in full from the property they attached before the other creditors got anything. We have already expressed the opinion that such a contention cannot be maintained.

We are informed that a distribution of assets has already been made in accordance with the schedule. The appellants had applied for stay of distribution but the application was rejected on the 21st June 1911, as it was not pressed.

We do not, therefore, propose to disturb now the proceedings of the Court below. We have indicated the mistakes in procedure which were committed and have pointed out the manner in which the claims of secured creditors are to be dealt with. It is for the Courts below to see that secured creditors comply strictly with the procedure laid down in section 31 and to bear in mind that under the provisions of section 16 of the Act, the rights of secured creditors are not affected in any way by the passing of an order of adjudication. With these observations, we dismiss both the appeals. We make no order as to costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1052 OF 1911.

June 6, 1912.

Present:—Mr. Justice Banerji.

THAKUR PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu NARENDRA BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 25, 26—Remission of issues to the lower Court by Court of Appeal—Transfer of case by the Appellate Court to another Court of Appeal before findings were returned—Jurisdiction.

A District Judge heard an appeal and remitted certain issues to the Court of first instance. Before that Court returned its findings, the District Judge transferred the case from his own file to that of the Subordinate Judge who, after considering the findings of the first Court, decided the case:

Held, that the District Judge was not competent to transfer the case to the Subordinate Judge for disposal.

Udit Narain Singh v. *Jhanda*, 15 A. 315; *Kumarasami Reddiar* v. *Subbaraya Reddiar*, 23 M. 314, followed.

Second appeal from the decision of the Subordinate Judge of Gorakhpur, dated 14th August 1911.

Mr. *Jung Bahadur Lal*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—I regret that I am obliged to set aside the decree of the Court below, and remand the case as the suit was brought so far back as the 29th of February 1904. It was one for possession of land on the ground that it belonged to the plaintiffs and appertained to their village. The Court of first instance, the Munsif of Bansgaon, dismissed the suit on the 30th of August, 1904. An appeal was preferred by the defendants to the District Judge of Gorakhpur. It was heard by him and issues were referred by him to the Court below on the 13th of March 1907. The Munsif recorded findings on the issues on the 21st of March 1907. The learned Judge considered the findings to be insufficient and referred back the issues on the 4th of June 1907. Meanwhile, some of

the parties died. The Munsif thereupon sent back the case to the District Judge in order that the legal representatives of the deceased might be brought on the record. On receipt of the record and before findings upon the issues referred to the Court below had been returned, the learned Judge, by his order of the 16th of August 1907, transferred the case to the Court of the Subordinate Judge. That Court, after considering the finding of the Court of first instance on the issues referred by the District Judge, decided the appeal on the 14th of August 1911.

From the decision of the Subordinate Judge, this appeal has been prefererd and the first contention raised is that the order made by the District Judge for the transfer of the case which had been heard by him in part, was improper and without jurisdiction and that the decision of the Subordinate Judge was consequently without jurisdiction also and must be set aside. This contention is supported by the ruling of this Court in *Udit Narain Singh* v. *Jhanda* (1). That was a case very similar to the present. In that case, as in this, the District Judge had made an order referring issues under section 566 of the Code of Civil Procedure, 1882. Before the return was made by the Court of first instance, the District Judge transferred the case to the Court of the Subordinate Judge. It was held that the Appellate Court was not competent to transfer the appeal for disposal by another Court and was bound to decide the case itself. Reference was made to the last paragraph of section 566 and the first paragraph to section 567 of the old Code, which have been re-enacted in the new Code of Civil Procedure in Order XLI, rules 25 and 26. I am bound to follow this ruling which is also consonant with the decision of the Madras High Court in *Kumarasami Reddiar* v. *Subbaraya Reddiar* (2). I accordingly set aside the order of transfer to the Subordinate Judge and the decree of the Subordinate Judge on appeal and direct the District Judge to restore the appeal to the file of pending appeals in his own Court and to dispose of it according to law. Costs here and heretofore will abide the result. Costs in this Court will include fees on the higher scale.

Appeal allowed

(1) 15 A. 315.
(2) 23 M. 314.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 216 TO 218 OF 1910.

January 12, 1912.

Present:—Sir Ashutosh Mookerjee, Judge, and Mr. Justice Carnduff.

SARJUG PROSAD NARAIN SINGH—PLAINTIFF—APPELLANT

versus

AJODHYA RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Bengal Tenancy Act* (*VIII of* 1885), *s.* 106—*Dismissal of suit under section* 106 *for default*—*Whether decision* res judicata—*Rent suit*—*Question, what is rent payable annually*—*Decision upon evidence*—*Decision conclusive*—*Civil Procedure Code* (*Act V of* 1908), *s.* 11.

The dismissal of a suit, under section 106 of the Bengal Tenancy Act, for default, may bar a second suit of the same scope and nature, but it does not operate as *res judicata*. Where there is no adjudication that the rent was as alleged by the tenant or by the landlord, the determination of the question in a subsequent suit between the parties is not barred.

Chand Kour v. *Partab Singh*, 16 C. 98; 15 I. A. 156, relied upon.

Where the question in controversy in a previous suit between the landlord and tenant was, not the amount of rent payable for the particular years for which rent had been claimed, but the amount of *jama* annually payable by the tenant to the landlord, and the Court expressly found that the plaintiff had failed to prove his allegation while the tenants (defendants) had established by affirmative evidence that the *jamas* were as stated by them:

Held, that, there was an express adjudication by the Court upon the question of the amount of rent annually payable and the decision in the previous suit must be deemed conclusive.

Rajendra Nath Ghose v. *Tarangini Dasi*, 1 C. L. J. 248; *Hara Chandra Bairagi* v. *Bipin Bihari Das*, 6 Ind. Cas. 860; 13 C. L. J. 38 and *Panchu Mandal* v. *Chandra Kanta Shaha*, 12 Ind. Cas. 9; 14 C. L. J. 220, relied upon.

Kali Roy v. *Protap Narain*, 5 C. L. J. 92; *Sri Narain Singh* v. *Sunderbati Kumari*, 6 Ind. Cas. 860; 13 C. L. J. 653 and *Neikajee* v. *Nanda Dulal*, 1 C. W. N. 711, distinguished.

Appeal from the decree of the District Judge of Saran, dated June 17th, 1909, affirming that of the third Munsif of Chapra, dated January 25th, 1909.

Babu *Baldeo Narain Singh*, for the Appellant.

Babu *Dwarka Nath Mitter*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for rent. The controversy between the parties relates to the rate of rent annually payable. This question, the plaintiff-appellant contends, is

res judicata by reason of the decision in a prior suit between the parties. The defendants-respondents urge on the other hand that the question is *res judicata* by reason of the decree of the Settlement Officer in a suit under section 106 of the Bengal Tenancy Act. The District Judge has held that the decision of the Settlement Officer does not operate as *res judicata*, whereas the decision in the previous suit for rent is conclusive between the parties. Two questions, therefore, require consideration in this appeal, namely *first*, what is the effect of the decree of the Settlement Officer, and, *secondly*, what is the effect of the decision in the rent suit.

The previous suit for rent was instituted in the year 1900 for recovery of arrears of rent for the years 1897 to 1900. The original Court decided in favour of the landlord on the 22nd September 1900. Upon appeal preferred by the defendants, the Appellate Court, on the 28th February 1901, decided against the landlord. On the 14th March 1904, that decision was affirmed by this Court. Meanwhile, during the pendency of the appeal in the Court of the Subordinate Judge, the tenant had instituted a suit under section 106 of the Bengal Tenancy Act, before the Revenue Authorities. In this suit no evidence was produced on either side. The Settlement Officer accordingly, on the 9th November 1900, dismissed the suit, holding that the only material he had before him was the decision of the first Court in the rent suit against which no evidence had been adduced. Now, it may be conceded, that as provided under section 107 of the Bengal Tenancy Act, the decision of the Settlement Officer operates as a decree. But the question still remains, what was actually decided by him. The dismissal of the suit under section 106 of the Bengal Tenancy Act for default may bar a second suit of the same scope and character, but clearly it does not operate as *res judicata*. *Chand Kour* v. *Partab Singh* (1). It is plain that there was no adjudication that the rent was as alleged by the tenant or by the landlord; obviously, therefore, that decree does not bar the determination of the question now in controversy. We may add that the learned Vakil for the appellant placed reliance upon the case of *Jogendra Nath Roy* v. *Krishna Promoda Dassi* (2) to show that a suit in the Civil Court for alteration and correction of entries made in the Record-of-Rights published under Chapter X of the Bengal Tenancy Act, is not maintainable. That decision is clearly of no assistance to him and it is worthy of note that the decision in question has not been followed in this Court. *Golab Misser* v. *Kumar Kalanand Singh* (3); *Pandab Dowari* v. *Anand Kishun* (4).

As regards the effect of the decision in the suit for rent, the answer must depend upon the scope of the question raised in that suit and the adjudication by the Court. Now, it is clear that the question in controversy then was, not the amount of rent payable for the particular years for which rent had been claimed, but the amount of *jama* annually payable by the tenant to the landlord. This question was decided in favour of the landlord by the Court of first instance, but the Appellate Court decided against him. The Appellate Court expressly found that the plaintiff had failed to prove his allegation while the tenants defendants had established by affirmative evidence that the *jamas* were as stated by them. Consequently, there was an express adjudication by the Court upon the question now in controversy. In view, therefore, of the decisions of this Court in the cases of *Rajendra Nath Ghose* v. *Tarangini Dasi* (5) *Hara Chandra Bairagi* v. *Bepin Behari Das* (6) and *Panchu Mandal* v. *Chandra Kant Shaha* (7), the decision in the previous suit for rent must be deemed conclusive.

On behalf of the appellant, reliance has finally been placed upon the cases of *Kali Roy* v. *Pratap Narain* (8) and *Sri Narain Singh* v. *Sundarbati Kumari* (9), where the principle was laid down that, where there is conflict between the decision in a suit for rent and an entry in the Settlement Record, the Court must decide upon the conflicting evidence in the case. This principle, in our opinion,

(1) 16 C. 98; 15 I. A. 156.

(2) 35 C. 1013; 12 C. W. N. 1032; 8 C. L. J. 322.
(3) 12 C. L. J. 107; 14 C. W. N. 884; 6 Ind. Cas. 217.
(4) 12 C. L. J. 195; 14 C. W. N 897; 7 Ind. Cas. 102.
(5) 1 C. L. J. 248.
(6) 13 C. L. J. 38; 6 Ind. Cas. 86.
(7) 14 C. L. J. 220; 12 Ind. Cas. 9.
(8) 5 C. L. J. 92.
(9) 13 C. L. J. 653; 6 Ind. Cas. 860.

applies only when the decision in the suit for rent does not operate as *res judicata*. In such a contingency, the entry in the Settlement Record furnishes presumptive evidence and the question arises whether that evidence is rebutted by the decree in the suit for rent. But the case before us is not one of the type of *Nekejnie* v. *Nanda Dulal* (10), where it was pointed out that there is no adjudication as to the rate of rent if, upon the failure of the plaintiff to establish his case, the Court makes a decree in his favour on the admission of the defendant, not because the defendant has established his case to be true but because the plaintiff, having failed to prove his case, has become entitled to obtain a decree according to the admission of the defendant. In the case before us, there was a clear decision upon the question of the annual rent based upon the evidence adduced by the parties.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

It is conceded that this judgment will govern the other two Appeals Nos. 217 and 218 of 1910 which are, therefore, also dismissed with costs.

Appeals dismissed.

(10) 1 C. W. N. 711.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1242 OF 1911.

July 1, 1912.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

BIDYA PERSHAD RAM TEWARI—PLAINTIFF—APPELLANT

versus

ACHAIBAR RAM TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Title of the plaintiff at date of sale and at date when decree ought to have been passed—Partition after the decree of first Court, effect of.

A plaintiff having a right to a decree in a pre-emption suit at the date of the sale and at the date upon which the decree ought to have been made by the first Court, does not lose that right because of a partition, which comes into force before the decree becomes final on appeal.

Rohan Singh v. *Bhau Lal*, 6 A. L. J. 699; 3 Ind. Cas. 42; 31 A. 530 relied upon.

Tafazzul Husain v. *Than Singh*, 32 A. 567; 7 A. L. J. 715; 6 Ind. Cas 426, *Ram Gopal* v. *Piari Lal*, 21 A. 441, explained and distinguished.

Second appeal from the decision of the District Judge of Gorakhpur, dated the 24th of May 1911.

Mr. *Iswar Saran*, for the Appellant.

Mr. *Govind Prashad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff came into Court alleging that he was a co-sharer in the same *khata* as the vendor while the vendees were more distant co-sharers. He then alleged that, according to the custom of pre-emption prevailing in the village, a "near" co-sharer had a preferential right over a more distant co-sharer. It is quite clear that the plaintiff was alleging nearness in space as distinguished from nearness of relationship. The Court of first instance originally found that the custom of pre-emption was not proved and that the *wajib-ul-arz* was an entry of a contract and not of a custom and dismissed the suit. The plaintiff appealed and the lower Appellate Court held that the custom of pre-emption was proved. We think that this ought to be taken as a finding that the particular custom alleged by the plaintiff in fact existed. When the case came before the Court of first instance a second time on remand, it erroneously went into the question of the custom a second time. It framed an issue as to whether a custom prevailed. It then went on to find the issue in favour of the plaintiff upon the ground that this very matter had been decided by the lower Appellate Court. The Court then went into the question whether or not the plaintiff had a preferential right over the defendants-vendees, that is to say, the meaning of the reference to nearness and found in favour of the plaintiff. We think that it ought never to have gone into this matter having regard to the finding of the lower Appellate Court. All that it had to do was to find whether or not the plaintiff was, as he alleged, a co-sharer in the same *khata* as the vendor. However, we do not think that any injustice was done because the claim was decreed and we think that the Court was quite justified in finding on the evidence that the custom as set forth in the *wajib-ul-arz* gave a preferential right to a co-sharer who was nearer in space,

The defendants again appealed. The lower Appellate Court decided in favour of the defendants but not upon the ground of the non-existence of the custom.

It appears that before the sale which gave rise to the present claim, partition proceedings had commenced. Before the order of remand and after the first decision of the Munsif, the partition came into force with the result that the plaintiff ceased to be a co-sharer in the same *khata* with the vendor. If this had been the position of things at the date of the sale, the plaintiff would have no right against the defendant vendee. The vendor, vendee and pre-emptor would all have been sharers in different *khatas*. It was successfully urged before the lower Appellate Court that inasmuch as the plaintiff no longer fulfilled the condition of being a co-sharer in the same *khata* as the vendor, a decree could not be made in his favour. It would appear that the defendants never raised this point relating to the partition proceedings when the case came before the lower Appellate Court the first time. It was mentioned for the first time apparently when the case came before the Munsif on remand.

The real question that we have to decide is, whether or not the plaintiff, having a right to a decree in pre-emption at the date of the sale and at the date upon which such decree ought to have been made by the Munsif, loses that right because of a partition which comes into force before the time the decree becomes final on appeal. No direct authority has been cited to us in support of such contention. The respondent cited the case of *Tufazzul Husain* v. *Than Singh* (1). That case was decided entirely upon the principles of Muhammadan Law. Furthermore, the partition had actually come into effect prior to the date of the decree. In the case of *Rohan Singh* v. *Bhau Lal* (2), very much the same question arose. Then the vendee became a co-sharer long after the decree of the first two Courts and it was urged on his behalf that because the plaintiff at the date of the final decree could not show that he had a preferential right, the suit should be dismissed. The authorities are referred to at some length and the Court was of opinion that the plaintiff in a suit for pre-emption does not lose his right if he can show that at the date of the institution of the suit and at the date upon which the decree ought to have been made he had a right to pre-emption. At page 702 of the judgment, the following passage occurs:—"We think that it would be contrary to all justice to hold that because the Court of first instance and the Court of first appeal made an erroneous decision, the plaintiff should be denied a decree which, it must be admitted, for the purposes of this appeal, he was entitled to". In the present case on the 6th of April 1910, the date of the first Court's first decision, the plaintiff was, (it must now be admitted), entitled to a decree. The partition did not come into force until the 1st of July 1910. The lower Court refers to the case of *Ram Gopal* v. *Piari Lal* (3). That case is clearly distinguishable from the present. There the partition proceedings were completed before the Court of first instance came to make its decree.

We allow the appeal, set aside the decree of the lower Appellate Court, and restore the decree of the Court of first instance with costs in all Courts. We extend the time for payment of the money to three months from this date.

Appeal allowed.

(1) 32 A. 567; 7 A. L. J. 715 6 Ind. Cas. 426.
(2) 6 A. L. J. 693; 3 Ind. Cas. 42; 31 A. 530.

(3) 21 A. 441.

PUNJAB CHIEF COURT.
FULL BENCH.
MISCELLANEOUS FIRST CIVIL APPEAL No. 335 OF 1909.
June 25, 1912.
Present:—Mr. Justice Kensington,
Mr. Justice Rattigan and
Mr. Justice Chevis.

JAGDIP SINGH AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS
versus
Bawa NARAIN SINGH AND OTHERS—DECREE HOLDERS—RESPONDENTS.

Execution of decree—Ancestral property—Liability for personal decree—Property in the hands of legal representatives—Civil Procedure Code (Act V of 1908), ss. 47, 50.

The ancestral landed property of a male proprietor, governed by customary rules, is not liable in the hands

of the next holder for any debt, even if a just debt, contracted by his predecessor. The creditor cannot by obtaining a simple money-decree either against the debtor himself in his life-time or after his death against the persons who are legal representatives *pro tanto* of the deceased execute his decree, after the death of the debtor, by attaching the landed ancestral property, which at one time was in the possession of the deceased.

Hansraj v. *Suchet Singh*, 79 P. W. R. 1911; 11 Ind. Cas. 375; 182 P. L. R. 1911 and *Kartar Singh* v. *Munshi Ram*, 80 P. W. R. 1911; 11 Ind. Cas. 376, followed.

Gujar v. *Sham Das*, 107 P. R. 1887; *Harvans Singh* v. *Harnam Singh*, 84 P. R. 1898; *Sadhu Singh* v. *Secretary of State*, 18 P. R. 1908; 19 P. W. R. 1908; 156 P. L. R. 1908 and *Sundar* v. *Salig Ram*, 26 P. R. 1911; 33 P. W. R. 1911; 34 P. L. R. 1911; 9 Ind. Cas. 300, relied upon.

Atma Ram v. *Nauranga*, 24 P. R. 1894, not followed.

Miscellaneous first appeal from the order of the District Judge, Ambala, dated the 8th February 1909, disallowing the appellant's objections.

Lala *Balwant Rai*, for the Appellants.

Lala *Dwarka Das*, for the Respondents.

ORDER OF REFERENCE.

The facts connected with this appeal are set forth in detail in our judgment in *Bhamphul Devi* v. *Harbakhsh Singh* (1). For the purposes of the present appeal, we need say no more than that Bakhtawar Singh, the father of appellants, was heavily involved in debt at the time when he thought fit to execute a deed of gift of the whole of his property in favour of his two minor sons, Jagdip Singh and Jagindar Singh. This deed of gift was executed on the 6th August 1907, and for reasons given in our judgment in the case above referred to, we are satisfied that the so-called gift was a fictitious transaction, the object of which was to defraud Bawa Gurbakhsh Singh, who was at the time endeavouring to execute a decree which he held against Bakhtawar Singh. In April 1908, the decree-holder attached the property of his judgment-debtor, Bakhtwar Singh, whereupon the latter's minor sons objected to the attachment on the ground that the said property belonged to them in virtue of the said deed of gift. Before these objections were heard, Bakhtawar Singh died and his sons were, in due course, brought on to the record of the execution proceedings as his representatives. Their objections were accordingly heard and determined under section 47 of the Civil Procedure Code, with the result that the objections were dismissed and the attachment of the property was maintained. From this order, the objectors have appealed to this Court, and in support of their contentions, they rely—(1) upon the gift in their favour, and (2) upon the fact that the property has now devolved upon them and that it cannot after such devolution be made liable for the debts of their father.

As regards the first contention, we have no hesitation in holding, for reasons given in our judgment in the connected case, that the gift was a mere sham and that Bakhtawar Singh did not cease to be owner of the property after the execution of the deed of gift. If, therefore, appellant's case rested merely upon that gift, we would have decided against them.

But the second contention is supported by the authority of two cases reported as *Hansraj* v. *Sochet Singh* (2) and *Kartar Singh* v. *Munshi Ram* (3). In these cases, it was held that ancestral land and houses belonging to an ordinary agriculturist, once they have come into the hands of the heir of the debtor, and the latter had not in his life-time actually charged them with the debt, are not assets of the debtor's estate which the heir is bound duly to apply and to account for.

For the purpose of this case, both parties are agreed that the property in question was ancestral and that the question at issue must be decided in accordance with the ordinary rules of Customary Law. In these circumstances, the rulings above referred to are directly in point and, if they are to be followed, the objectors must succeed in this appeal.

But, with every deference, we have some doubt as to the correctness of these rulings, as the principle therein enunciated appears to us to be novel and opposed to the idea, heretofore somewhat widely prevalent, that agricultural tribes in this Province recognise the just debts of the last male holder as an enforceable charge upon the property derived from him, whether such property be ancestral or acquired. The question is one of great importance and the decision of it must necessarily have far-reaching effects.

(1) 14 Ind. Cas. 40; 113 P.W.R. 1912; 64 P. R. 1912.

(2) 79 P. W. R. 1911; 11 Ind. Cas. 375; 182 P. L. R. 1911.

(3) 80 P. W. R. 1911; 11 Ind. Cas. 376.

We, therefore, refer it to a Full Bench for final determination.

The question is this:—If a male proprietor, governed by customary rules, contracts a just debt and dies leaving ancestral landed property, is such property liable, in the hands of the next holder, in respect of such debt?

Rai Sahib Pandit *Sheo Narain* and Lala *Balwant Rai*, for the Appellants.

Rai Bahadur Lala *Sukh Dial* and Mr. *Naurang* for Lala *Dwarka Das*, for the Respondents.

DECISION OF THE FULL BENCH.

RATTIGAN, J.—The question referred to the Full Bench is abstract and has no reference to the facts of any particular case. It is as follows:—

"If a male proprietor, governed by customary rules, contracts a just debt and dies leaving ancestral landed property, is such property liable in the hands of the next holder in respect of such debt?"

Though not actually stated in so many words, the debt is clearly assumed, in the order of reference, to be one which has not been made an express charge on the ancestral landed property by the debtor. It is, in other words, a personal debt, and for its liquidation the person who incurred it has made no express provision by sale or mortgage of the ancestral estate for the time being in his possession. In these circumstances, can the creditor by obtaining a simple money decree either against the debtor himself in the life-time or after his death against the persons, who are the legal representatives *pro tanto* of the deceased debtor, execute his decree, after the death of the debtor, by attachment of the landed ancestral property which was at one time in the possession of the deceased? It may, perhaps, be conceded that such *attachment* is permissible during the life-time of the debtor, but with that aspect of the question, we are not at present concerned. The point before us is whether, in such circumstances, the creditor can, after the death of the debtor, proceed to execute his money-decree against ancestral land in the hands of a person who has obtained possession of it in due course under the rules of Customary Law. In our opinion, the answer to the question must be in the negative.

The decisions of the Full Benches of this Court reported as *Gujar* v. *Sham Das* (4); *Harvans Singh* v. *Harnam Singh* (5); *Sadhu Singh* v. *Secretary of State* (6) and *Sundar* v. *Salig Ram* (7), all proceed upon the principle that the person for the time being in possession of ancestral landed property is not a full owner, and that he is "not regarded as having the whole and sole interest in the property and power to dispose of it, so as to defeat the expectations of those who are deemed to have a residuary interest and who would take the property if the owner died without disposing of it" [Plowden, S. J., in *Gujar* v. *Sham Das* (4)]. The right of the reversionary heirs under Customary Law, is, as stated by Clark, C. J., in *Sadhu Singh* v. *Secretary of State* (6), "a right in property, the enjoyment of which is deferred" and it is vested in interest in the sense that the person in whom it inheres has a present fixed right to its future enjoyment. As the learned Chief Judge further remarked, "in this respect, the reversionary heir of the Customary Law bears a resemblance to the tenant in tail, *such reversioner not inheriting from the last owner but from the common ancestor.*"

Logically, no doubt, it should not be in the power of a person, who is for the time being in possession of ancestral landed estate, to charge that estate beyond the period of his own life, and certainly not by any act on his part prejudicially to affect the rights of the reversionary heirs to succeed to it. But, as has been often remarked, custom is not always logical. A well defined exception to the general principle has been recognized by custom in favour of the power of the present holder of the estate to alienate it, by sale or mortgage, for purposes which such custom recognizes as necessary and binding on the person who would in the ordinary way take the estate upon the death of the alienor. This is in itself an exceptional power conferred upon the holder of the estate, and this exceptional power is strictly circumscribed. The holder is com-

(4) 107 P. R. 1887 (F. B.)
(5) 84 P. R. 1898 (F. B.).
(6) 18 P. R. 1908; 19 P. W. R. 1908; 156 P. L. R. 1908.
(7) 26 P. R. 1911; 33 P. W. R. 1911; 34 P. L. R. 1911; 9 Ind. Cas. 300.

petent to alienate the estate for necessary purposes but, beyond this, custom does not go; and we know of no cases where ancestral landed property, upon which the last holder has created no charge, has been held liable in respect of his debts, just or otherwise, after it has passed into the hands of his reversionary heirs.

Mr. Sukh Dial relies upon certain observations made by Plowden, S. J., in the course of his judgment in *Atma Ram* v. *Nauranga* (8) to the effect that the entire interest of a proprietor, whether sonless or not, is liable, without any special act upon his part creating a charge, for his just debts, not only while in his own hands but also in the hands of his heirs. But these observations were *obiter* and were not necessary for the decision of the case before the Court, and, with every deference to one whose knowledge of Punjab Customary Law was exceptionally profound, we cannot assent to a proposition which, so far as we know, has never been recognized in any direct decision of this Court; and would, if accepted, very materially extend the scope of a rule which is itself of a peculiarly exceptional character.

For the reasons given, we are of opinion that the answer to the abstract question put to us must be in the negative and with this expression of opinion, we direct that the record be returned to the Division Bench for disposal of the appeal before it.

Reference disposed of.

(8) 24 P. R. 1894.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 517 AND 770 OF 1909.

May 15, 1912.

Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.

SATISH CHANDRA SINHA AND OTHERS —DEFENDANTS—APPELLANTS

versus

MUNJANALI DEBI—PLAINTIFF—RESPONDENT.

Res judicata—*Decision in rent suit by defaulting* patnidar—*Subsequent rent suit by purchaser of* patni *under* Patni *Regulation—Whether former decision* res judicata *in later suit*—Patni *Regulation Act (VIII of* 1819), *s.* 11—*Action in ejectment by purchaser at* patni *sale—Limitation—Incumbrance—Adverse possession, when incumbrance.*

Although the position of a purchaser at a *patni* sale may not be precisely that of a purchaser at a revenue sale (*Moizuddi* v. *Ishan Chandra*, 7 Ind.Cas. 849; 13 C. L. J. 293;15 C. W.N. 706), yet he is not privy in estate to the defaulting proprietor and does not derive his title from him, as, under section 11 of the *Patni* Regulation, he acquires property free of all encumbrances that might have been created upon it by the act of the defaulter, his representatives or assignees.

Tara Prosad Mitter v. *Ram Nursingh Mitter*, 5 B. L. R. A. p. 5; 14 W. R. 283 and *Radha Gobind Koer* v. *Rakhal Das Mukerjee*, 12 C. 82 at p. 90, relied upon.

Therefore, a suit for rent by the purchaser cannot be barred as *res judicata*, because a previous suit for rent by the defaulter failed on the ground that the relationship of landlord and tenant between the then plaintiff and the defendant was not established.

If an action in ejectment is brought by the purchaser, limitation will run against him only from the date when his purchase became final.

Nuffer Chandra Pal Chowdhury v. *Rajendra Lal Goswami*, 25 C. 167, followed.

The interest of a person in adverse possession is an incumbrance only when the adverse possession has continued for the statutory period.

Gokul Bagdi v. *Debendra Nath Sen*, 11 Ind. Cas. 453; 14 C. L. J. 136, relied upon.

Therefore, where the defaulting *patnidar* was not dispossessed for ten years before the *patni* sale, the trespasser's title by adverse possession had not been perfected, and, consequently there was no incumbrance to be annulled by the purchaser.

Appeal from the decree of the Sub-Judge of Birbhum, dated December 14th, 1908, modifying that of the Munsif of Suri, dated June 12th, 1908.

Babu *Naresh Chandra Sinha*, for the Appellants.

Babus *Hemendra Nath Sen*, and *Sachhidananda Gupta*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in a suit for rent. The dispute is limited to a six-annas share of the property which the plaintiff claims to have purchased on the 15th May 1905 at a sale held under Regulation VIII of 1819. The defence is substantially two-fold, namely, *first*, that the claim is barred by *res judicata*, as a suit by a previous *patnidar* in 1895 failed on the ground that the relationship of landlord and tenant between the then plaintiff and the defendants was not established; and *secondly*, that the claim is barred by limitation.

In so far as the first ground is concerned, it is entirely untenable. The plaintiff is a purchaser at a sale under Regulation VIII of

1819. Consequently, although his position may not be precisely that of a purchaser at a sale for arrears of revenue [*Moizuddi Biswas* v. *Ishan Chandra* (1)], yet he is not privy in estate to the defaulting proprietor and he does not derive his title from him, as, under tection 11 of the Regulation, he has acquired he property free of all encumbrances that might have been created upon it by the act of the defaulter, his representatives or assignees. This is clear from the cases of *Tara Prasad Mitter* v. *Ram Nursingh Mitter* (2) and *Radha Gobind Koer* v. *Rakhal Das Mukherji* (3). The first contention, therefore, fails.

In so far as the second contention is concerned, it is equally groundless. It is argued, not that the claim for rent is barred by limitation, but that the title to recover rent has been extinguished by adverse possession on the part of the defendants. Now, as already stated, the plaintiff purchased the property on the 15th May 1905 and the case of *Nuffer Chandra Pal Chowdhry* v. *Rajendra Lal Goswami* (4) shows that if an action in ejectment were brought, limitation would be taken to run against the plaintiff only from the date when his purchase became final. There is, therefore, no substance in the second contention.

It has been finally suggested, somewhat faintly, that the plaintiffs are bound to show by overt act that they have elected to extinguish the interest of the defendants. But it is clear, upon the authority of the cases of *Modhoo Soodun Koondoo* v. *Ramdhan Gangolee* (5) and *Titu Bibi* v. *Mohesh Chunder Bagchi* (6), that the plaintiff need not take any steps, before the suit is brought, to annul the encumbrance. As a matter of fact, however, it is an entirely unfounded assumption that there is any encumbrance at all to annul in the present instance. The case of *Gokul Bagdi* v. *Debendra Nath Sen* (7) shows that the interest of an adverse possessor is an encumbrance only when the adverse possession has continued for the statutory period. Here, the adverse possession of the defendant was asserted by the sale of the *patni* on the 15th May 1905. The defendants had been in adverse possession, even if it be assumed that there was adverse possession on their part, for ten years, when the interest of the *patnidar* was sold out under the Regulation. Their title as adverse possession had not, therefore been perfected, when the plaintiffs as purchasers became entitled to the property and so far as the plaintiffs are concerned, no title has been acquired against them since their purchase.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

It is conceded that this judgment will govern the other appeal (Second Appeal No. 770 of 1909) which is, therefore, also dismissed with costs.

Appeals dismissed.

(1) 13 C. L. J. 293, 7 Ind. Cas. 849; 15 C. W. N. 706.
(2) 6 B. L. R. Ap. 5; 14 W. R. 283.
(3) 12 C. 82 at p. 90.
(4) 25 C. 167.
(5) 12 W. R. 383.
(6) 9 C. 683.
(7) 11 Ind. Cas. 453; 14 C. L. J. 136.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 352 OF 1910.

January 31, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

PREONATH ROY—PETITIONER—APPELLANT

versus

NIBARAN CHANDRA SARKAR—OPPOSITE PARTY—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 15—Insolvency, petition for—Dismissal—Ground to be indicated in judgment—Adjudication—Equitable distribution of assets—Advantage to creditors.

An adjudication of insolvency ensures the distribution of the assets, if there are any, according to the equitable arrangement for which provision is made in the Insolvency Act.

Therefore, if there are considerable assets, it would be most disadvantageous to the general body of creditors that there should not be an adjudication.

A Judge, in dismissing a petition for adjudication, should indicate one of the grounds set forth in section 15 of the Provincial Insolvency Act as that on which he purports to act.

Appeal from the order of the District Judge of Hooghly, dated April 25th, 1910, dismissing the application of the petitioner to be adjudged of insolvent.

Babu *Gopal Chandra Ghoshal*, for the Appellant.

Babu *Atul Krishna Roy*, for the Respondent.

JUDGMENT.—In our opinion, the order of dismissal of the insolvent's petition for adjudication must be reversed. The power to dismiss is under section 15 of the Provincial Insolvency Act, and the Judge in his judgment does not indicate any of the grounds there set forth as that on which he purports to act, nor is it made to appear before us that there was any ground on which we can properly uphold the judgment. In fact, if, as the creditor maintains, there are considerable assets, it would be most disadvantageous to the general body of creditors that there should not be an adjudication. The adjudication ensures the distribution of the assets, if there are any, according to the equitable arrangement for which provision is made in the Act.

We must, therefore, allow this appeal and make an order of adjudication.

The respondent must pay the costs of this appeal, hearing fee one gold *mohur*.

The case will now be remitted to the lower Court and the proceedings in insolvency will be continued as contemplated by the Act.

Appeal allowed: case remitted.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 10 AND 188 OF 1909.

April 25, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

IN No. 10

MUTHU SRI JIEJAMBA RAI SAHIB—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TANJORE—RESPONDENT

IN No. 188

PANCHANATHASWAMI—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TANJORE—RESPONDENT.

Grant—Construction of deed—Whether grant of land or of land revenue only—Resumption by Government—Claim for declaration as to invalidity of resumption—Jurisdiction of Civil Court—Pensions Act (XXIII of 1871), s. 4.

A grant by a Mahratta Raja was in the following terms:—"Total of 60 *velies* of land, including wet and dry lands, water, trees, stones, *sidha*, *sadhya* (whatever is and may be brought into existence), present and future *patti*; all *banb* and all *kana* with all *Samudavams* with water poured from the hand. * * * * * * * *"

Held, (1) that this was a grant only of the land revenue, and

(2) that a suit for a declaration that the resumption of same by Government was illegal was barred by section 4 of the Pensions Act.

Government may grant the *kudivaram* to one person and the *melvaram* to another; similarly, though both the *kudivaram* and *melvaram* may be combined in the hands of the Government, there is nothing to prevent it from treating them as distinct interests and granting them to the same person.

Land revenue is not a servitude attaching to the land. The *kudivaram* and *melvaram* are distinct interests constituting the totality of ownership in the land. The revenue is not a servitude on property which belongs to the *kudivaram* holder.

Section 4 of Act XXIII of 1871 does not require that the grant should be of the land revenue alone in order to shut out the jurisdiction of the Civil Court to entertain a suit relating to a grant of land revenue.

Even where land revenue is granted along with the land itself, a Civil Court has no jurisdiction to determine a suit which relates to the land revenue alone.

Rama v. *Subba*, 12 M. 98; *Peria Kovil Kalavi Appan* v. *A. Pulliah Chetty*, 1 Ind. Jur. 164; *Gunnaiyan* v. *Kamakchi Ayyar*, 26 M. 339, relied upon.

Panchandayyan v. *Nilakandayyan*, 7 M. 191; *Kumara Tirumalai Naik* v. *Bangaru Tirumalai Sauri Naik*, 21 M. 310; *Babaji Hari* v. *Rajaram Ballal*, 1 B. 75 at p. 81; *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai*, 1 B. 523; *Ganpat Rao* v. *Anand Rao*, 28 A. 104; A. W. N. (1905) 206; *Ganpat Rao* v. *Anant Rao*, 32 A. 148; 5 Ind. Cas. 689; 14 C. W. N. 310; 7 M. L. T. 53; 7 A. L. J. 165, 11 C. L. J. 281; 12 Bom. L. R. 267; 20 M. L. J. 164; *Mannu Lal* v. *Fazal Imam*, 33 A. 580; 10 Ind. Cas. 353; 8 A. L. J. 692, explained and distinguished.

Freedom from liability to land revenue is not identical with holding a grant of land revenue. The land revenue arising from a man's own holding, when it is remitted and the land pays nothing, is rather extinguished than granted.

Babaji v. *Rajaram*, 1 B. 75 at p. 81, referred to.

The Pensions Act (XXIII of 1871) contemplates money payments to be received through the Collector or recovered from persons bound to pay revenue.

Quære:—Whether, when there is a grant of the land revenue only to a person already owning the *kudivaram* right, there is anything in section 4 of Act XXIII of 1871, construed in the light of Regulation IV of 1832 and Act IV of 1862, to take away the jurisdiction of a Civil Court with respect to a claim to the *kudivaram* right?

Appeal against the decree of the Subordinate Judge of Mayavaram in O. S. No. 15 of 1907.

Messrs. *K. Srinivasa Aiyangar* and *S. Srinivasa Aiyar*, for the Appellant (in No. 10).

MUTHU SRI JIEJAMBA RAI SAHIB *v.* SECRETARY OF STATE.

Mr. *T. R. Venkatrama Sastri*, for the Appellant (in No. 188).

Mr. *J. L. Rosario*, Government Pleader, for the Respondent in both.

JUDGMENT.—This appeal was preferred against the decision of the Subordinate Judge of Mayavaram in a suit instituted by a Ranee of His Highness the late Rajah Sivaji of Tanjore against the Secretary of State for India in Council for a declaration that certain lands were absolute freehold *Inam* and not liable to resumption by the Government and for recovery of assessment paid by her under protest for *faslies* 1312-1315. The lands in question, along with some other lands, aggregating in all 26 *velies*, are situated in the village of Kottaiyoor in the Kumbakonam *taluq*. The whole village was granted in *Inam* by Maharaja Tuljaji of Tanjore in the year 1763 to 24 Brahmins by a grant under the Royal seal (*sicca* grant), which is marked as Exhibit L in the case. The lands in dispute in this suit were alienated by the descendants of the grantees at various times. Some portions of them came into the possession of the late Maharaja Sivaji in 1846 and others into the possession of the plaintiff's co-Ranees and the plaintiff subsequently on various occasions, by purchases made for the benefit of a temple of which the plaintiff is the present trustee. The Government resumed the *Inam* in June 1905 and collected assessment on the lands from the year *fasli* 1312, the notification for resumption having been published in January 1903. The plaintiff's case is that Government had no right to resume the *Inam* as the lands were granted as absolute freehold to the donees under Exhibit L. The plaint also alleged that no proper inquiry was held before the resumption and the order of resumption is, therefore, illegal. The defendant contended that the order of resumption was passed in conformity with the law of the country and orders of Government, that the grant itself was invalid and that the title under the grant ceased on the alienation of the lands by the original *Inamdars*. He also contended that the Civil Courts had no jurisdiction to question the legality of the order of resumption. The Subordinate Judge held that the right under the grant was forfeited both by the failure of the holders to bring the lands to settlement under the *Inam* rules and by the alienations made by the *Inamdars*. He also upheld the defendant's contention that the Civil Court had no jurisdiction to question the validity of the resumption. We are of opinion that the decision of the lower Court on the question of jurisdiction is right and it is, therefore, unnecessary to go into the questions whether the grantees under Exhibit L were entitled to alienate the *Inam* and whether the order of resumption was legal.

The question whether the jurisdiction of the Civil Court is barred rests on the construction of section 4 of the Pensions Act (XXIII of 1871), which enacts: "Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant and whatever may have been the nature of the payment claimed or right for which such pension or grant may have been substituted." Section 6 provides that on a certificate from a Collector, Deputy Commissioner or other officer authorised in that behalf, a Civil Court can take cognisance of such claim. The question for decision is, whether the suit is one relating to a grant of land revenue made by the Mahratta Government of Tanjore in the year 1768. Exhibit L is in the form of a letter addressed to "M. Anam Karkoons (clerks) present and future, Subha Mannargudi." After describing the lands granted, the terms of the grant are thus set out:—"Total of 60 *velies* of land including wet and dry lands, water, trees, stones, *nidhi*, *niksheha* (treasure), *sidha*, *sadhya* (whatever is and may be brought into existence) present and future *patti* all *banb* and all *kana* with all *samudavams* with water poured from the hand.

"Boundaries to be fixed and the land made *dumala*.

"The gift is to be continued *puthra pouthra paramparya* (*i.e.*, from son to grandson in succession). Fresh orders from year to year are not required." It is contended for the appellants that the grant is of the land itself with everything contained in it and not of the Government assessment or melvaram. For the Government, it is contended that the language of the document does not necessarily show that the gift was of any-

thing more than melvaram, or Government assessment, and that, at any rate, the document expressly makes a grant of land revenue. There is no evidence on record to show whether the kudivaram right in the lands was vested in the Tanjore Government at the time of the grant or not. But the language is appropriate to a grant of kudivaram right also. We shall assume, for the purposes of this judgment that the kudivaram right in the lands was vested in the Tanjore Government and passed to the grantees under Exhibit L. But taking this to be so, is Exhibit L a grant of the melvaram or Government assessment or not? We are prepared to assume, without deciding, that a grant of all rights in certain lands vested in the Government, without reserving any right to Government revenue, would not by itself amount to a grant of the land, not being liable to revenue in the hands of Government; a mere grant of the land should not be construed to mean a grant of what did not exist at the time, namely, the Government assessment on it. But it cannot be disputed that Government may grant the kudivaram to one person and melvaram to another; similarly although both the kudivaram and the melvaram may be combined in the hands of the Government, there is nothing to prevent it from treating them as distinct interests and granting them to the same person. Now, what is the fair construction of the words in Exhibit L. It is not disputed that the words "*patti*" means Government assessment and that the words "*banb*" and "*kana*" also mean certain cesses leviable by Government. According to the terms of Exhibit L, the *patti*, "*banb*", and "*kana*" are given to the grantees. The gift is not of the land only, as Sarvamaniyam, though such gift may have the effect of exempting the grantee from the payment of any revenue. The items of Government revenue are expressly stated to be granted as well as the land itself. There was nothing to prevent the Tanjore Rajah from granting the kudivaram and the melvaram rights to the same grantee severally though he might also merely grant the land itself with all rights as Sarvamanyam. It is argued that the Government revenue and the cesses are referred to merely to show that the gift was to be free of liability to revenue and to express more fully the idea that the land was granted absolutely with all rights.

But, although the same legal effect might be achieved in either of two ways, the question is what was the method adopted in the particular case? The water, trees and stones might refer to rights included in the kudivaram. It is unnecessary to consider whether mines and treasures would form part of the kudivaram or melvaram right or of both. There is anyhow a distinct enumeration of Government assessment and cesses as subjects of grant. We must, therefore, hold that there was a grant of land revenue in Exhibit L. This being the case, we are of opinion that the suit relates to a grant of land revenue.

Section 4 of Act XXIII of 1871 does not require that the grant should be of land revenue alone in order to shut out the jurisdiction of the Civil Court to entertain a suit relating to a grant of land revenue. Such a construction would be opposed to the plain language of the section. No authority has been cited which goes to the extent of holding that, where land revenue is separately granted (along with the land itself) from the kudivaram right therein, a Civil Court would have jurisdiction to determine a suit which relates to the land revenue alone. In the present case, the Government, by its order of resumption, merely resumed the land revenue; and levied full assessment on the land and the suit is for a declaration that the resumption by the Government of the land revenue was illegal. In *Rama* v. *Subba* (1), it was held that a suit for the moiety of two villages granted as *jagir* was unsustainable in the Civil Court without a certificate from the Collector against the rival claimant who set up an exclusive right to the whole *jagir*. It does not appear that anything more than the melvaram was granted by the Government as *jagir*, and *prima facie* the grant would not include kudivaram right. The suit, therefore, apparently related only to the melvaram right and was clearly barred by section 4 of Act XXIII of 1871. The decision, however, proceeded on a wider ground. The learned Judges, Collins, C. J., and Muttuswami Aiyar, J, were apparently of opinion that, even though the *inam* might consist only of the land revenue, if it was granted

(1) 12 M. 98.

to one in whom the kudivaram right was also vested and if a dispute arose between rival claimants of both the kudivaram and melvaram right, a suit relating to such would not be maintainable in the Civil Court even with respect to the kudivaram right. The view adopted by them was that unless the *inam* had been enfranchised and made the free-hold property of the *inamdar*, the jurisdiction of the Civil Court was shut out formerly by the provisions of Regulation IV of 1831 and afterwards by Act XXI of 1871. Regulation IV of 1831 in terms excluded the jurisdiction of the Civil Courts only with respect to grants of land revenue. Act IV of 1862 rescinded the provisions of Regulation IV of 1831 in cases in which the *inam* was enfranchised.

It is unnecessary to consider whether, when there is grant of the land revenue only to a person already owning the kudivaram right, there is anything in section 4 of Act XXIII of 1871, construed in the light of Regulation IV of 1831, and Act IV of 1862, to take away the jurisdiction of the Civil Court with respect to a claim to the kudivaram right. Reference is made by the learned Judges to the judgment of Holloway and Kindersley, JJ., in *Peria Kovil Kalavi Appan* v. *A. Pulliah Chetty* (2). The suit in that case was for the recovery of certain lands which the plaintiff alleged he had purchased from an *inamdar*. It does not appear whether the *inam* in that case consisted of the melvaram right only or of the land itself. The judgment apparently proceeded on the footing that it was the melvaram but that the kudivaram already belonged to the grantee at the time of the grant. It was argued that the release, by the Government in favour of the owner of the kudivaram, of the right to the revenue could not be taken to amount to a grant of the land revenue. The learned Judges say:— "It appears, therefore, to us that the receipt from a tenant of revenue less than that assessable upon land of the same quality is a gift or grant of the difference." The dismissal of the suit by the District Court was upheld in second appeal. This judgment also apparently assumed that a suit relating to the kudivaram would also be unsustainable if it vested in the same person as the *inam* grant of melvaram. On the other hand in *Panchanadayyan* v. *Nilakandayyan* (3), where the suit was for partition of certain lands, and it was found that the *inam* grant was of the lands themselves revenue free and not merely of the revenue, it was held that the suit was maintainable. Turner, C. J., says:— "We are of opinion that the nature of the grants is such that they do not come within the provisions of the Pensions Act. That Act contemplates money payments to be received through the Collector or recovered from persons bound to pay revenue." It does not appear that the grant contained a distinct gift to the grantee of the Government revenue of the land as Exhibit L does in this case. The case is only authority for the position that, where there is no gift of the land revenue as such, the case does not come within the purview of section 4 of the Pensions Act. In *Kumara Tirumalai Naik* v. *Bangaru Tirumalai Sauri Naik*(4), the suit was, *inter alia*, to remove the defendants from the management of certain *inam* lands and to appoint other managers. The grant was not made by the Sovereign power but was confirmed by the British Government. The Court held, in accordance with the view taken in *Panchanadayyan* v. *Nilakandayyan* (3), that assuming that the confirmation by the Government of the previous grant amounted to a re-grant, it could not be said that the giving of the land free of revenue was a grant of land revenue so as to bring the case within the provisions of the Pensions Act." Freedom from liability to land revenue is not identical with holding a grant of land revenue, any more than the extinction of an easement by becoming sole proprietor of the property servient as well as dominant, is a grant of an easement. The land revenue arising from a man's own holding, when it is remitted and the land pays nothing, is rather extinguished than granted. See *Babaji Hari* v. *Rajaram Ballal* (5). It may be that if the land itself is granted without any distinct grant of the revenue thereon, the case would not come within section 4. But the observation that the relinquishment of the revenue due on land previously subject

(2) 1 Ind. Jur. 164.

(3) 7 M. 191.
(4) 21 M. 310.
(5) 1 B. 75 at p. 81.

to it is not tantamount to the grant of the revenue is more questionable and is opposed to the decision of this Court in *Peria Kovil Kalavi Appan* v. *A. Pulliah Chetty* (2). Land revenue is not a servitude attaching to the land. The kudivaram and melvaram are distinct interests constituting the totality of ownership in the land. The revenue is not a servitude on property which belongs to the kudivaram holder. The case is, however, not similar to the present one as there was apparently no distinct grant of land revenue in that case whether *Panchanadayyan* v. *Nilakandayyan* (3) and *Kumara Tirumalai Naik* v. *Rangam Tirumalai Sauri Naik* (4), are reconcilable with *Rama* v. *Subba* (1) or not they do not for the reason already mentioned affect the decision to be come to in the present case. *Babaji Hari* v. *Rajaram Ballal* (5), and *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai* (6) were similar to *Panchanadayyan* v. *Nilakandayyan* (3), and *Kumara Tirumalai Naik* v. *Rangam Tirumalai Sauri Naik* (4) and decided merely that where the grant is of the land itself section 4 of the Pensions Act does not apply. Our attention was drawn to the fact that in the latter case, in a letter accompanying the *sanad* and written to the Desathikaris and Deshlekhakes, the present and future *patti* (taxes) was said to be granted to the *inamdar* as in Exhibit L, in this case. But the *sanad* itself did not mention the *pattis*. See page 524. And it was contended by the defendant in that case that there was a distinct grant of the revenue of the land. *Ganpat Rao* v. *Anand Rao* (7) was also similar to *Panchanadayyan* v. *Nilakandayyan* (3). So also was *Ganpat Rao* v. *Anant Rao* (8). In the latter case, the Privy Council did not definitely, decide the point, although their Lordships' observations might show that, if the grant was of the land itself and not of the revenue, section 4 of the Pensions Act would not be applicable. In *Mannu Lal* v. *Fazal Imam* (9), also, apparently the grant was of the land itself. The learned Judges, Richards, C. J., and Bannerjee, J., were apparently of opinion that section 4 would apply only where the land revenue is payable by the Government to the grantee. They refer to section 3 which states that land revenue includes anything payable on the part of the Government in respect of any right, privilege, perquisite or office. The object of the definition was merely to include payment to be made by the Government and not to confine the expression "grant of money" to such payments. We are unable to accept this restricted interpretation of section 4. The decision of the case, however, is rested on the authority of *Ganpat Rai* v. *Anand Rao* (7), and proceeded, therefore, on the ground that the grant was of the land itself and not of the revenue thereon. In *Gunnaiyan* v *Kamakchi Ayyar* (10), Bashyam Iyengar, J., observed (page 345) that "claims in respect of personal *inams*, which have not been enfranchised, are exempt from the cognizance of Civil Courts and may be adjudicated upon only by the Governor in Council or other executive authority." The respondent contends that the learned Judge adopted the view taken in the case in *Rama* v. *Subba* (1). Whether it was the intention of the Legislature to shut out from the jurisdiction of the Civil Courts all claims relating to the kudivaram right also, where both the kudivaram and the melwaram are granted by the Government to the same person, and whether such intention has been effectively carried out in section 4 of the Pensions Act, it is not necessary for us to decide in this case. As we read Exhibit L, there was a distinct grant of the land revenue, apart from a grant of the kudivaram right. The suit, therefore, relates to a grant of land revenue, and it relates only to the land revenue. We are, therefore, of opinion that the suit is barred by section 4 of the Pensions Act. We dismiss the appeal with costs.

Appeal No. 188 of 1908 follows, and is dismissed with costs.

Appeals dismissed.

(6) 1 B. 523.

(7) 28 A. 104; A. W. N. (1905) 206.

(8) 32 A. 148; 5 Ind. Cas. 689; 14 C. W. N. 310; 7 M. L. T. 53; 7 A. L. J. 165; 11 C. L. J. 281; 12 Bom. L. R. 267; 20 M. L. J. 164.

(9) 33 A. 580; 10 Ind. Cas. 353; 8 A. L. J. 692.

(10) 26 M. 339.

RADHA BALAB SINGH *v.* SEWA RAM.

PUNJAB CHIEF COURT.
CIVIL APPLICATION No. 12 OF 1912.
April 1, 1912.
Present:—Mr. Justice Chevis.
Swami RADHA BALAB SINGH—PLAINTIFF—PETITIONER
versus
SEWA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Stay of execution—Sufficient cause—Substantial injury—Civil Procedure Code (Act V of 1908), O. XLI, r. 5.

In an appeal from a decree in a suit for a declaration that certain property is not liable to attachment and sale in execution of a decree, the Appellate Court can and should stay execution of that decree inasmuch as otherwise it would be difficult for the claimant to recover the property in the event of his succeeding in the appeal.

Sardarni Bhagwan Kaur v. *Rani Harnam Kaur*, 82 P. R. 1910; 122 P. W. R. 1910; 149 P. L. R. 1910; 7 Ind. Cas. 1017, referred to.

In such a case, the property should remain under attachment pending decision of the appeal.

Application, under Order XLI, rule 5 of the Civil Procedure Code, for stay of execution proceedings pending decision of the appeal case noted above by the Chief Court of the Punjab.

The Hon'ble Mr. *Muhammad Shafi*, for the Petitioner.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—This matter arises out of a suit in which Sewa Ram and Ram Chand got a decree dated 10th March 1908, for Rs. 3,200, with lien on certain property mortgaged, against Durga Pershad. In execution, property was attached. Radha Balab Singh, son of Durga Parshad, brought an objection which was dismissed, and then brought a regular suit which also failed, his claim being dismissed with costs. An appeal lodged by Radha Balab Singh is now pending in this Court.

In my order of 17th January 1912, which was an *interim* order for stay of execution, I have not clearly stated whether the decree of 10th March 1908, or the later decree is the one of which execution is to be stayed. But the later decree is one which can only be executed for costs, and the application for stay of execution speaks of giving security for the decretal amount and costs.

If the property which Radha Balab Singh is suing for is sold and passes into other hands, it will be difficult for him to recover it even if he succeeds in his appeal to this Court. I certainly think execution should be stayed in such a case, and I have no doubt that I have power to order stay of execution of the decree, dated 10th March 1908 [*vide Sardarni Bhagwan Kaur* v. *Rani Harnam Kaur* (1)]. The property is already under attachment, so I am told; so it is itself sufficient security for the decree of 10th March 1908. As for the 2nd decree petitioner, has furnished security.

The *ex parte* order of 17th January, 1912 is accordingly confirmed. The property will not be sold pending decision of appeal but will remain under attachment.

Stay of execution granted.

(1) 82 P. R. 1910; 122 P. W. R. 1910; 149 P. L. R. 1910; 7 Ind. Cas. 1017.

CHAJJUMAL *v.* NATHAN.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 425 OF 1911.
June 24, 1912.
Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.
CHAJJU MAL AND OTHERS—PLAINTIFFS—APPELLANTS
versus
NATHAN—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Suit on a mortgage by manager of the family—Parties—Non-joinder—Suit, maintainability of.

A suit on a mortgage brought by some of the members of a joint Hindu family in their capacity as managers, does not fail because the other members of the family are not impleaded as parties.

Madan Lal v. *Kishen Singh*, 9 A. L. J. 844; 15 Ind. Cas. 138, followed.

Second appeal from the decision of Additional Judge of Meerut, dated the 27th March 1911.

Dr. *S. C. Banerji*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This was a suit upon a mortgage, dated the 15th of March 1890, executed in favour of the predecessor-in-interest of the plaintiffs. Three sons of the original mortgagee brought the suit. An adult and a minor member of the joint family were not made plaintiffs. The Court of first instance treated the suit by the plaintiffs as by the managers of a joint Hindu family and gave them a decree. On appeal, the lower Appellate Court decided all the other points raised in the appeal in favour of the plaintiffs and came to the conclusion that the adult son and minor grandson were necessary parties and that as they were not impleaded within the period of

limitation, the defect was fatal to the suit. The son and the grandson in the lower Appellate Court filed an affidavit to the effect that the plaintiffs had instituted the suit in their capacity of the managers of the joint family. But the lower Appellate Court thought that that affidavit was too late. In second appeal, it is urged that the suit was instituted by the three plaintiffs as the managers of a joint Hindu family and that the case was covered by the recent Full Bench ruling of this Court in *Madan Lal* v. *Kishen Singh* (1). Though the plaintiffs did not state in so many words that they were suing in their capacity of managers, yet the tenor of the whole plaint leaves no doubt in our minds that they did sue in that capacity. In this view the omission of two members of the family from the plaint was not fatal to the suit. We, therefore, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs which in this Court will include fees on the higher scale.

Appeal accepted.

(1) 9 A. L. J. 844; 15 Ind. Cas. 138.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 90 OF 1910.

April 18, 1912.

Present:—Mr. Justice Rattigan.

GURMUKH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PUNJAB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Suit to contest validity of mortgage brought by one son and grandson—Effect of other descendants admitting alienation—Holding unable to support alienor's large family.

In a suit to contest an alienation of ancestral land by a *Jat*, brought by one of his sons and a grandson, the facts that they delayed for nine years in bringing the suit, that other sons and grandsons had not joined and had admitted the validity of the alienation, and that the holding was unable to support the large family of the alienor, constitute strong evidence in support of the alienation.

Second appeal from the order of the Divisional Judge of Amritsar Division, dated the 30th day of October 1909, reversing that of the Honorary Munsif of the 1st class, Gurdaspur, dated the 15th day of July 1909, decreeing the plaintiff's claim.

Pandit *Ram Bhaj Datta*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—In this case, one son and one grandson of a man, named Sant Singh, challenged a mortgage effected by the latter in 1900. Both Courts are agreed that Sant Singh found it impossible to maintain himself and his family from the land in dispute, and that the said land was at various times mortgaged to different persons. The Munsif found that necessity and consideration had both been proved in respect of Rs. 1,150 out of the total of Rs. 1,300 and that the mortgage was binding on the plaintiffs *pro tanto*. The mortgagee alone appealed to the Divisional Judge, who held that the full amount of the mortgage-money had been actually paid, and that there was no reason to doubt the necessity of the mortgagor in effecting the alienation. He accordingly accepted the appeal and dismissed the suit with costs throughout. He also held that the suit was premature as the mortgage was expressly made not redeemable until the expiry of 25 years.

The plaintiff has preferred an appeal to this Court and I have heard arguments at some length on his behalf. I am not, however, convinced that the finding of the lower Appellate Court should be set aside It is quite clear from the judgments of both Courts that the land was unable to support Sant Singh, who had a wife, four sons, and several grandsons, and the very fact that one son, Ganga Singh, and one grandson, Jagat Singh, have refused to join the plaintiff and have admitted the validity of the mortgage as a whole, is a strong piece of evidence in support of the mortgagee. There is also the fact that the mortgage was executed in 1900 and that the plaintiffs made no attempt to contest it for nine years. It is also significant that the plaintiff himself has mortgaged this land to one Bhag Singh and that the term of that latter mortgage is 30 years. I see no reason, therefore, to interfere with the decree of lower Appellate Court and I dismiss this further appeal with costs.

Appeal dismissed.

KHITISH CHANDRA LAHIRI *v.* GERPA HAZRA.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1153 OF 1909.
June 9, 1912.
Present :—Mr. Justice Sharfuddin and
Mr. Justice Coxe.
KHITISH CHANDRA LAHIRI—
PLAINTIFF—APPELLANT
versus
GERPA HAZRA—DEFENDANT—RESPONDENT.

Landlord and tenant—Rent stated in kabulyat—*Partition kept in abeyance or* hajat *for certain years—Landlord suing for full amount—Enhancement—Bengal Tenancy Act* (*VIII of* 1885), *s.* 29.

In a *kabulyat*, it was stated that the rent of the holding was Rs. 23 odd, that Rs. 14 odd was to be kept in abeyance and that for three years, the tenant would be liable to pay Rs. 8 odd. At the end of that time, he was to take a fresh settlement and execute a fresh *kabulyat* and if he did not do so, he was to be liable for rent at the rate of Rs. 23 odd. After the expiry of the period, no fresh settlement having been taken by the tenant, the landlord sued for rent at the higher amount:

Held, that rent being defined as what was lawfully payable in money, the amount payable during the first three years of the tenancy was Rs. 8 odd; that if at the end of that time the landlord desired to realise rent at Rs. 23, that was enhancement of the rent; that the stipulations in the *kabulyat* were a mere device to defeat the provisions of section 29 of the Bengal Tenancy Act, and that the landlord was entitled to a decree for rent at Rs. 8 odd only.

Appeal from the decree of the District Judge of Rungpur, dated March 11th, 1909, affirming that of the First Munsif of Nilphamari, dated September 4th, 1908.

Babu *Hem Chandra Mitra*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit for rent based on a *kabulyat* dated the 5th *Magh* 1300 B. S. In that *kabulyat*, it was stated that the rent of the holding was Rs. 23 odd, that the sum of Rs. 14 odd was to be kept in abeyance and that for three years the tenant would be liable to pay the rent of Rs. 8 odd. At the end of that time, he was to take a fresh settlement and execute a fresh *kabulyat* and if he did not do so, he was to be liable for rent at the rate of Rs. 23.

The Courts below have held that this raising of the rent from Rs. 8 to Rs. 23 was not legal and have accordingly given the plaintiff a decree for rent at the rate of Rs. 8 odd.

The plaintiff has appealed to this Court. It appears to us that the stipulations in the *kabulyat*, to which we have referred, are a mere device to defeat the provisions of section 29 of the Bengal Tenancy Act. Under that section, the money-rent of an occupancy-*raiyat*

BUDHU SINGH *v.* BHAGWATI PARSHAD.

cannot be enhanced by contract except subject to certain conditions. The rent is defined as being what is lawfully payable or deliverable in money or in kind, and there can be no question whatever that during the three years from 1300-1302, the amount payable or deliverable to the landlord was Rs. 8 only. If at the end of that time, the landlord desired to realise rent at the rate of Rs. 23, it is idle to say that the rent was not enhanced. It is clearly the intention of section 29 that tenants should not be allowed to contract themselves out of the provisions of the Act and a landlord cannot be permitted to defeat the intention of the Act by inducing ignorant tenants to take his lands on an agreement to pay enhanced rents subsequently. Cultivators are notoriously lacking in foresight and probably could easily be tempted by the immediate advantage of getting land at a lower rate of rent to enter into unreasonable and extortionate agreements of this kind.

In our opinion, the view which the Courts below have taken in this case is correct and this appeal is dismissed but without costs as no one appears for the respondent.

Appeal dismissed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 111 OF 1911.
March 29, 1912.
Present:—Mr. Justice Kensington and
Mr. Justice Chevis.
BUDHU SINGH—DEFENDANT—APPELLANT
versus
BHAGWATI PARSHAD—PLAINTIFF,
BABU RAM AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Partnership account—Plaintiff to prove his own case.

As a plaintiff has to prove his own case, therefore, in a partnership suit, though the defendant may have been negligent in not keeping detailed account and may possibly be to blame for not producing books, the plaintiff cannot succeed if he has been, at least, equally negligent in not keeping up any correct detail of the various works undertaken and of the profits realised thereon.

Second appeal from the order of the Divisional Judge, Ambala Division, dated 24th October 1910, modifying that of the Subordinate Judge, 2nd class, Ambala, dated 29th January 1910, decreeing the claim in part.

BUDHU SINGH *v.* BHAGWATI SINGH.

Mr. *Nand Lal*, for the Appellant.

Pandit *Rambhaj Datta*, Lala *Sangam Lal*, and Mr. *Roshan Lal*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant, Budhu Singh, alone against the lower Appellate Court's decree in plaintiff's favour for Rs. 1,500 as against the appellant and Ram Diyal who has not appealed, but is represented by a Pleader, as respondent. We are satisfied that Ram Diyal is entitled to the benefit of Budhu Singh's appeal under the terms of rule 33, Order XLIII, Civil Procedure Code, and for practical purposes, the appeal is one on behalf of both the defendants against whom the lower Appellate Court's decree was passed.

The subject-matter of the dispute is a rather confused partnership account in respect of certain contract work done for the East Indian Railway in 1908 by the parties referred to above and a third defendant, named Balu Ram. The plaintiff's case has been dismissed as against Balu Ram and though the present appellant urged in ground 3 of this appeal that Balu Ram had been improperly discharged from liability, he has, in the course of argument, given up this plea as hopeless. The appellant's Counsel had to admit that Balu Ram is separately suing Budhu Singh for his share of the partnership proceeds, and that any dispute that may be between these two partners will be disposed of in that suit. We are, therefore, no longer concerned with the original co-defendant, Balu Ram.

The two questions, which we are then called in to deal with in the present appeal, relate to,—

(1) the extent of plaintiff's share in such contract work as was undertaken by these four partners; and

(2) the amount of capital contributed by the plaintiff and of his share of profits in the contract work done.

On the first point, the Sub-Judge passed a preliminary decree, dated the 8th January 1910, finding plaintiff's share in the partnership at one-fourth. This was adhered to in the final decree of the 29th January 1910, and the finding on the point has been accepted by the learned Divisional Judge. The plaintiff has not appealed on the point, but has urged that it should be re-considered in the event of any reduction being made in the decree for Rs. 1,500, passed in his favour by the Divisional Court. He has nothing to go on beyond certain oral evidence to the effect that he and Budhu Singh alone were the original contractors in equal shares of one-half. No document was drawn up in these terms when the work was first undertaken in May, 1908, in what is described as the *Sabzi Mandi* contract and plaintiff was not a party to a later document, dated the 6th July 1908, in which his share was put at one-fourth. We do not, however, attach importance to the oral evidence and we think it clear that though the plaintiff did not execute the document of the 6th July 1908, he was well aware at the time of the terms recorded thereon and made no sort of protest. He continued joining in the partnership work notwithstanding that his share of the profits was limited to one-fourth, and we see no reason for going further into a matter which is settled by the concurrent findings of the lower Courts. The decision on this point appears to us quite correct and we cannot allow that plaintiff is entitled to more than one-fourth of the profits.

On the second point stated above, it is not seriously in dispute that plaintiff's share of the capital provided by the parties was Rs. 907 or that he has been re-paid Rs. 664 out of the sum leaving a balance due to him in respect of capital of Rs. 243 as found by the lower Courts. The appellant has indeed attempted to show that the re-payments to plaintiff amount to Rs. 1,320 in two items of Rs. 664 and Rs. 656. It is, however, quite clear from the plaintiff's receipt, dated the 19th May 1909, and from the available accounts, that the item of Rs. 656 is included in the item of Rs. 664. The appellant's contention on this point fails hopelessly and we find that Rs. 243 is still due to plaintiff on account of capital advanced.

In regard to profits, the Sub-Judge found that these amounted to Rs. 2,000 as admitted by the defendants. Taking the plaintiff's share to be one-fourth, he decreed Rs. 500 as profit in addition to Rs. 243 on account of capital, or Rs. 743 in all, as against an original claim for Rs. 1,500. In the lower Appellate Court, there was no clear finding as to the amount of the profits realised, but the learned Divisional Judge assumed, on the basis of *Jagna* v. *Gainda Mal*(1), that plain-

( ) 62 P. R. 1897.

tiff's share of the profits should be not less than Rs. 1,257 and he accordingly raised the amount of plaintiff's decree to the full Rs. 1,500 claimed.

There is nothing definite to go on beyond the defendant's admission that the profits realised amounted to Rs. 2,000, and considering that the total capital contributed by all the partners was only Rs. 2,700 and that work was only proceeding for about a year, we cannot believe that the actual profit was largely in excess of Rs. 2,000 The plaintiff has alleged that the East Indian Railway made payments amounting to Rs. 7,000, but it is clear that these payments represent the aggregate of sums due on works undertaken successively, and the plaintiff's contention that Rs. 4,300 out of the sum should be treated as profit is altogether absurd. We do not think that the learned Divisional Judge has looked at the matter from the proper point of view. The plaintiff has to prove his own case and though the defendants may have been negligent in not keeping detailed accounts and may possibly be to blame for not producing books, the plaintiff has been at least equally negligent in not keeping up any correct detail of the various works undertaken and of the profits realised therein. So far as we can judge, the total profit in which plaintiff is entitled to share cannot have exceeded the sum of Rs. 2,000 admitted by defendants, and as both sides have been equally negligent, there is no reason why plaintiff should be given Rs 1,257 as profits merely because he has chosen to bring an exaggerated claim.

Our conclusion is, therefore, that the sum decreed to plaintiff in the first Court should not have been enhanced by the learned Divisional Judge. We accept the defendant's appeal to this extent and set aside the decree of the lower Appellate Court, and direct that the decree of the Sub-Judge for Rs. 743 be restored as against the defendants, Budhu Singh and Ram Dyal only. The suit will stand dismissed as against the defendant Balu Ram. The plaintiff's claim was, to start with, much exaggerated and all parties concerned are more or less to blame for the litigation. The order as to costs will, therefore, be that the parties shall pay their own throughout, including their costs in this Court.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 426 OF 1911.

June 19, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

RAM PRASAD—PLAINTIFF—APPELLANT

versus

JAGRUP—DEFENDANT—RESPONDENT.

Mortgage—Provision not to redeem for 58 years—Whether unconscionable.

The provision in a mortgage deed that the mortgagor would not be entitled to redeem for 58 years is not *per se* a hard and unconscionable bargain.

Morgan v. *Jeffreys*, 1 Ch D. 620; 74 J. P. 154; 26 T. L. R. 324; 79 L. J. Ch. 360; *Bhawani* v. *Sheo Dihal*, 26 A. 479; A. W. N. (1904) 60; 1 A. L. J. 133; *Syed Abdul Hak* v. *Ghulam Jilani*, 20 B. 677, referred to.

Second appeal from the decision of the District Judge of Benares, dated 10th of February 1911.

Dr. *Satish Chandra Banerjee* (with him Messrs. *Gokul Prashad* and *Haribans Sahai*), for the Appellant.

Mr. *S. N. Sen*, for the Respondent

JUDGMENT.—The plaintiff's, father on the 19th of July 1899, executed a mortgage with possession in favour of Jagrup. One of the terms of the mortgage was that the mortgagor would not be entitled to redeem for 58 years. The mortgagor's son brought an action on the 9th of August 1910 for redemption of the mortgage. In paragraph 5 of his plaint, he stated as follows:—"The defendant has cunningly, fraudulently and dishonestly got the period of mortgage entered as 58 years in the deed of mortgage sought to be redeemed, which is most prejudicial and improper and is legally and equitably null and void". The fraud which the plaintiff attempted to prove was that a long term was entered in the mortgage-deed without the knowledge and consent of the mortgagor. The Court of first instance dismissed the plaintiff's suit on the ground that there was non-joinder of parties and that the fraud alleged by the plaintiff was not proved. The lower Appellate Court affirmed the dismissal. In second appeal, it is urged that such a long period as was agreed upon in this case is unconscionable and hard and should, therefore, be set aside and in support of this contention reliance is placed upon *Morgan* v. *Jeffreys* (1), in which a term of 28 years was regarded as unreasonable.

(1) (1910) 1 Ch. D. 620; 74 J. P. 154; 26 T. L. R. 324; 79 L. J. Ch. 360.

The learned Vakil for the appellant also relies upon *Bhawani* v. *Sheodihal* (2). We are unable to accept the contention raised on behalf of the appellant. The learned Judges, who decided *Syed Abdul Hak* v. *Ghulam Jilani* (3), quote from a Printed Judgment in *Ganesh* v. *Prahbakar*, S. A. No. 191 of 1893, decided on August the 12th, 1895:—"The terms (35 years) may or may not have been hard, they were agreed to by adults, and there is neither allegation in the plaint nor proof in the cause that any undue advantage was taken." In the case before us, there was an allegation of fraud which has been held by the Courts below not to have been proved, and, therefore, the remarks made by the learned Judges fully apply to this case, and we see no reason to set aside the decrees of the Courts below, especially taking into account the fact that the period of limitation for redemption in this country is 60 years while in England it is only 12 years. The parties to the mortgage, without any duress or undue influence, came to that agreement, and, therefore, they cannot be allowed to go behind its terms. It was, however, contended that the recitals in the mortgage deed show that the mortgagor was a debtor of the mortgagee, and that, therefore, the latter took advantage of the helpless condition of the former and made him accept a very hard bargain. No such case was alleged by the plaintiff in his plaint, and at this stage of the litigation, we are not inclined to allow him to make a new case.

A fraud only was alleged but not proved. For these reasons, we uphold the decree of the lower Appellate Court and dismiss the appeal with costs including fees in this Court on the higher scale. As the suit is premature, it is unnecessary for us to pronounce any opinion on the question of non-joinder.

Appeal dismissed.

(2) 26 A. 479; A. W. N. (1904) 60; 1 A. L. J. 133.
(3) 20 B. 677.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 3 OF 1911 CONNECTED WITH FIRST CIVIL APPEAL No. 2 OF 1911.

February 13, 1912.

Present:—Mr. Justice Griffin and Mr. Justice Chamier.

JAMBU PRASAD—APPELLANT

versus

AFTAB ALI KHAN AND OTHERS—RESPONDENTS.

Registration Act (III of 1877), ss. 32, 33, 87—Presentation of document for registration by person holding general power-of-attorney, validity of—Evidence Act (I of 1872), s. 114—Presumption in favour of validity of registration—Presence of executant of document at the time of registration, effect of.

A Court will presume that a registered document was presented for registration by a person duly authorized under the law. But this presumption may be rebutted.

Where a document was proved to have been presented for registration by a person holding a general power of attorney, not authenticated in the manner prescribed by section 33 of the Registration Act and not authorising its holder to register documents:

Held, that the presumption in favour of the validity of registration proceedings was rebutted.

The provisions of sections 32 and 33 of the Registration Act are not open to a lax interpretation and the fact that the executant of a document was present and admitted execution when it was registered does not justify the inference that he was present at the moment when the document was actually presented for registration.

Where a document was presented for registration by a *karinda* (agent) of the executant and no attempt was made to prove that he did not hold a proper authority to present it:

Held, that the presumption in favour of the validity of the registration proceedings must be given effect to.

First appeal from a decree of the Subordinate Judge of Saharanpur.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *Motilal Nehru*), for the Appellant.

Mr. *B. E. O'Conor*, (with him Messrs. *Abdul Raoof*, *Nehal Chand* and *S. A. Haidar*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale on two mortgages; the first executed on the 2nd July 1882, by Muhammad Ilias Khan, now deceased, the father of defendant No 1 and the husband of defendant No. 2, and by one Sayed Muhammad Khan, now deceased, who is represented by defendant No. 1; and the second executed on the 25th October 1882, by defendant No. 1 and Sayed Muhammad Khan, now represented by defendant No. 1. Defendant No. 3 has been joined as a puisne mortgagee.

JAMBU PRASAD *v.* AFTAB ALI KHAN.

The suit was defended on various grounds; among others, on the ground that the documents on which the suit was based had not been validly registered according to law. The learned Subordinate Judge framed the following issue:—

Whether or not the documents in suit had beed presented for registration by persons authorised to do so; and whether or not they had been validly registered; and whether or not they affected the property sought to be sold; and whether the claim for money was time-barred?

The Court below has found that the registration of both documents was invalid, and on this ground alone has dismissed the suit.

The plaintiff appeals.

The material portions of the registration endorsements on the two documents are as follows:—

On the mortgage-deed of the 2nd July 1882.

"Present:—Narain Singh, Sub-Registrar of Saharanpur.

This document was presented in the office of the Sub-Registrar of Tahsil Saharanpur, on Tuesday, the 11th July 1882, at 3 P. M.

Dated the 11th July 1882.

(Sd.) Nathu Mal, General Attorney of Lala Mittar Sen,

Signature of the Sub-Registrar.

Nawab Sayed Muhammad Khan, aged 50 years, and Muhammad Ilias Khan, aged 35 years, son of Muhammad Sardar Khan, sect Afghan Baraich, occupation *zemindars*, *Raises* and residents of *Kasba* Saharanpur, identified by Rao Muhammad Ali Khan, Rajput, aged 35 years, occupation *zemindari*, *Rais* and Resident of *Mauza* Sakranda, Tahsil Roorkee, and Sayed Tawangar Ali, son of Sayed Kabir Ali, aged 50 years, Mukhtar of the Court, resident of *Kasba* Saharanpur, who are known to me personally, admitted the execution and completion of this document and received at this time in my presence the sum of Rs. 59,000 in cash as per detail given in this document.

Dated the 11th July, 1882.

Signature of the Sub-Registrar.

(Sd) Sayed Muhammad Khan, in autograph.

(Sd.) Muhammad Ilias Khan, in autograph.—Witnesses.

(Sd.) Muhammad Ali Khan.

(Sd.) Tawangar Ali Khan, Mukhtar of the Court."

On the mortgage-deed of the 25th October 1892:—

"Present.—Munshi Anand Singh, Sub-Registrar, Maula Bakhsh (*karinda*) (agent), presented this document in the office of the Sub-Registrar of Tahsil Saharanpur, to-day (Wednesday), the 26th October 1892, at 1 P. M.

Signature of the Sub-Registrar.

(Sd.) Maula Baksh, *karinda*, in autograph.

Nawab *Sayed* Muhammad Khan, son of Sardar Khan, aged 65 years, and Aftab Ali Khan, son of Muhammad Ilias Khan, aged 24 years, by occupation *zemindars*, residents of Saharanpur, sect Pathan, residents of *Mohalla* Nawabgunj, admitted the execution and completion of this decument. I am satisfied as to (the identity of) these executants. The document be made over to Nathu Mal '*Karinda*' (agent).

Dated 26th October 1892.

Signature of the Sub-Registrar.

(Sd.) Sayed Muhammad Khan, in autograph.

(Sd.) Muhammad Aftab Ali Khan, in autograph."

Section 32 of the Registration Act, III of 1877, the Act then in force, is as follows:—

"32. Except in the cases mentioned in sections 31 and 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

"by some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person,

"or by the agent of such person representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

The material portions of section 33 are as follows:—

"33. For the purposes of section 32, the powers-of-attorney next hereinafter mentioned shall alone be recognized (that is to say)—

"(*a*) if the principal at the time of executing the power-of-attorney resides in any part of British India in which this Act is for the

time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides.

* * * * * * * * *

"Any power of attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf."

In both the documents in suit, Lala Mitter Sen (now represented by plaintiff), in whose favour they were executed, is described as a resident of Saharanpur. It is not alleged that at the time of execution of these documents, Lala Mitter Sen resided elsewhere than at Saharanpur. The validity of the registration of the documents was impugned by the defendant No. 1 on the ground that they were presented for registration by persons not qualified under the Registration Act to make such presentation. The registration endorsements show that in the case of the mortgage-deed of 1882, it was presented by one Nathu Mal, described as the General Attorney of Lala Mitter Sen, and in the case of the mortgage of 1892, that it was presented by one Maula Bakhsh, described as *karinda* (agent).

There is on the record no power-of-attorney in favour of either Nathu Mal or Maula Bakhsh such as is required by section 33 (*a*).

In appeal, it is contended on behalf of the appellants that every presumption should be made in favour of the validity of the registration proceedings, and that it should be presumed that the Sub-Registrar had in each instance satisfied himself that the document was presented for registration by a person duly authorized under the law. Reliance is placed on the observations of their Lordships of the Privy Council in *Muhammad Ewaz* v. *Biri Lal* (1):—

"Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down.....If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely on, or when they would be safe."

We have been further referred to two unreported decisions of this Court in a First Appeal No. 210 of 1910, decided on the 10th January 1912, and in *Wilaiti Begam* v. *Fazal Hussain* (2). The facts of neither case bear any resemblance to those of the case before us. In First Appeal No. 210 of 1910, the Court said:—

"In our opinion, the production of the bond with the certificate of due registration endorsed thereon raised a strong presumption in favour of the due registration of the bond, and that in the absence of clear proof that the requirements of law were not complied with, the Court was bound to admit the documents in evidence. Section 114 of the Evidence Act coupled with section 60 of the Registration Act seems to us to be abundant justification for the proposition."

Conceding the existence of the presumption contended for by the learned Advocate for the appellant, we have to consider the evidence by which the respondent sought to rebut that presumption. They called the Sub-Registrar of Saharanpur to produce the register of powers of-attorneys for the Saharanpur division from 1878 to 1886. The Sub-Registrar appeared as a witness. His evidence printed at page 1 of the respondent's book shows that he produced in Court Register No. 4 of 1882. That register contained a general power-of-attorney registered on the 19th of July 1882 (13 days before the execution of the mortgage-deed of 1882) executed by Lala Mitter Sen in favour of Nathu Mal. The power of attorney did not authorize Nathu Mal to register documents on behalf of Lala Mitter Sen nor was it authenticated in the manner prescribed by section 33 of the Registration Act.

The evidence of this witness was recorded on the 30th August 1910. The suit was not decided until the 26th September 1910. The plaintiff, therefore, had ample time in which to have a thorough search made in the records of the registration office. No other power of attorney except that deposed to by the Sub-Registrar has come to light. It is contended on behalf of the appellant

(1) 4 I. A. 166; 1 A. 465.

(2) 13 Ind. Cas. 961; 9 A. L. J. 148.

that the respondents have not exhausted every possibility, but we must hold nevertheless that the respondents have established by evidence the existence of a very strong probability that Nathu Mal held no such power of attorney as would authorise him to present documents for registration, and that in respect of the deed of 1832, the respondents have succeeded in rebutting the presumption in favour of the validity of registration proceedings.

With regard to the deed of the 25th October 1892, the matter stands on a different footing. The registration endorsement shows that the document was presented for registration by one Maula Bakhsh described as a *karinda* (agent). In paper No. 213 a petition filed in the Court below on behalf of the respondent No. 1, it was stated that Maula Bakhsh was not a general attorney He appears to have been employed as a *karinda* (agent) by the executants of the bond. No power-of-attorney in his favour is on the record, nor is there any evidence that any such power-of attorney exists. There is no proof of any search having been made for powers of attorney between 1883 and 1892. In the case of the mortgage-deed of the 25th October 1892, therefore, we must give effect to the presumption in favour of the validity of the registration proceedings.

It was further contended on behalf of the appellants that the substance of the proceedings before the Sub-Registrar should be looked to, and that it was immaterial by whose hands the document reached that of the Sub-Registrar, provided there were persons present before that official who were qualified under the law to have the document of 1882 registered. It is pointed out that the registration endorsement on that document shows that the executants were present before the Sub-Registrar and admitted the execution of the document. We were also referred to the evidence of one Gobind Rai, a witness called by the plaintiff. He was an attesting witness to the document. He says that he was present at the registration and that the executants asked Nathu Mal to present the documents before the Sub-Registrar. The learned Subordinate Judge did not believe his evidence. He was produced on the 21st September 1910, (by which time the plaintiff had realised that Nathu Mal was not duly authorized to present the document for the registration), no doubt, with the object of showing that Nathu Mal had handed the document to the Sub-Registrar at the request of the executants. We think it impossible for him to remember such a trifling incident after a lapse of 28 years, and we do not accept his evidence. As to the other branch of the argument for the appellant that the executants who were present at the registration office should be regarded as the persons presenting the document for registration, there is the initial obstacle in the way of the appellant that the registration endorsement shows that it was presented by Nathu Mal. It has not been proved in this case that the executants were actually present when the document was presented for registration. Their presence in the office of the Sub Registrar at that particular moment of time cannot be inferred from the registration endorsement. The only inference that can be drawn from that endorsement is that the executants attended the Sub-Registrar's office on the same day as the document was presented. The argument on behalf of the appellant is in effect that it does not really matter by whom the document was presented for registration provided the executants appeared before the Sub-Registrar and admitted execution. The provisions of sections 32 and 33 of the Registration Act III of 1877, are not open to this lax interpretation. In *Mujib-un-nissa* v. *Abdur Rahim* (3), their Lordships of the Privy Council observed.

"When the terms of section 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed."

In this case, we have found that the mortgage-deed of 1882 was presented by Nathu Mal, a person who had no authority to present the document for registration. In view of the observations of their Lordships of the Privy Council, set out above, we are unable to hold that this initial defect, if it can be said to be merely a defect, can be held to be cured by the subsequent admission of execution by the executants. Nor can we hold that the provisions of section 87 of the Act can be invoked in aid of the validation

(3) 23 A. 233; 11 M. L. J. 58; 5 C. W. N. 193; 3 Bom L. R. 154; 28 I. A. 15.

of registration proceedings done in violation of the express provisions of sections 32 and 33 of the Registration Act.

We, therefore, dismiss the appeal in so far as the suit on the mortgage-deed of the 2nd July 1892, is concerned. We allow the appeal in so far as the suit on the mortgage-deed of the 25th October 1892, is concerned. The respondents will receive their proportionate costs in both Courts in so far as they have been successful. The costs of the appeal in so far as the suit on the second mortgage is concerned will be costs in the cause. We remand the case for decision on the merits, in respect of the mortgage-deed of the 25th October, 1892.

Decree reversed: Cause remanded.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4125 OF 1912.
July 22, 1912.
Present:—Mr. Justice Mookerjee and Mr. Justice Holmwood.
SAILENDRA NATH MOOKERJEE—
DEFENDANT—PETITIONER
versus
RAM SUNDAR GHOSH—PLAINTIFF—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 20 cl. (c)—Cause of action, accrual of—Parties resident of place where money advanced—Absence of agreement to re-pay at other place—Presumption that money to be re-paid where transaction took place—Jurisdiction of Court—Contract Act (IX of 1872), ss. 49, 50.

In a *hat-chita*, on which a suit was brought, the creditor was described as resident of *S.* within the jurisdiction of the Katwa Court, the money was alleged to have been advanced at *S.*, and the parties at the time of the loan were residents of that place:

Held, that the money was presumably re-payable at *S.* where it was advanced and where the parties resided at the time of the transaction, and the Court at Katwa only had jurisdiction to take cognizance of the matter in the absence of any proof of any agreement for re-payment of the money at some other place.

Section 49 of the Contract Act does not apply where the money is payable on demand and not "without application by the promisee."

Raman Chettiyar v. *Gopalachari*, 31 M. 223 at p. 228, 4 M. L. T. 97 followed.

Section 50 of the Contract Act merely lays down the elementary rule that a promisor is discharged from liability if he performs the promise in a manner or at a time prescribed or sanctioned by the promisee.

Rule against the decree of the Small Cause Court Judge of Burdwan, dated April 24th, 1912.

Babu *Hemendra Nath Sen*, for the Petitioner.

Babus *Bipin Bihari Ghosh* (Junior), *Khetter Mohan Sen* and *Bankim Chandra Mukherji*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside a decree of a Court of Small Causes on the ground that it was made without jurisdiction. The plaintiffs sued to recover money due on a *hat chita* alleged to have been executed in their favour by the defendants on the 29th January 1910. Monetary transactions between the parties and their predecessors appear to have been of considerable standing. The original *hat-chita* was granted in favour of the father of the plaintiffs. In that *hat-chita*, the parties were described as residents of Shibloon (within the jurisdiction of the Court of Katwa), and in the *hat-chita* on which the suit is brought the creditors are similarly described as residents of Shibloon. The money is alleged to have been advanced at Shibloon; the parties, at the time of the loan, were residents of that place where their ancestral housesare situated. *Prima facie*, therefore, the Court at Katwa has jurisdiction to take cognizance of the matter, under section 20 clause (*c*) of the Code of Civil Procedure, 1908. The plaintiffs, however, assert that they are entitled to maintain the suit in the Burdwan Court, because the cause of action arose within the jurisdiction of that Court. One of the plaintiffs now resides in Burdwan and practises there as a Pleader, and it was sought to be proved in the Court below that there was an agreement for payment of the money at Burdwan. The Small Cause Court Judge, however, has not expressly found that there was such an agreement although he has noticed this allegation on the part of the plaintiffs. In the plaint itself, it is not asserted that at the time of the loan the parties agreed that the money should be re-paid, not where it was advanced but at Burdwan where one of the creditors resided. In the notice of demand sent on the 15th January 1912, there is no allegation of such an agreement between the parties. Under these circumstances, it is fairly clear that

the plaintiffs have failed to establish that the Burdwan Court has jurisdiction.

The case before us is very much stronger than that of *Raman Chettiyar* v. *Gopalachari* (1). There, a promissory-note payable on demand was made at Tanjore and no place was fixed expressly or impliedly for payment. The creditor, however, resided at Kumbakonam and he commenced the suit within the jurisdiction of the Court at Kumbakonam. It was held that the suit was not maintainable at Kumbakonam. Sir Arnold White, C. J., pointed out that, under these circumstances, looking at the contract and at the facts which existed at the time the contract was made, the contract must be taken to have been intended to be performed within the jurisdiction of the Court at Tanjore [see the judgment of Cotton, L. J., in *Reynolds* v. *Coleman* (2) and of Lindley, L. J., in *Rein* v. *Stein* (3)]. In the case before us, it must be borne in mind that when the amount was originally advanced, the contract was with the father of the plaintiffs and there is no suggestion that he ever resided at Burdwan; there is no presumption, therefore, that there was any agreement to re-pay the loan at Burdwan. The fact that in the notice of demand, the debtors were called upon to pay the money at Burdwan does not plainly affect their position. The money was presumably re-payable at Shibloon where it was advanced and where both the parties resided at the time of the transaction; that presumption has not been rebutted by the plaintiffs by proof of an agreement to the contrary. Section 49 of the Indian Contract Act is of no avail to the plaintiffs, because as pointed out by Sir Arnold White, C. J., in *Raman Chettiar* v. *Gopalachari* (1), that section does not apply where, as here, the money is payable on demand and not "without application by the promisee." Section 50 also is of no assistance as it merely lays down the elementary rule that a promisor is discharged from liability if he performs the promise in a manner or at a time prescribed or sanctioned by the promisee.

It is worthy of note that the objection as to jurisdiction taken in the Court below and re-iterated here is of substance and not of form, because if the suit is tried at Katwa, it will be tried as a regular Civil suit by a Munsif and an appeal on the facts will lie to the District Judge, whereas if it is heard at Burdwan, it is summarily tried as a Small Cause Court suit. Under these circumstances, we are of opinion that the Rule must be made absolute, the decree of the Small Cause Court Judge discharged, and that Court directed to return the plaint to the plaintiffs for presentation to the proper Court. The petitioners are entitled to the costs of this Rule. We assess the hearing fee at one gold *mohur*.

Rule made absolute.

(1) 31 M. 223; 4 M. L. T. 97.

(2) 36 Ch. D. 453; 56 L. J. Ch. 903; 57 L. T. 588; 35 W. R. 813.

(3) (1892) 1 Q. B. 753; 66 L. T. 469; 61 L. J. Q. B. 401.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 4 OF 1911 AND No. 7 OF 1911 (MATRIMONIAL JURISDICTION.)

November 29, 1911.

Present:—Mr. Justice Fletcher.

THOMPSON, FLORENCE AMELIA—PETITIONER

versus

THOMPSON, GEORGE S.—RESPONDENT.

Divorce—Adultery, incestuous, by husband—Condonation by wife—Subsequent conduct of husband—Treatment of wife with silent indifference—Injury to wife's health—Cruelty—Revival of condoned adultery.

A wife condoned her husband's incestuous adultery with her sister. Subsequently, he treated his wife with silent indifference and in consequence her health suffered:

Held, that the conduct of the husband was such as to revive the condoned incestuous adultery of the husband and the wife was entitled to a divorce.

Durant v. *Durant*, 1 Hag. Eccl. Rep. 733 at p. 761; *Bramwell* v. *Bramwell*, 3 Hag. Eccl. Rep. 618; *Cooke* v. *Cooke*, 3 Sw. & Tr. 126; 32 L. J. Mat. 154; 9 Jur. (N S.) 754; 8 L.T. 644; 11 W.R. 957 and *Ridgway* v. *Ridgway*, 29 W. R. Eng. 612, followed.

Petition for divorce.

Messrs. *Buckland* and *Langford James*, for the Wife.

Messrs. *Avetoom* and *Bagram*, for the Husband.

Messrs. *E. P. Ghose* and *H G. Pearson*, for the Co-respondent Hugh Doherty.

JUDGMENT.—These are two cross-petitions for divorce, which by the consent of the parties were heard together.

FLORENCE AMELIA THOMPSON *v.* GEORGE S. THOMPSON.

The first petition presented by the wife, Florence Amelia Thompson, against her husband, George Sprott Thompson, claims a divorce on the ground of incestuous adultery by the husband. In answer to that petition, the husband denies the incestuous adultery, and charges his wife with adultery, (the same acts which form the subject of the second petition), and the answer to the husband's petition is a denial by the wife, and the acts of which she complains in her own petition. Therefore, the facts in the two petitions are the same, the position only being reversed; the husband being in the one case respondent and in the other case, petitioner. The co-respondent to the husband's petition is Hugh Doherty, who is in business in Calcutta.

It appears from the petition and the evidence that the husband and wife were married on the 31st of October 1901 at the Congregational Chapel at Hastings in this town.

The parties profess the Christian religion.

After the marriage, the parties first of all lived in a boarding house in 13, Camac Street, and then they removed to 13, Telkul Ghat Road, Howrah, as being nearer the husband's place of work, the husband being employed in an engineering firm at Howrah; and after that they left that residence where they were for two and a half years, and lived in 28, Grand Trunk Road together, until the wife finally left her husband on the 25th of March 1911.

There is one child of the marriage, Sylvia Irene, born on the 23rd September 1905.

The wife charges in paragraph 4 of the petition "that on various occasions, in or about November or December 1908, the respondent at 13, Telkul Ghat Road, committed incestuous adultery with Ada Goodwin, the sister of the petitioner, who was then residing with your petitioner." * * *

* * * * *

I have no doubt that the husband committed incestuous adultery with his sister-in-law.

The next question is, has that incestuous adultery been revived by the subsequent conduct of the husband? First of all, it is necessary to decide in what manner condoned adultery is revived, and I refer to the cases cited in the Court of Arches. First, there is the case of *Durant* v. *Durant* (1). There the Dean of the Arches expressed his opinion thus: "Under these authorities (which he cited), I am inclined to hold: first, that cruelty will revive adultery, and, secondly, that less is necessary to revive than to found an original sentence." Then there is the case of *Bramwell* v. *Bramwell* (2). That was decided by a very distinguished Judge, Dr. Lushington. He followed the opinion that has been expressed by Sir John Nichols, Dean of the Arches, in *Dowden* v. *Dowden*. That was also followed in two other cases, the first one of which is *Cooke* v. *Cooke* (3). After the constitution of the Royal Court for Matrimonial Cases, when the Ecclesiastical Jurisdiction had been taken away, a Judge in that Court (I think it was Sir John Wilde) also adopted the opinion which has been expressed in those other cases. It has been followed also by the late President of the Probate and Divorce Division, Lord Hannen, in the case of *Ridgway* v. *Ridgway* (4). So one must apply one's mind to this case having regard to the authorities that have been cited.

* * * * *

The husband has failed to establish that the wife and co-respondent committed adultery.

The question is, has the incestuous adultery, which the wife condoned certainly on the 1st January 1909, been restored by the subsequent conduct of the husband?

I am satisfied that the husband in this case, as Mrs. Keble said, only spoke to his wife on household matters. That, obviously, was not the terms on which the wife forgave the husband. The wife forgave the husband on the footing that if she came back to him, he should conduct himself, in a manner in which a husband should conduct himself, not that the wife should be spoken to only on household matters, and that she should be treated with what has been called in the case "silent indifference."

The evidence in this case shows that the wife's health has suffered.

I do not agree with the statement as to why marital intercourse ceased, namely, that the *ayah* told the husband something. I

(1) (1825) 1 Hag. Eccl. 733 p. at 761.
(2) (1831) 3 Hag. Eccl. 618.
(3) (1863) 3 Sw. and Tr. 126; 32 L. J. Mat. 154; 9 Jur. (N. S.) 754; 8 L. T. 644; 11 W. R. 957.
(4) (1881) 29 W. R. (Eng.) 612.

think it is much more probable that the husband had during his absence from his wife acquired vicious habits. That a man should during this long period, even admitting the absence of the wife during the hot weather in Darjeeling, sleep alongside a young wife without resuming marital intercourse is very unusual, and that the husband satisfied his passions in other ways is very probable. Apart from the fact that the husband gave way to disgusting habits, it is a fact that the wife's health suffered in consequence of the husband's treatment.

In my opinion, the wife has established in this case that her health suffered by the conduct of the husband after she condoned his incestuous adultery, and the result of that is that the incestuous adultery has been revived, and, therefore, the wife is entitled to a decree.

On the wife's petition, I grant a decree *nisi* with the usual order for costs, including all reserved costs, and the husband's petition is dismissed with costs against the respondent and co-respondent. The wife to have custody of the child.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 14 OF 1912.

June 21, 1912.

Present:—Mr. Lindsay, J. C., and and Mr. Rafique, A. J. C.

Musammat RAJ KUER—PLAINTIFF—APPELLANT

versus

CHUNNOO LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 72, 90—Permission to bid granted to decree-holder subject to certain conditions, validity of—Purchase without abiding the conditions, effect of—Sale, whether in such a case valid or not—Joinder of a stranger, effect of—Separation of interests purchased in the case of one joint bid.

The mere fact that a decree-holder has associated with himself a stranger would not make a sale valid when the bid is a joint one and the interest of the decree-holder cannot be separated.

The law authorizes a Court to impose any condition it considers fit on the permission granted to a decree-holder to bid at a sale of the property of his judgment-debtor. An order imposing on the decree-holder a condition that his lowest bid should be the amount of the decree, is not *ultra vires* or illegal, but valid and enforceable.

Srimati Sarat Kumari Debi v. *Nimai Charan Dey*, 5 C. W. N. 265, followed.

Wazir Ali v. *Janki Prasad*, 28 A. 671; 3 A. L. J. 458; A. W. N. (1906) 183, *Lakhraj* v. *Shamlal*, 16 B. 404, distinguished.

The conduct of a decree-holder, who evades a condition imposed and colludes with strangers to bid with him in purchasing the property for much less than the decretal sum, amounts clearly to fraud.

Srimati Sarat Kumari Debi v. *Nimai Charn Dey*, 5 C. W. N. 265, followed.

The mere fact that the decree-holder agrees to bid for the property for the amount of the decree and purchases it for a sum much less than that amount, is sufficient to show that his fraud has led to substantial loss.

Such a sale is bad and should be set aside.

Appeal against an order of the Subordinate Judge, Biswan, dated 1st Deceber 1911.

Babu *Ishri Prasad*, for the Appellant.

Mr. *A. P. Sen* and *Pandit Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—It appears that the respondents Nos. 1 to 4 and Gauri Shanker, the husband of respondent No. 5, obtained a decree for Rs. 15,000 on 27th of September 1902 against Mahant Pitambar Das, Thakur Drigbijai Singh and Thakurain Raj Kunwar, wife of the latter. The first application for execution of decree was made by the decree-holders on the 9th of September 1907 by which they asked for the attachment of moveable property. No property was found and the application was consigned to the Record Room. On the 28th of October 1907, another application was made by which the decree holders sought to attach three villages. The Court executing the decree allowed the application with regard to village Chandnapur only, which was attached. The decree-holders filed a third application on the 28th August 1908, asking for the attachment of two more villages *viz.*, Maraura and Bhanpur. The application was allowed and the two villages were attached. But the proceedings on the applications of the 28th of October 1907 and the 28th of August 1908 were stayed under the orders of the Government. On the 11th of March 1909, the decree-holders applied for

the sale of the three attached villages. A sale statement was submitted to the Government and the sanction for sale of the said of three villages was granted on the 5th of December 1910. An order for the sale of the villages was accordingly made. But before the date fixed for sale the decree-holders applied to the lower Court for permission to bid at auction. The lower Court granted the permission in the following words:—

Ijazat kharidari nilam dijati hai bashhrteke sab se ziyada boli baqadar matalba digridar ke ho. Rasid basharat khatam hone nilam digridar se dakhil karai jawe.

"Permission to purchase at auction is granted provided the highest bid is by the decree-holders and the bid is equivalent to the amount of the decree. In case the sale is concluded in favour of the decree-holders, a receipt for the satisfaction of the decree will be taken from them."

The sale was held on the 20th of June 1911, at which the three villages were sold in one lot and knocked down to the decree-holders and two strangers for Rs 8,240. On the 19th July 1911, the judgment-debtor filed objections to the sale. It was urged before the lower Court that the decree-holders had not observed the terms upon which permission to bid at auction was granted to them and that their collusion with two other bidders had prevented the sale of the property at its proper value.

The learned Subordinate Judge disallowed the objections. He said that he did not mean by his order of the 25th February 1911 that the lowest bid of the decree-holders was to be equivalent to the decretal amount. He saw no collusion and no harm in the conduct of the decree-holders in getting two strangers to join in the purchase of the property. He thought that the villages had been sold at a fair price. The judgment-debtor has preferred this appeal and repeats before us the objections urged before the lower Court. The learned Counsel for the decree-holders and the two strangers admit that the order of 25th of February 1911 can only have one meaning, *viz.*, that permission was given to the decree-holders to bid provided their lowest bid was equivalent to the decretal amount. But it is argued that such an order was *ultra vires*. The Court passing such an order could and should withdraw it or ignore it. The following cases are cited in support of the agrument:—*Wazir Ali* v. *Janki Prasad* (1); *Lekhrai* v. *Shamlal* (2).

It is further contended that the Court executing the decree has a discretion as to whether a sale should be confirmed or set aside. The lower Court exercised its discretion and properly in favour of the decree-holders. The Court ought not to interfere with that discretion. Moreover, it is said that no sale can be set aside unless the alleged irregularity is attended with substantial loss to the judgment-debtor. In the present case, the learned Subordinate Judge has held that the three villages have been sold at a fair price.

We do not think that the order of the lower Court passed on the 25th February 1911, imposing on the decree-holders the condition that their lowest bid should be the amount of the decree, was *ultra vires* or illegal. The law authorizes a Court to impose any condition it considers fit on the permission to a decree-holder to bid at the sale of the property of his judgment-debtor. The condition fixing a certain sum as the lowest bid of the decree-holder prevents him from colluding with the other bidders and getting the property at an unfair price. Such a condition has been recognised to be enforceable and valid. *Vide Srimati Sarat Kumari Debi* v. *Nimai Charan Dey* (3).

The cases cited by the learned Counsel for the decree-holders do not relate to the point under discussion. All that is laid down in *Wazir Ali* v. *Janki Prasad* (1) and *Lekhraj v. Sham Lal* (2) is, that a Court is competent to withdraw its order if it considers it objectionable and illegal. The order of the lower Court, dated the 25th February 1911, being legal, the conduct of the decree-holders in evading the condition imposed by that order by joining two strangers to bid with them and purchasing the property for much less than the decretal sum amounts clearly to fraud. This view is borne out by the case of *Srimati Sarat Kumari Debi* v. *Nimai Charan Dey* (3). But it is said that fraud alone will not vitiate the sale unless it has led to substantial loss. And the lower Court has held that there has been no such loss. We are unable to agree

(1) 28 A. 671; 3 A. L. J. 458; A. W. N. (1906) 183.
(2) 16 B. 404.
(3) 5 C. W. N. 265.

with the lower Court. The mere fact that the decree-holders agreed to bid for the property for the amount of the decree which was more than Rs 23,000 and purchased the property for Rs. 8,240 shows that their fraud has led to substantial loss.

One more argument remains to be considered. It is urged for Munnu Lal, one of the strangers who joined the decree-holders in the bid at auction, that he should not suffer by the conduct of the decree-holders. The property was sold in one bid and Munnu Lal did make an independent bid.

He joined the decree-holders in the purchase of the property. He cannot, therefore, ask that his interest, whatever that might be, should be separated from that of the decree-holders, and the sale to the extent of his interest should be confirmed.

We accept the appeal, reverse the order of the lower Court and set aside the sale. Costs are allowed to the appellant.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 689 OF 1908.

October 25, 1909.

Present:—Mr. Skinner, A. J. C.

RAMJI—APPELLANT

versus

SHEIKH MANSUR—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 10—Pre-emption—Property leased to vendee—"Capable of physical possession"—Limitation—Merger—Res judicata—*Estoppel—Suit for pre-emption—Plea of bar by limitation—Suit dismissed as premature—Plea of limitation in subsequent suit.*

When property sold is in the possession of another person as lessee, it is not capable of being taken into physical possession by the vendee, and the limitation for a pre-emption claim runs from the date of the registration of the deed of sale.

Batul Begum v *Mansur Ali Khan*, 24 A. 17, 3 Bom. L. R. 707; 5 C. W. N. 888; 28 I. A. 248, referred to.

Gauhri Mal v. *Jainti Mal*, 73 P. R. 1885 and *Mansabdar* v. *Nabi Baksh*, 43 P. R. 1900, followed.

Yesaji v. *Ramkrishna*, 3 N. L R. 142 and *Ganpat Rai* v. *Masita Khan*, A.W.N.(1887) 235, not followed.

By a sale deed executed and registered on the 26th June 1897, *A.* purchased certain land. The land conveyed by the sale had already been leased to *A.* for nine years by a lease executed on the 9th April 1895 and expiring on the 5th June 1904. The sale-deed purported to take effect from the expiry of the lease but did not reserve any rent to the vendor.

On 1st July 1903, *B.* filed a suit for pre-emption against *A.*, who pleaded that the suit was time-barred. *B.*, then, urged that the sale only took effect from the date of the expiry of the lease. It was then pleaded on *A*'s. behalf that in that case the suit was premature, and on that view, it was dismissed.

On the expiry of the lease, *B.* again sued *A.* for pre-emption:

Held, (1) that there was no *res judicata* against *A.* as the decision in the previous suit merely amounted to this that on *B.*'s own contention, the claim then made was premature; there was no decision of the plea that the claim was even then time-barred or not;

Run Bahadur Singh v. *Lucho Koer*, 11 C. 301; 12 I.A. 23 referred to.

(2) that there was no estoppel by *A.*'s plea in the former case as *B.*'s position had in no way been affected by it, for if limitation ran from the date of sale, the claim was then already barred;

(3) that if the lease did not merge in the sale, the present suit was barred under the 2nd part of the third column of Article 10 of the Limitation Act;

(4) that if the lease merged in the sale, the possession of *A.* was under the sale from the date of sale and on this view too, the suit was time-barred.

Appeal against the decree of the District Judge, West Berar, Akola, dated the 28th July 1908, confirming that of the Subordinate Judge, Akola, dated the 31st March 1908.

Messrs. *J. Mittra* and *G. L. Subhedar*, for the Appellant.

Mr. *M. R. Dixit*, for Respondent No. 1.

JUDGMENT.—The plaintiff-respondent is a co-occupant of a survey number in Berar, and sues for pre-emption in respect of part of the survey number sold to the defendant-appellant by one Chimnaji by a sale-deed executed on the 26th June 1897, and registered the same day. The land conveyed by the sale had already been leased to the defendant by Chimnaji for nine years by a lease executed on the 9th April 1895, and expiring on the 5th June 1904; and the sale-deed purports to take effect from the expiry of the lease, but does not reserve any rent to the vendor, beyond the Government revenue, which was to be paid by the vendee. Neither did the lease reserve any, as the consideration consisted of a cash premium of Rs. 50 and an agreement that the lessee would pay another Rs. 50 to a creditor of the lessor. And though the sale-deed purports to take effect from the end of the lease by the words 'After completion of the years it is sold to you', it goes on to say "The immoveable property mentioned above is sold to you for

the above amount. You are full owner of it. No rights now remain with me. The *khata* of the field would be transferred to your name whenever you ask for it. If any one brings a suit regarding the share, I shall be responsible for it. You shall not be put to expense and molestation."

The plaintiff filed a suit for pre-emption on the 1st July 1903, more than six years after the registration of the defendant's sale-deed, but before the expiry of the lease, and on the defendant's pleading that the suit was time-barred, urged that the sale only took effect on the expiry of the lease. It was then pleaded on the defendant's behalf that in that case the suit was premature, and on that view it was dismissed. The plaintiff appealed, but on the 16th December 1903, his appeal was withdrawn, his Pleader admitting that the suit was premature. The present suit was filed in the Court of the Subordinate Judge on the 15th July 1906, and it has not been made clear to me how the plaintiff brings it within time, even if his cause of action is held to have accrued on the expiry of the defendant's lease. But apparently the plaint was originally presented in another Court in June 1904, and the proceedings in that Court lasted till the 6th July 1905, when after amendment and payment of additional Court-fee, the plaint was returned for presentation to a Court having jurisdiction. The question of the plaintiff's right to exclusion of this period was raised in the first Court, and an issue framed:—"Was the suit barred when the plaint was presented to this Court on the 6th of July 1905, assuming that the cause of action arose in June 1904?" On this issue, the first Court gave a decision which, as it stands, is inconsistent with the decree passed by it in the plaintiff's favour, *viz.*, "Plaintiff was *bona fide* going on with the proceedings in the Munsif's Court, and I do not, therefore, think that although the plaint was presented in this Court on the 6th July 1905, plaintiff is entitled to deduction of time during which he was going on with the proceedings in Munsif's Court." Apparently, the words 'do not' should have been omitted. The point has not been raised before me and only attracted my attention when I was writing my judgment. Learned Counsel on both sides assumed that the suit was within time, if the plaintiff's cause of action arose on the expiry of the defendant's lease, and the view I take of this question, makes it unnecessary that I should call for the Munsif's record, and satisfy myself that the plaintiff is entitled to exclusion of the time spent in his Court, and that if this is allowed, the suit was filed within one year of the expiry of the lease.

That the plaintiff's cause of action accrued on the expiry of the defendant's lease is said to have been decided in his favour by the ruling of this Court in *Yesaji* v. *Ramkrishna* (1), and by the decision in the previous litigation. The first Court was inclined to distinguish the case of *Yesaji* v. *Ramkrishna* (1), but held the question of limitation concluded by the previous decision between the parties, and gave the plaintiff a decree for pre-emption. The defendant appealed, but the lower Appellate Court, holding the first part of Article 10 applicable, and that possession under the sale was only taken with effect from the expiry of the lease, dismissed the appeal.

The defendant has come up in second appeal, and the appeal must, in my opinion, succeed. There is no *res judicata* against him, as the decision in the previous case merely amounts to this, that on the plaintiff's own contention the claim then made was premature; so there was no decision of the plea raised by him that the plaintiff's claim was even then time-barred, and the decree passed was, in the words of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (2), "not based upon" his plea of limitation but made "in spite of it." And there is no estoppel by his plea in the former case, as the plaintiff's position has been in no way affected by it, for if limitation runs from the date of the sale, the claim was then already time-barred. And the defendant then as now raised the plea of limitation, but, the case being decided in his favour on another point arising out of the plaintiff's own statement of his case, and the appeal withdrawn, was unable to urge his plea of limitation before the higher tribunals. It would have been a different matter if the former suit had been

(1) 3 N. L. R. 142.
(2) 11 C. 301; 12 I. A. 23.

within time, counting from the date of the sale, and had been dismissed on an objection by the defendant that it was premature.

The Article of the second Schedule of the Limitation Act applicable is clearly 10 and not 120, which was only held applicable by their Lordships of the Privy Council in *Batul Begam* v. *Mansur Ali Khan* (3) and by the Allahabad High Court in *Kounshilla Kuar* v. *Gopal Prasad* (4), as those were suits for pre-emption on the foreclosure of mortgages so there was no instrument of sale, from the registration of which limitation could be reckoned, and the property not being capable of physical possession, the general and residuary Article 120 was resorted to. But in this case, as in that of *Yesaji* v. *Ramkrishna* (1), the property having been transferred by registered sale-deed, Article 10 is clearly applicable, and this was not disputed before me.

My learned predecessor held in that case that a deferred sale took effect from the date agreed upon by the parties, and that if possession was given under it from that date, that would be 'personal and immediate possession' within the meaning of their Lordships of the Privy Council in *Batul Begam* v. *Mansur Ali Khan* (3), and limitation under the first part of Article 10 would run from the date, on which possession was so given. With all deference, I am unable to concur in this view, and think their Lordships' *dictum* will be more correctly applied by following the Chief Court of the Punjab in *Gauhri Mal* v. *Jainti Mal* (5) and the previous decisions therein cited, in which it was held that when property sold is in the possession of a third party as tenant, it is not capable of being taken into physical possession by the vendee, and the limitation for a pre-emption claim runs from the date of the registration of the deed of sale. The later decision of the same Court in *Mansabdar* v. *Nabi Bakhsh* (6) also supports this view and I concur with the remarks of Harris, J:—

"That possession was not with the vendors at the time of sale does not prevent the sale being complete..... Delivery is not necessary to complete the vendee's title. Such title as the vendor can convey passes to the vendee on execution of the registered deed, and the fact that the vendor was at the time of sale neither in actual nor in constructive possession does not prevent a valid title passing under the deed."

The decision of Tyrell, J., in *Ganpat Rai* v. *Masita Khan* (7) is against this view and in favour of that taken by my learned predecessor in *Yesaji* v. *Ramkrishna* (1); but the facts of that case are not fully stated, and the parties seem to have agreed that the sale should only take effect when the property was severed, whereas in this case the vendor's proprietary right passed to the vendee by the deed of sale, and only a tenant-right was kept alive. And it did not, I think, make any difference that the tenant was himself the vendee, provided, of course, his lease did not merge in the sale, whilst if it did merge in the sale, his possession was under the sale from the date thereof. I need not, therefore, go into the question of merger either as to the correctness of the decision on that point in *Yesaji* v. *Ramkrishna* (1), or as to whether this case can be distinguished on the ground that no beneficial interest was retained by the vendor. Even if the lease did not merge in the sale, there was, in my opinion, in this case an out-and-out sale of the vendor's remaining interest, which took effect from the date of the sale; and as the proprietary right thus sold was, by reason of the subsisting lease not capable of immediate physical possession, the second part of Article 10 applied, and time ran against the right of pre-emption from the date of registration of the sale-deed.

The plaintiff's suit being time-barred, the appeal must be allowed, the decrees of the Courts below reversed, and the plaintiff's suit dismissed with costs in all three Courts.

Appeal allowed.

(3) 24 A. 17; 3 Bom. L. R. 707; 5 C. W. N. 883; 28 I. A. 248.

(4) 3 A. L. J. 191; A. W. N. (1906) 73; 28 A. 424.

(5) 73 P. R. 1885.

(6) 43 P. R. 1900.

(7) A. W. N. (1887) 235.

MORUFUL HUQ *v.* SURENDRA NATH ROY.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1827 OF 1909.
June 25, 1912.
Present:—Mr. Justice Carnduff and
Mr. Justice Chapman.
Munshi MORUFUL HUQ—PLAINTIFF—APPELLANT
versus
SURENDRA NATH ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Right of suit—Suit to set aside decree—Mere ground of fraud—Fraud—Decree based on perjured evidence—Whether suit to set aside such decree, lies.

An action will not lie to set aside a decree merely on the ground that it was based on perjured evidence.

Mahomed Golab v. *Mahomed Sulliman*; 21 C. 612; *Flower* v. *Lloyd*, 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496, *Abdul Haque* v. *Abdul Hafiz*, 5 Ind. Cas. 648; 14 C. W. N. 695; 11 C. L. J. 636; *Patch* v. *Ward*, 3 Ch. 203; 18 L. T. 134; 16 W. R. 441 and *Baker* v. *Wadsworth*, 67 L. J. Q. B. 301, followed.

Lakshmi Charan Shaha v. *Nur Ali*, 11 Ind. Cas. 626; 38 C. 936; 15 C. W. N. 1010 and *Venkatappa Naick* v. *Subba Naick*, 29 M. 179; 16 M. L. J. 59, dissented from.

Abouloff v. *Oppenheimer & Company*, 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57 and *Vadala* v. *Lawes*, 25 Q. B. D. 310, 63 L. T. 128; 38 W. R. 594, distinguished.

Appeal from the decree of the District Judge of 24-Pergannas, dated June 7th, 1909, affirming that of the first Sub-Judge of that District, dated January 28th, 1909.

Mr. *B. Chakravarti*, Counsel, and Moulvi *Nuruddin Ahmed*, for the Appellant.

Dr. *Rash Behari Ghose*, Babus *Dwarka Nath Chakravarti*, *Mohendra Nath Roy*, *Tarak Chandra Chakravarti*, *Romesh Chandra Sen* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.—This is a second appeal against the decision of the District Judge of the 24-Pargannas, affirming that of the Subordinate Judge and dismissing the appellant's suit for the setting aside of a decree on the ground of fraud.

In 1906, the appellant was sued on ejectment by the respondent, and a decree was obtained against him *ex parte*. An application for the discharge of that decree and the re-hearing of the suit was made under section 108 of the Code of Civil Procedure of 1882; but it was refused, and the refusal was affirmed on appeal. A regular appeal against the *ex parte* decree was next preferred; but it was dismissed by the first Appellate Court, and a second appeal to the High Court, was equally unsuccessful. The suit, out of which the present second appeal arises, was then instituted; and the only fraud complained of in it is that the description in the plaint of the subject-matter of the respondent's suit of 1906, and the evidence on which the respondent obtained the *ex parte* decree against the appellant, were alike false. Both the Courts below have held that this suit was not maintainable, and the short point raised before us is as to whether an action will lie for the setting aside of a decree merely on the ground that it was based upon perjured evidence.

In *Mahomed Golab* v. *Mahomed Sulliman*(1), Petheram, C. J., laid it down that, where a decree has been obtained by a fraud practised on another whereby that other has been prevented from placing his case before the tribunal, which was called upon to adjudicate upon it, in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit; but that "it is not the law that, because a person against whom a decree has been passed, alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is, of course, fraud of the worst kind, he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given." "To so hold would," the learned Chief Justice continued, "be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but also of that which relates to *res judicata* as well;" and reference was made to the reasons why this could not be given by James, L. J., on behalf of himself and Thesiger. L. J., in *Flower* v. *Lloyd* (2): "Where," Lord Justice James inquired, "is litigation to end, if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed in the first actions * * * * ? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and

(1) 21 C. 612 at p. 619.
(2) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.

corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum* * * * Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply infinitely the mass of those very perjuries, falsehoods and frauds."

It is true that the observations of Sir Comer Petheram in *Mahomed Golab's* case (1) are not binding upon us because the actual decision in it reduced them to the level of *obiter dicta*. But the view his Lordship expressed was cited and acted upon by a Division Bench of this Court in *Abdul Haque* v. *Abdul Hafiz* (3) and, as that decision is precisely in point, it is an authority which we must, under rule 1 in Chapter V of the Appellate Side Rules, follow or make the subject of a reference to a Full Bench. Another Division Bench, it appears, has recently, in the case of *Lakshmi Charan Shaha* v. *Nur Ali* (4), refused to be so bound, because, the learned Judges (D. Chatterjee and N.R. Chatterjea, JJ.) said, "the authority on which the judgment of Sir Comer Petheram, C.J., was based, has never been recognised as an authority in England," and, therefore, neither it nor any case based upon it was, in their opinion, binding upon them. We are not disposed to adopt this reasoning, and, in any case, having the two opposing rulings before us, we prefer to follow *Abdul Huqe* v. *Abdul Hafiz* (3). We find that a Division Bench of the Madras High Court has, in *Venkatappa Naick* v. *Subba Naick* (5), taken the contrary view and ruled that a suit will lie to set aside a judgment on the ground that the defendant had obtained it by fraud in that he had committed deliberate perjury and suppressed evidence. The learned Judges (Boddam and Moore, JJ.) there declare that the law in England has been authoritatively and finally laid down in *Abouloff* v. *Oppenheimer and Co.* (6) and *Vadala* v. *Lawes* (7) and that it is the same in India. With all deference, be it said, we doubt the completeness and finality even in England of these two cases. They are, of course, very high authorities; but in each of them, the judgment impeached was a foreign judgment, and foreign judgments unquestionably stand on a footing of their own. *Priestman* v. *Thomas* (8) and *Cole* v. *Langford* (9) are the only English cases we know of which at all support the appellant in respect of the judgments of our own Courts, and neither of these seems to us to be a very clear or very decided authority on the point now before us. In the former, there was an alleged collusive compromise followed by an order for Probate, and the case is relevant only in so far as it shows that Probate may be revoked on the ground that it was the result of a fraudulent compromise. Such a fraud would probably be within the meaning of the word as explained by Chief Justice Petheram in *Mahomed Golab's* case (1) and, moreover, the revocation of Probate is governed by a law of its own. And the judgment of Ridley and Phillimore, JJ., in *Cole* v. *Langford* (9) is a very bare pronouncement following *Priestman* v. *Thomas* (8).

On the other hand, the case of *Patch* v. *Ward* (10), which relates to an English judgment and was referred to and relied upon in *Mahomed Golab's* case (1), tends in the same direction as *Flower* v. *Lloyd* (2); while in *Baker* v. *Wadsworth* (11), Wright and Darling, JJ., were guided by the remarks of James and Thesiger L.JJ. in *Flower* v. *Lloyd* (2) and held that a judgment in an action would not be set aside on a subsequent action brought for that purpose on mere proof that the judgment was obtained by perjury or the fraud of the plaintiff in the former action.

Our conclusion is that the maxim *interest reipublicæ ut sit finis litium* should prevail, and that the view taken by both the Courts below is sound and should be affirmed. If

(3) 14 C. W. N. 695; 5 Ind. Cas. 648; 11 C. L. J. 636.
(4) 38 C. 936; 11 Ind. Cas. 626; 15 C. W. N. 1010.
(5) 29 M. 179; 16 M. L. J. 59.
(6) (1832) 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57.
(7) (1890) 25 Q.B.D. 310; 63 L. T. 128; 38 W.R. 594.
(8) (1883) 9 P. D. 210; 53 L. J. P. 109; 51 L. T. 843; 32 W. R. 842.
(9) (1898) L. R. 2 Q. B. 36; 67 L. J. Q. B. 698; 14 T. L. R. 427.
(10) (1867) L. R. 3 Ch. 203; 18 L. T. 134; 16 W. R. 441.
(11) (1898) 67 L. J. Q. B. 301.

evidence not originally available comes to the knowledge of a litigant and he can show thereby that the evidence on which a decree against him was obtained, was perjured, his remedy lies in seeking a review of judgment but the rule of *res judicata* prevents him from re-agitating the matter on the same materials or on materials which might have been laid before the Court in the first instance. We may add that the present suit might apparently have been disposed of without the raising of the general question which we have been discussing; and this was indeed, pressed upon us on behalf of the respondents. For the plaintiff-appellant failed to adduce any evidence on the date fixed for the hearing, his application for an adjournment was refused, and his suit might have been dismissed for want of prosecution under section 102 of the Civil Procedure Code of 1882. But this course was not taken, and the application for an adjournment was thrown out on the same ground as the suit itself, namely, on the ground that no such suit was maintainable and, on the pleadings, further proceedings would be futile. That being so, we felt it incumbent upon us to deal with the important portion of law raised by the judgments of the Courts below.

The result, as we have already foreshadowed, is that this appeal must, in our opinion, fail, and it is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 703-B OF 1910.

February 12, 1912.

Present:—Mr. Batten, A. J. C.

LAXMAN—APPELLANT

versus

SHEORAM—RESPONDENT.

Occupancy-rights—Suit for possession of alienated land—Plaintiff not a registered occupant—Prayer for declaration not necessary—Berar Land Revenue Code, ss. 4, 15, 72, 73, 74, 76.

In a suit for possession of unalienated land in Berar, it is not a condition precedent for a decree for possession that the plaintiff should already be the registered occupant or that the decree should be accompanied by a declaration that the plaintiff is entitled to be the registered occupant.

Appeal against the decree of the District Judge, West Berar, Akola, dated the 27th August 1910, reversing that of the Subordinate Judge, Akola, dated the 28th February 1910.

Mr. *G. P. Dick*, for the Appellant.

Messrs. *J. Mittra* and *M. P. Walsh*, for the Respondents.

JUDGMENT.—The history of the case out of which this appeal arises is as follows:—

One Pama was the actual occupant in possession of the northern two-thirds share of field Survey No. 88 in *Mouza* Bagayit in the Murtizapur *Taluk*. Pama died in November 1905 and the defendant-appellant took possession of Pama's share of the field. The plaintiffs brought this suit for possession of the two-thirds share of the field on the ground that they were the nearest heirs to Pama The defendant pleaded that he was a nearer heir to Pama, and that Pama had made a Will in his favour, as regards the field in dispute. The Munsif held that the plaintiffs were nearer heirs than the defendant, but found the Will to be proved and valid, and he, therefore, dismissed the plaintiffs' suit. On appeal, the learned District Judge held that the plaintiffs were the nearer heirs and that the Will in favour of the defendant was not proved. The defendant-respondent raised a fresh argument before the District Judge, apparently based on the following passage in the judgment of the Munsif: "The present suit is, in effect, a suit to indirectly set aside the order made by the Revenue Authorities (*vide* Exhibit P-2) directing that the defendant should be entered as 'registered occupant' of the field—in the revenue papers—in place of Pama deceased. The Patwari reported the matter and asked for mutation of name in the '*khata*' (*vide* Exhibit P-1). The entire proceedings of the Revenue Authorities (Exhibit P-2) show that plaintiffs were examined at the inquiry made in detail—that they laid their claim before the Tahsildar—and that defendant resisted it on the basis of the Will (Exhibit D-1) successfully. The *khata* was accordingly ordered to be transferred in defendant's name on 15th June 1906. Plaintiffs were thus unsuccessful there—and hence they now seek the only remedy left to them by contesting the claim once more in a Civil Court."

LAXMAN *v.* SHEORAM.

It is to be observed that these remarks are not based on the pleadings of either party, in which no reference whatever is made to the transfer of *khata*, except quite incidentally in one of the statements of the defendant's Pleader. There is no mention of the *khata* in the plaintiffs' pleadings. The plaintiffs are suing for possession, and even if the *khata* had been transferred in their name, this would not have obtained for them possession of the property, so that it is by no means accurate to say that this is a suit to set aside the order made by the Revenue Authorities. The result of the suit may possibly have that effect, but what the plaintiffs sue for is possession, as to which the Revenue Authorities have no jurisdiction, the land not being unoccupied land and the occupancy not having been forfeited under section 56 or otherwise and not having been relinquished. It was argued for the respondent before the District Judge that the plaintiffs cannot claim possession of the field without also claiming to have the field registered in their name. It was, it seems, argued that this consequence follows from the ruling in *Baliram* v. *Maroti* (1). The learned District Judge held that the ruling had no application, and gave the plaintiffs a decree for possession. The defendant appeals to this Court.

The 1st, 2nd and 4th grounds of appeal contest the findings of fact by the District Judge. No ground has been shown which would render those findings not binding on this Court, and these grounds of appeal fail. The remaining grounds raise the question of law argued before the District Judge, and it is contended for the appellant that the plaintiffs cannot get a decree for possession without adding a prayer for, and getting a decree for, a declaration that they are entitled to be the registered occupants. I agree with the learned District Judge that the ruling in *Baliram* v. *Maroti* (1) has no application in the present case. As the District Judge says:—"It refers to cases where the registered tenant has of his own free will surrendered the holding not generally but specially in favour of a particular person. There it is held that the acceptance by Government of the new tenant is in fact a re-grant. I do not think that this doctrine can be extended to the case where the registered tenant has died and the tenancy is continued to his heir. There is in such cases, I consider, no new grant but a continuance of the old grant." But, whether this view is correct or not, it seems to have no connection with the question whether in a suit for possession by a person who is not the registered occupant, he is bound to add a prayer to be declared entitled to be the registered occupant. The respondents in this Court do not wish to add such a prayer. I am not here concerned with the question whether the decree merely for possession is one which the Deputy Commissioner should consider a decree adjudging the decree-holder to be entitled to be the registered occupant. The sole question before me is whether the Court cannot give a decree for possession unless it also gives a decree declaring the plaintiff to be entitled to be the registered holder. It is a fact that cannot be disputed that the actual occupant and the registered occupant are very often different persons. Section 73 of the Code provides that the Deputy Commissioner shall, on the production of a decree adjudging a person to be entitled to be the registered occupant, recognise that person as the registered occupant, and section 74 provides that, save as provided in section 73, section 72 and certain other sections, the Deputy Commissioner is not bound to recognise any assignee as the registered occupant. But it does not seem to me to follow that the person not recognised as the registered occupant by the Deputy Commissioner cannot get possession under a decree for possession. A "registered occupant" means the person for the time being primarily responsible to the Government under the provisions of the Code for the payment of the revenue, *vide* section 4 (15), but the Code distinctly recognises in section 76 that persons other than the registered occupant may be interested in the occupancy, and I can find nothing in the Code making it necessary that the registered occupant must be the person in possession, and *vice versa*. The Code recognises co-occupants other than the registered occupant, and in this very case some one else other than the registered occupant is already in possession of one-third of the field. Whatever the ground on which a decree for possession is sought, I can find nothing to support the proposition that it is a condition of a decree for possession that the

(1) 6 N. L. R. 78; 6 Ind. Cas. 824.

plaintiff should already be the registered occupant or that the decree should be accompanied by a declaration that the plaintiff is entitled to be the registered occupant.

For these reasons, I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 6050 AND 6051 OF 1911.

May 13, 1912.

Present:—Sir Ashutosh Mookerjee, Judge, and Mr. Justice Beachcroft.

KALI CHARAN DUTT AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

MANODABALA DASI AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

[*Consolidation of suits, when can be made—Inherent power of Court—Civil Procedure Code (Act V of 1908), s. 151—Consent of parties—Revision—Material irregularity—Interference by High Court.*

An order for consolidation of suits can be made in a proper case in the exercise of the inherent power of the Court, now recognized by section 151 of the Civil Procedure Code of 1908.

Nehal Singh v. *Alai Ahmed*, 15 W. R. 110; *Peacock* v. *Byjnath*, 10 C. 58; *Soorendro Pershad* v. *Nundun Misser*, 21 W. R. 196 and *In re SS. Falls of Ettrick*, 22 C. 511, relied upon.

When many actions are oppressively and vexatiously brought by the same plaintiff for the purpose of trying the same question, the Court will interfere either by staying the proceedings or granting time to plead in all the actions, but only upon terms, or in some other way.

The Court ought not to consolidate actions commenced by the same plaintiff against different defendants unless the issues to be tried are precisely similar or the parties consent to such consolidation.

Leo v. *Arthur*, (1909) 100 L. T. 61, relied upon.

A Court consolidated a mortgage suit, a money suit and a partnership suit on the ground that the substantial parties were the same and some of the points raised were common to them and so it would be convenient to try them together, in that the evidence on the common points would be the same in all the suits. It appeared, however, that the substantial questions in controversy were not identical, and it was not likely that the questions in controversy between the parties in the money suit and in the mortgage suit could be covered by the decision in the partnership suit:

Held, that the order for consolidation ought not to have been made, that the Court acted with material irregularity in the exercise of its jurisdiction and that irremediable mischief might be done if the High Court refused to interfere.

Charu Chandra v. *Sarat Chandra Singh*, 8 Ind. Cas. 87 at p. 90; 12 C. L. J, 537 at p. 544, relied upon.

Rule against the order of the Sub-Judge of Burdwan, dated November 11th, 1911.

Dr. *Rash Behari Ghosh* and Babu *Bipin Behari Ghosh* (Junior), for the Petitioners.

Mr. *S. P. Sinha*, Babus *Ram Chandra Majumdar* and *Khether Mohan Sen*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order whereby the Court below has directed the consolidation of two suits commenced by the petitioners along with a third suit wherein the petitioners are defendants. It appears that on the 26th May 1910, the petitioners sued to recover a sum of Rs. 15,924 on a *hat-chita* said to have been executed on the 16th May 1906. On the 23rd September 1910, they commenced another suit to recover a sum of Rs. 13,035 on a mortgage-bond alleged to have been executed in their favour on the 16th May 1906. In the interval, some of the defendants had commenced a suit against the petitioners on the 11th July 1910 for accounts of a partnership founded on an indenture executed on the 17th April 1907. The petitioners are not parties to this document; but the case for the opposite party is that they were really interested in the partnership transaction. During the pendency of these three suits, one Manadasundari Dassi applied to be added as a party defendant in the money suit and the mortgage suit and also as a plaintiff in the partnership suit. Her allegation was that on the 18th October 1910, that is after the commencement of these suits, she had acquired by purchase the interest of two of the infant defendants. The Court granted this application and allowed her to file written statement in the money and in the mortgage suits. She thereafter applied for consolidation of the three suits, and her allegation substantially was that the money advanced on the *hat chita* and on the mortgage-bond had been applied for the purpose of the partnership transaction. The petitioners opposed the application; but their objection was overruled and on the 11th November 1911, the Subordinate Judge made the order now under consideration. He has held that in these three suits, the substantial parties are the same, and some of the points raised, rightly or wrongly, are common to them, and, so it would be convenient to try them together, in that the

evidence on the common points will be the same in all the suits. In support of the Rule, it has been contended, *first*, that the Court had no jurisdiction to make an order for consolidation, and *secondly*, that the grounds assigned do not justify the order in question.

In so far as the first ground is concerned, our attention has been drawn to rule 4 of Order XLV of the Code of 1908, which expressly provides for consolidation of suits for the purpose of pecuniary valuation of appeals to His Majesty in Council. It has been argued that the absence of a similar provision in relation to suits justifies the conclusion that the Legislature did not intend that suits should be consolidated except by consent of parties. We are not prepared to accept this contention as well founded. The history of the rule to which our attention has been invited is well known. Under the Code of 1882, there had been divergence of judicial opinion upon the question whether consolidation was permissible in case of appeals to His Majesty in Council. It had been held by the High Court of Allahabad, in *In the matter of the petition of Khwaja Muhammad Yusuf* (1), that such consolidation was permissible even though the suits had been disposed of by separate judgments. On the other hand, it had been held by this Court, in the cases of *Royal Insurance Co.* v. *Akhoy Koomar* (2); *Moosti Muhammed Ubloolah* v. *Mootechund*(3) and *Byinath* v. *Graham*(4), that such consolidation was not permissible except when the cases had been disposed of by one judgment. The rule in question was obviously introduced to settle this divergence of judicial opinion and it does not follow, as has been contended on behalf of the petitioners, that the absence of a similar rule in relation to suits indicates that the Legislature intended that no consolidation was allowable except by consent of parties. We are of opinion, therefore, that an order for consolidation can be made in a proper case in the exercise of the inherent power of the Court, now recognised by section 151 of the Code of 1908. This view is supported by the decisions in *Nehal Singh* v. *Alii Ahmed* (5); *Peacock* v. *Byinath*(6), where consolidation was allowed, and *Soorendro Pershad* v. *Nundun Misser*(7); *In re S. S. Falls of Ettrick* (8), where consolidation was refused.

In so far, however, as the second ground is concerned, we are of opinion that it is well founded. Rule 8 of Order XXXIX of the Rules of the Supreme Court of England indicates that the power of the Court to make an order for consolidation is not affected by anything contained in the rules of the Court, and that the principles applicable to cases of this description, as recognised by the Judicature Act, are to remain unaffected. These principles will be found formulated, in so far as Courts of Equity are concerned, in Daniell on Chancery Practice, Volume II, page 1610, and, in so far as Common Law Courts are concerned, in Chitty—Archbold—on Practice of the Queen's Bench Division (Volume I, page 407). The cases in England are not easy to reconcile, but the true rule appears to be that the Court will, where many actions are oppressively and vexatiously brought by the same plaintiff for the purpose of trying the same question, interfere either by staying the proceedings or giving time to plead in all the actions, but only upon terms, or in some other way, as the Courts have an unlimited power over their own process for the purpose of preventing the same being abused or made the instrument of oppression. The question was recently discussed by the Court of Appeal in England in the case of *Lee* v. *Arthur* (9). It was there pointed out that the Court will not consolidate actions commenced by the same plaintiff against different defendants unless the issues to be tried are precisely similar; the Court will, however, make an order of this description by consent of parties. Reference may in this connection be made to *Seale* v. *Seale* (10), where it was held that a partition action may be consolidated with an administration action and *O'Gorman* v. *Harding* (11), where an action by plaintiff on foot of a guarantee, and an action by the defendant to recover damages for breach of contract and for negligence in

(1) 18 A. 196.
(2) 6 C. W. N. 41.
(3) 5 W. R. 34 (P. C.); 1 M. I. A. 363.
(4) 11 C. 740.
(5) 15 W. R. 110.
(6) 10 C. 58.
(7) 21 W. R. 196.
(8) 22 C. 511.
(9) (1909) 100 L. T. 61.
(10) (1882) Eng. W. N. 83.
(11) (1884) 18 Ir. L. T. R 93.

relation to an auction-sale, were held entirely distinct and disconnected in their subject-matter, and consolidation was refused. In the case before us, it is perfectly clear, as indeed appears on the face of the order of the Subordinate Judge, that the substantial questions in controversy are not identical. In the money suit and in the mortgage suit, the question raised is, whether the loan was advanced. In the partnership suit, the question is, who are the partners in the transaction and what are their respective rights and liabilities. It is significant that in the partnership suit, the plaintiff seeks to recover Rs. 2,189, whereas in the money suit and in the mortgage suit, considerable sums are claimed. It is not likely, therefore, that the question in controversy between the parties in the money suit and in the mortgage suit can be covered by the decision in the partnership suit. Even if it is established that the money advanced by the petitioners was applied for the purpose of the partnership transaction, it does not follow by any means that the plaintiffs may not be entitled to the relief they seek. On the other hand, it is fairly clear that the object of the opposite party is to tie up the money and the mortgage suits, which in ordinary course are likely to be heard and disposed of much sooner than the partnership suit. Under these circumstances, we are of opinion that the order for consolidation ought not to have been made. The Subordinate Judge has plainly acted with material irregularity in the exercise of his jurisdiction, and irremediable mischief might be done, if the Court refused to interfere at this stage [*Charu Chandra* v. *Sarat Chandra Singh* (12).]

The result is that this Rule is made absolute and the order of the Subordinate Judge discharged. The petitioners are entitled to their costs in this Court. We assess the hearing fee at five gold *mohurs*.

It is conceded that this judgment will govern Rule No. 6051 of 1911, which is accordingly made absolute; but there will be no separate order for costs in that Rule.

Rules made absolute.

(12) 12 C. L. J. 537 at p. 544, 8 Ind. Cas. 87 at p. 90.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 32-B OF 1911.

February 26, 1912.

Present:—Mr. Batten, A. J. C.

KISAN—APPELLANT

versus

HIRALAL—PLAINTIFF—RESPONDENT.

Occupancy-rights—Presumption—Practice—Registered occupant, whether entitled to occupancy rights—Berar Land Revenue Code, ss. 4 (14) & (15), 61, 72, 105.

According to the Revenue law and practice in Berar, the "registered occupant" and the "actual occupant" may be different persons.

There is no presumption that the occupancy rights in unalienated land are held by the registered occupant until some other person is recognized as the registered occupant.

Nor is there a presumption that any person newly recognized as the registered occupant must necessarily be the owner of the rights of occupancy.

Baliram v. *Maroti*, 6 N. L. R. 78; 6 Ind. Cas. 824 distinguished.

Appeal against the decree of the District Judge, West Berar, Akola, dated the 2nd September 1910, confirming that of the Junior Munsif, Akola, dated the 4th February 1909.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *M. P. Walsh*, for the Respondent.

JUDGMENT.—The case for the plaintiff-respondent, Hiralal, is that the field in suit, Survey No. 72 of Khanapur in the Akola District of Berar, belonged to Akaji; Akaji sold the field by an oral sale to the 1st defendant, Shivaji, about 35 years ago since which date Shivaji has been in possession; on the 23rd May 1907, Shivaji sold the field to the plaintiff by a registered sale deed, but when the plaintiff went to take possession, he was resisted by the appellants, the 2nd and 3rd defendants, Kisan and Mubarak, so the plaintiff has brought this suit for possession of the field. The case for the appellants, the 2nd and 3rd defendants, was that they know nothing of any sale by Akaji to Shivaji, that on Akaji's death, his son Ragho became owner and was in possession, and on the 15th of February 1906, Ragho sold the field to the appellants who thereupon lawfully entered into possession. They admit that Shivaji was in physical possession of the field for four or five years previous to the sale to them, but account for this by alleging that Shivaji was a

bataidar under Ragho. The 1st defendant Shivaji supports the plaintiff. The appropriate issues were framed and the Munsif held on the evidence that Akaji had sold the field to Shivaji, that Shivaji entered into possession, and that Akaji's son Ragho had never been in possession and had in fact left the village a long time ago. On these findings, a decree for possession was given to the plaintiff. On appeal, the District Judge upheld the findings and dismissed the appeal. In 2nd appeal to this Court, the point was for the first time raised that Akaji was the recorded *khatedar* until 1892, and after his death, the *khata* was transferred to the name of his son Ragho. This point was apparently raised as tending to show that Akaji and his son had remained in possession and that Akaji had not sold the field to Shivaji. My learned predecessor, Skinner, A. J. C., remarked as follows in his judgment (Second Appeal No. 534 of 1909): "The Courts below have found the sale by Akaji to Shivaji proved, and that Ragho had, therefore, nothing left that he could convey to the appellants. But in arriving at this conclusion, they have failed to consider the presumptions arising from the facts that Akaji continued to be registered occupant of the field till his death, which occurred some time after 1892, and was succeeded as such by his son Ragho, or to require the plaintiff to explain why Shivaji, if he had really purchased the whole field, did not get it transferred to his name by *razinama* and *kabuliyat*. Under these circumstances, I am unable to accept the finding of the lower Appellate Court as one of fact binding on me, and must direct that the decree appealed against be set aside, and the case remanded to the lower Appellate Court for a fresh decision of the first appeal."

I would here observe that the reason why the plaintiff was never called upon to explain why Shivaji did not get the *khata* of the field transferred to his name, is that the 2nd and 3rd defendants in the lower Courts never raised the point; and they clearly never attached any importance to the question who was the registered occupant, since it appears from the evidence of the Patwari that in 1908 Ragho was still the registered occupant and the appellants had taken no steps whatever to get the *khata* transferred to their name.

After remand, the appellants called no evidence in support of the argument which had been raised on their behalf for the first time in this Court. But six witnesses were called for the plaintiff, namely, four Government officials with long experience of Berar, being a Deputy Commissioner, an Extra-Assistant Commissioner holding the post of a Sub-Divisional Officer, a Tahsildar, and the Patwari of Akola; the other two witnesses are Pleaders who are also land-holders in Berar. The first three witnesses depose that as a matter of practice the actual "occupant" of a survey number and the "registered occupant" are not necessarily the same persons, and they estimate that from 24 per cent. to 50 per cent. of registered occupants are not actual occupants and have no connection whatever with the survey number. They attribute this state of affairs to the fact that when a registered occupant dies, no notice is issued to the villagers in general before transferring the *khata* to the name of his heir [under section 72 (1) of the Berar Land Revenue Code], and that similarly no notice is issued when there is an application for transfer by *razinamah* and *kabuliyat* (under section 69 of the Land Revenue Code); but the main reason appears to be that it is not the duty of the Patel, or of any other Revenue officer, to report private transfers of unalienated land. The Patwari of Akola gives actual figures for the Revenue year 1909-10 showing that out of 73 fields transferred, in the case of 24 fields, the *khatedar* had ceased to have connection with the field, in other words that in 24 out of 73 cases the actual "occupant" and the "registered occupant" were different persons. It is not clear whether the 73 transfers are transfers of *khata* or private transfers of the fields, but in either case the figures have the same significance. The Sub-Divisional Officer and the Tahsildar depose that in cases of transfer of *khata*, no consideration is paid to the question who is the owner or actual occupant or man in possession of the field. The Deputy Commissioner says that in revenue practice the "registered occupant" and the "occupant" may be different persons and he justifies this practice by the two terms being separately defined in sub-sections (14) and (15) of section 4 of the Code. The Sub-Divisional Officer and the Deputy Commissioner both point out that while the "registered occupant" is the person to whom the Revenue Authorities first look to for the

land revenue, and on default of payment by him, they look to the co-occupants, if any, and then to the person in actual occupation. This is in accordance with section 105 of the Code. The two Pleader witnesses are also holders of survey numbers in Berar. One of them deposes that he is the occupant of three survey numbers but not the registered occupant, that as regards another survey number, he purchased the occupancy right from the owner thereof, who was not the registered occupant, and got the registered occupant who was a different person and who had had no connection with the field for many years to relinquish the *khata* in his favour; and that as to six other survey numbers, he has sold his rights, but nevertheless the *khatas* still stand in his name. The remaining witness "owns", as he says, that is to say, he has acquired the occupancy-rights in 20 survey numbers, but nevertheless the *khata* in respect of 16 of them does not stand in his name. Both Pleaders, moreover, say that in their experience as Pleaders in the Berar Courts, they have come across many cases in which the registered *khatedars* have no connection with the fields standing in their names.

On the evidence summarized above, the learned District Judge has held that according to the revenue practice in Berar, no presumption is raised by the facts that the *khata* was not transferred from the name of Akaji to the name of Shivaji, and that on Akaji's death, it was transferred from the name of Akaji to the name of his heir Ragho to rebut the evidence that Akaji did sell the field to Shivaji, who has been in possession ever since, and who has been paying the land revenue. In other words, after taking into consideration the matters drawn to his attention by my learned predecessor, the learned District Judge has again held, after taking fresh evidence, that Ragho had nothing left that he could convey to the appellants. I am of opinion that the case was remanded by my learned predecessor in order to give the parties an opportunity of proving the existing custom or practice in Berar, and that he did not consider the question to be one of law, but rather one of custom or practice, for I think that he would have discussed the law, if he had considered the question to be one in which the law assisted the appellants. Considered as evidence of custom or practice, it would be impossible to find stronger or more convincing evidence as to the existing practice, and indeed no attempt has been made in the present appeal to this Court to contest the finding as to the existing practice. I accept the finding as to sale and possession which, in these circumstances, I consider to be binding on this Court.

But it is further stated in the memorandum of appeal that custom cannot override the law. No clear argument has, however, been advanced to show in what way the custom overrides the law, or what portion of the law contained in the Berar Land Revenue Code it overrides. No doubt, Chapter VI of the Code contemplates that the registered occupant of a survery number shall be the occupant or one of the co-occupants of the survey number, but there is no provision in the Code or in the rules under the Code, at any rate up to the date of the suit, which ensures that this shall be the case. No Record of Rights corrected from year to year is kept; it is not the duty of any Revenue official to record private transfers, nor is it the duty of persons who have acquired occupancy-rights to report that they have done so. Except in the case of unalienated land newly occupied under sections 58 and 60, where an agreement in the form given in Appendix XIII is taken from the person accepting the registered occupancy according to rule 119 of the rules under sections 58, 60 and 216 (1) (*e*), and from the successors of such person, there is nothing to restrict free alienation of his rights by the registered occupant (see form in Appeddix XVI), and in the absence of any provision for the maintenance of a Record of Rights, I do not see how the practice, which has been deposed to by the Revenue officials, can be said to be actually contrary to the law. My attention has been called to the ruling in *Baliram* v. *Maroti* (1), but I fail to see its relevancy. That ruling concerned the effect of a relinquishment by a registered occupant who, at the time of the relinquishment was the actual occupant or one of the co-occupants, and it cannot, so far as I can see, have any application to the case of a registered occupant who has long ago, as a matter of fact, parted with all his rights over the

(1) 6 N. L. R. 78; 6 Ind. Cas. 824.

land. I may add that in over 13 years' experience of Berar as Judge and Judicial Commissioner, I have never before had it argued before me that the *khatedar* of a field must also necessarily be the owner of the occupancy-right, or *vice versa*. The fact that there is no presumption, such as has now been set up, has been admitted, though it has been deplored, and all the decisions in suits for possession have proceeded on the assumption that no such presumption arises. To hold otherwise now would not only be unjustified by anything on the record of this case, but would also be a complete reversal of the principles underlying the decisions of the Judicial Commissioner's Court for many years past. The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 226 OF 1911.

April 30, 1912.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

GOVINDA IYENGAR AND OTHERS—APPELLANTS

versus

RAGUNATHA DORAISINGAM *alias* GOWRI VALLABHA THEVAR, MINOR ZEMINDAR OF SIVAGANGA, THROUGH THE AGENT OF THE COURT OF WARDS, THE COLLECTOR OF RAMNAD—RESPONDENT.

Court of Wards Act (Mad. Act I of 1902), s. 63—Zemindar, Ward of Court—Ward, trustee of temple—Appointment by Court of Wards of manager to discharge trustee's duties—Suspension by manager of temple archakes—*Liability of minor trustee for acts done by the manager.*

A manager, appointed by the Court of Wards, under section 63 of Madras Act I of 1902, to discharge the duties of a temple trustee, for and on behalf of the minor ward, who is the trustee of the temple, is empowered to suspend or dismiss temple servants and *archakas*, who are bound to obey his orders.

A minor trustee is not liable for acts done by the officer appointed by the Court of Wards under the statutory authority conferred by section 63 of Madras Act I of 1902.

Second appeal against the decree of the Subordinate Judge of Ramnad, in A. S. No. 162 of 1910, presented against that of the Additional District Munsif of Paramakudi in O. S. No. 411 of 1908.

FACTS.—The plaintiffs sued for declaration that the order of their suspension by the manager of the defendant, the *zemindar* of Sivaganga, who was under the Court of Wards, was illegal, and that the defendant and his officers had no power to interfere with and pass orders with reference to the distribution of Tirtam (holy water), etc., by the plaintiffs, the hereditary *stanigars* of the plaint temple, and for damages, etc. The defendant maintained that the order of suspension was properly made because of the plaintiff's disobedience to carry out the Manager's orders about the distribution of Tirtam in a particular manner.

The District Munsif gave a decree to the plaintiffs declaring the order of suspension to be improper and setting it aside but refusing the other prayers of the plaintiffs.

The Subordinate Judge on appeal held that the order of supension was not improper or unreasonable and dismissed the suit of plaintiffs.

Mr. *K. Srinivasa Aiyangar*, for the Appellants.

Mr. *M. Kunjuni Nair*, for the Respondent.

JUDGMENT.—The manager is found by the Subordinate Judge to have been the person appointed by the Court of Wards under section 63 to discharge the duties of trustee or manager of the religious endowment during the minority of the wards. As temple servants, the plaintiffs were bound to obey the trustee and it was not for them to set up their judgment against that of the trustee. The Subordinate Judge was, therefore, right in dismissing the suit. We may add that it does not appear how the defendant, the minor, could be made liable for what was done by the officer appointed by the Court of Wards under a statutory authority conferred by section 63 of the Madras Act I of 1902. The second appeal is dismissed with Costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 400 OF 1910.

February 14, 1912.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

POKHPAL SINGH AND OTHERS—APPELLANTS

versus

CHHIDU SINGH AND OTHERS—RESPONDENTS.

Minor—Absence of order appointing guardian ad litem *—Irregularity—Minor properly represented in a suit—Effect of decree in such suit—Civil Procedure Code (Act XIV of* 1882*)*, s. 103*—Hindu Law—Joint family—Father's debt—Liability of ancestral property.*

A decree against a properly represented minor is binding upon him, but if he has not been properly represented, the decree is a nullity, and a claim brought to have it declared that the decree is a nullity is superfluous.

The absence of a formal order appointing a guardian *ad litem* is a mere irregularity.

Musammat Bibi Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 5 Bom. L. R. 822; 7 C. W. N. 774; 30 I. A. 182, referred to.

It being the pious duty of a Hindu son to pay his father's debt, not tainted with immorality, a sale for payment of such debt would bind the son and his interests in the ancestral property and would confer a complete title on the purchaser.

First appeal from the decree of the Subordinate Judge of Aligarh.

Mr. *Peary Lal Banerji* (with him Mr. *M. L. Agarwala*), for the Appellants.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *Shafi-uz-zaman*), for the Respondents.

JUDGMENT.—This and the connected Appeal No. 50 of 1911 arise out of a suit brought by the plaintiffs-appellants for possession of shares in two villages, namely, Moman Khurd and Sabra, and for certain house property situated in the former village. They also claimed a declaration that a decree obtained by the defendant Chhedu Singh against their father Rudra Singh, on the 19th of July 1903, and the proceedings held in pursuance of that decree are not binding on them, and are as against them null and void. Chhedu Singh, defendant, is the nephew of the plaintiff's father, Rudra Singh, being the son of his brother, Umrao. Chhedu Singh brought a suit against Rudra Singh for partition of *zemindari* property situated in the two villages mentioned above and also of house property. To that suit the plaintiffs were added as defendants. A decree was passed in favour of Chhedu Singh, declaring him entitled to a half share of the property claimed and for partition of the house property and costs were also awarded to him. For the realization of those costs, the decree was put into execution and a great part of the property, now in dispute, was put up to sale and purchased by Chhedu Singh himself. Subsequently, he sold that property to the defendants, Beni Singh and Sri Ram. Decrees for rent were also obtained by Chhedu Singh against Rudra Singh, and in execution of those decrees, some property was sold and the defendant, Husain Ali Khan, purchased it. In 1907, the plaintiffs brought a suit against Chhedu Singh and the purchasers of the property, for a declaration that they were the owners of a five-sixths share in the property now in dispute, other than the shares in the village Subra; that the decree obtained by Chhedu Singh was fraudulent and not binding on them and that the sale of the property in execution of that decree could not affect their interests. This suit was dismissed on the 13th of January 1908, apparently under section 102 of the Code of Civil Procedure, 1882, on the ground that the plaintiffs did not appear at the hearing and the defendants, who were represented, did not admit the claim. Subsequently, Rudra Singh died, and thereupon the suit out of which this appeal has arisen was brought by the plaintiffs. The main ground of the claim is that the plaintiffs were not properly represented in the suit brought by Chhedu Singh, and that the decree in that suit was not binding on them, and must be deemed to be null and void so far as they were concerned.

The Court below has held that as regards the five-sixths share claimed in the previous suit, the present suit is barred by the provision of Order IX, rule 9 of the Code of Civil Procedure of 1903, which corresponds with section 103 of Act XIV of 1882. As regards the remainder of the property, it granted the plaintiffs a decree for a part of their claim. The judgment of the learned Subordinate Judge is far from satisfactory, and it is not easy to follow all the reasoning by which it is supported. It is not, therefore, surprising that both the parties are dissatisfied with it and have appealed against the decree.

The plaintiffs in this appeal contend that the Court below is wrong in holding that a part of their claim is barred by reason of the dismissal of the suit brought by them in 1907. They urge that the cause of action

for the present suit is not the same as the cause of action for the former suit, inasmuch as at the time when they brought that suit, they were in possession of the property, and that before the institution of the present suit, they were dispossessed from it.

If, as the plaintiffs contend, they were not properly represented in the suit brought by Chhedu Singh in 1901, the decree in that suit would, as against them, be a nullity. This was so held in *Hanuman Pershad* v. *Muhammad Ishaq* (1). If, on the other hand, the plaintiffs were substantial parties to the former suit and were properly represented in it by a guardian, the decree in that suit is binding on them; and, so long as it is not set aside, they would not be entitled to maintain the present claim. Therefore, the question whether the dismissal of the former suit operates as a bar to the present claim, would depend mainly on the determination of the further question whether in the former suit they were properly represented. If, as we have said above, they were not so represented, the decree as against them being a nullity, the claim for a declaration that it is a nullity is superfluous and the present suit would be unaffected by the fact that the former suit was dismissed.

It appears that in the suit brought by Chhedu Singh, Rudra Singh was at first impleaded as the sole defendant. He objected that his sons had an interest in the property, and thereupon the plaintiff, Chhedu Singh, made an application to the Court praying that the minor sons of Rudra Singh, under the guardianship of their father, Rudra Singh, be added as defendants. The application contains a further prayer that "permission might be granted" after verifying the affidavit which was filed along with the application. This apparently refers to the usual affidavit made in support of an application for the appointment of a guardian *ad litem* and the permission sought refers to such appointment. From the decree which is printed at page 7 of the respondent's book, it appears that the present plaintiffs, the sons of Rudra Singh, were added as defendants under an order, dated the 15th of April 1901. The learned Subordinate Judge holds that there is no evidence on the record to show that a formal order was made for the appointment of Rudra Singh as the guardian *ad litem* of his minor sons, the present plaintiffs. It is clear that an order was made upon the application referred to above granting it, but we may accept the finding of the Court below that no formal order was drawn up, appointing Rudra Singh as the guardian *ad litem* of the minors. It is, however, manifest from the fact that the application of Chhedu Singh, to which we have referred, was granted, that the Court sanctioned the prayer for the addition of the sons of Rudra Singh as defendants and for the appointment of Rudra Singh as their guardian *ad litem*. That being so, this case closely resembles the case of *Musammat Bibi Walian* v. *Banke Behari Pershad Singh* (2), decided by their Lordships of the Privy Council. In that case also it did not appear that a formal order had been drawn up for the appointment of a guardian *ad litem*, but their Lordships held that the absence of a formal order was no more than a mere irregularity. Therefore, if the plaintiffs were substantially sued in the previous suit and were effectively represented in that suit by their father, with the sanction of Court, that would be sufficient to bind them. The suit brought by Chhedu Singh was contested by Rudra Singh, and it was after contest that a decree was passed. One of the grounds on which it is contended that the plaintiffs were not properly represented, and that their father, Rudra Singh, was not a fit person to be their guardian, is, that he was of unsound mind. The learned Subordinate Judge in the course of his judgment has remarked that Rudra Singh "was proved to be a half idiot." The only evidence on the record as to the mental capacity of Rudra Singh is the statement of a witness, Nathu Singh, who said that Rudra Singh was "somewhat crazy." The plaintiffs themselves in the suit brought by them in 1907, did not allege anything in respect of Rudra Singh's mental capacity beyond this that he was of weak intellect. There is a good deal of oral evidence adduced by the defendants which shows that Rudra Singh was in full possession of his intellect; and from the manner in which he defended the former suit, claiming as he did that the property in which Chhedu Singh asked for a big share, was

(1) 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229.

(2) 30 C 1021; 5 Bom. L. R. 822; 7 C. W. N. 774; 30 I. A. 182.

his self-acquired property, and denying that it was joint ancestral property, shows that he was not a man incapable of properly defending the suit. The remarks of the learned Subordinate Judge seem to us to have no sufficient justification. We fail to see that the interests of the plaintiffs in that litigation were not properly safeguarded, and that they were not properly represented. Chhedu Singh was claiming a half share in the property on the allegation that it was joint ancestral property—an allegation which is now admitted on behalf of the plaintiffs. If it was correct, Chhedu Singh was entitled to the half share which he claimed, and the other half belonged to Rudra Singh and his sons, the present plaintiffs. Rudra Singh denied that the property was ancestral and that Chhedu Singh had a half share in it. There was, therefore, nothing in that litigation in regard to which the interests of the plaintiffs were overlooked and not provided. Rudra Singh's interests in that litigation were in no sense adverse to the interests of the plaintiffs, and from the nature of the defence set up by him, it is, as pointed above, clear that he was trying his best not only to guard his own interests but also those of his minor sons. We are, therefore, unable to hold that in the previous litigation the plaintiffs were in any way prejudiced or that they were not substantially represented. The decree in the previous suit was, therefore, binding on them; and so long as they could not on any other ground get it set aside, they could not avoid the operation of that decree.

In the suit which they brought in 1907 they alleged that the decree had been obtained fraudulently. The same allegation has been made in the present suit so far as that decree is concerned. So that the cause of action alleged in both suits in regard to the decree is the same. The Court below was, therefore, right in holding that the dismissal of the previous suit barred the present suit in so far as it related to the property which was the subject-matter of the claim in the suit of 1907. Furthermore as the decree in Chhedu Singh's suit was, in our opinion, binding on the plaintiffs, the auction sale held in execution of that decree is equally binding on him. Assuming, however, that the plaintiffs were not properly represented in the suit brought by Chhedu Singh, and that they are entitled to treat the decree in that suit as a nullity, the question would still arise whether the sale of the family property in execution of what must be deemed to be a decree against the father alone is binding on the plaintiffs and their interests in the family property. The learned Subordinate Judge in one part of his judgment says that it has not been proved that the property in question was the ancestral propertyof the plaintiffs. If we accept this finding, then the property could only be deemed to be the property of Rudra Singh; and having been sold in execution of a decree obtained against him, it passed the whole of his interest to the purchaser. It was, however, the plaintiffs' case and it was held in the suit of Chhedu Singh that property was ancestral property. Therefore, the property being ancestral, and it being the pious duty of the sons to pay their father's debts not tainted with immorality, a sale for payment of such debts would bind the sons and their interests in the ancestral property, and would confer a complete title on the purchaser. It is not the plaintiff's case that the decree obtained against Rudra Singh for costs of the partition suit was tainted with immorality. On the contrary, as we have pointed out above, he was defending the interests not only of himself but also of his sons; and, therefore, it is impossible to say that the decree passed in that suit was a decree for a debt which it was not the bounden duty of the plaintiffs as Hindu sons to discharge. As the property has been sold for the realization of that debt and it has been purchased by the defendant, the plaintiffs are not entitled to claim any portion of that property from the purchasers. It is only on the ground of the debt being tainted with immorality that they could have claimed the property, but that is not their case; under these circumstances, no question of family necessity arises. From any point of view, therefore, the plaintiffs' claim cannot succeed, and the Court below was, in our opinion, wrong in decreeing any part of it. The result is that this appeal fails. It is dismissed with costs.

Appeal dismissed.

SHAKHI CHAND *v.* RAM CHANDRA MARWARI.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1000 OF 1912.
May 22, 1912.

Present:—Sir Ashutosh Mookerjee, Judge, and Mr. Justice Beachcroft.

SHAKHI CHAND—PLAINTIFF—PETITIONER
versus
RAM CHANDRA MARWARI—DEFENDANT—OPPOSITE PARIY.

Landlord and Tenant—Notice to quit—Notice that tenant shall have to pay enhanced rent if he keeps premises in occupation, whether sufficient.

The plaintiff in this case let out a shop to the defendant on an oral lease from month to month at a monthly rent of Rs. 18-8. On September 4, 1910, the plaintiff served the defendant with a notice in the following terms: "In respect of the shop, some persons offer Rs. 27 a month; you are, therefore, informed by this notice that if from the 1st *Asuin* 1318, you want to keep the shop in lease, you shall have to pay Rs. 27 a month." The defendant continued in occupation but refused to pay the enhanced rent. Subsequently, on the 2nd December 1910, the plaintiff served the defendant with a notice calling upon him to pay rent at the enhanced rate for three months and at the same time requiring him to quit on the 16th December 1910:

Held, that the first notice was not sufficient to terminate the tenancy or to enhance the rent.

Bradley v. *Atkinson*, 7 A. 899, followed.

Rule against the decree of the Small Cause Court Judge of Bhagalpore, dated February, 3rd 1912.

Babu *Naresh Chandra Sinha*, for the Petitioner.

Babu *Lachmi Narain Singh*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to modify the decree in a suit for enhancement of rent. The case for the petitioner, who was the plaintiff in the Court below, is that he let out three shops and two almirahs to the defendant on an oral lease from month to month. The rent settled was Rs. 10-8 for the shops and Rs. 8 for the almirahs. On the 4th September 1910, the plaintiff served a notice upon the defendant in the following terms: "Whereas two almirahs and three shops are in your tenancy and the rent for the same has been paid up to *Bhadro* 1317, and as in respect of this, some persons offer Rs. 27 a month, you are, therefore, informed by this notice that if from the 1st *Aswin* 1318 you want to keep the shops and the almirahs in lease, you shall have to pay Rs. 27 a month." The defendant continued in occupation but refused to pay rent at the enhanced rate. Subsequently, on the 2nd December 1910, the plaintiff served a notice upon the defendant calling upon him to pay rent at the enhanced rate for three months and at the same time requiring him to quit on the 16th December 1910. On the 14th November 1911, the plaintiff commenced the present action and claimed rent at the higher rate. The Small Cause Court Judge has made a decree in favour of the plaintiff for rent at the original rent and has deducted therefrom a certain sum alleged to have been spent by the defendant in effecting necessary repairs on the property. Two questions, therefore, require consideration; namely, *first*, whether the rent was validly enhanced; and *secondly*, whether the defendant is entitled to claim any deduction on account of the costs of repairs.

In so far as the first ground is concerned, it is reasonably plain that the first notice was not sufficient either to terminate the tenancy or to enhance the rent. The case falls within the principle of the decision of a Full Bench of the Allahabad High Court in the case of *Bradley* v. *Atkinson* (1). In that case, the landlord served a notice upon the tenant in the following terms: "If the rooms you occupy in the house are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." It was held that the letter was not such a notice to quit as the law requires, inasmuch as it was not a notice of the intention of the lessor to terminate the contract at the end of a month of the tenancy. Mr. Justice Straight further doubted whether the letter was a notice to quit at all. We are not unmindful that in England it has been held that if a definite notice to quit is given, it is not invalidated by the addition of words requiring, in a notice by the landlord, an increase, or in a notice by the tenant, a diminution, of rent, if the tenant stays on, and that a notice so expressed operates as a notice to quit with an offer to grant or to take a new tenancy; as the case may be. Thus, it was laid down by the majority of the Court of Appeal in *Ahearn* v. *Bellman* (2) that although a notice to quit must be

(1) 7 A. 899.
(2) (1879) 4 Ex. D. 201; 48 L. J. Ex. 681; 40 L. T. 711; 27 W. R. 928.

clear and certain so as to bind the party who gives it and to enable the party to whom it is given to act upon it at the time he receives it, it cannot be laid down as an inflexible rule of law that the notices to be given must not be optional. In the case before the Court of Appeal, the notice was in these terms: "I hereby give you notice to quit and deliver up possession of the shop premises and show-rooms now held by you as tenant from me, on or before the first day of May 1878; and I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises now held by you from me will be £160 payable quarterly in advance." It is obvious that the first part of the notice was sufficiently precise to terminate the tenancy. The second part merely gave the tenant the option of a new contract of tenancy. [*Doe* v. *Jackson* (3), *Doe d. Lyster* v. *Goldwin* (4); *Roberts* v. *Hayward* (5); *Bury* v. *Thompson* (6)]. In two analogous cases in this country, the rule in question has been followed. [*Kikabhai* v. *Kalu Ghela* (7) and *Adolph Sharager* v. *Emma Price* (8)]. In our opinion, the present case falls rather within the principle of the decision in *Bradley* v. *Atkinson* (1) than within the rule laid down by the Court of Appeal in *Ahearn* v. *Bellman* (2). The inference follows that the tenancy was not terminated and the notice did not operate to enhance the original rent. The first ground, therefore, fails.

In so far as the second ground is concerned, section 108, clause (6), of the Transfer of Property Act provides that if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself and deduct the expense of such repairs with interest from the rent or otherwise recover it from lessor. In the case before us, the defendant asserted in his written statement that the landlord was liable to effect the repairs after notice had been given to him for the purpose, and that after his failure, the tenant had, to his knowledge, effected the repairs himself. This allegation does not appear to have been challenged at the trial, and no evidence was adduced on behalf of the landlord to show under what circumstances the repairs were effected. It further appears from the judgment of the Small Cause Court Judge that the question was not raised before him in the shape in which it has been presented to us. In view of these facts, we are of opinion that sufficient ground has not been made out to justify our interference in revision. The second ground, therefore, fails.

The result is that this Rule is discharged with costs. We assess the hearing fee at two gold *mohurs*.

Rule discharged.

(3) (1779) 1 Dougl. 175.

(4) (1841) 2 Q. B. 143; 10 L. J. Q. B. 275; 1 G. and D. 463.

(5) (1828) 3 Car. and P. 432.

(6) (1895) 1 Q. B. 696; 64 L.J. Q. B. 500; 14 R. 299; 72 L. T. 187; 43 W. R. 338; 59 J. P. 228.

(7) 22 B. 241.

(8) 12 C. W. N. 1059.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 359 OF 1911.

March 11, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Tudball.

KALLA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARGIAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-mortgage—Usufructuary mortgage—Mushrut-ul-rehan—*Apportionment of mortgage-money—Liability of person claiming pre-mortgage of usufructuary mortgage.*

H. and three other persons usufructuarily mortgaged their property to one *M.* On the same day, *H.* alone executed a *Mushrut-ul-rehan* in favour of the same mortgagee and agreed to pay the amount due under this mortgage along with the money due under the usufructuary mortgage. *K.* sued to pre-empt the usufructuary mortgage so far as *H.*'s share was concerned:

Held, that he was not bound to pay the money under the *Mushrut-ul-rehan* which was a separate and independent transaction. He was liable to pay the proportionate amount of the consideration of the usufructuary mortgage on *H.*'s share.

Sita Ram v. *Nand Ram*, A. W. N. (1881) 80, referred to.

Second appeal from the decision of the Subordinate Judge of Agra.

Mr. *S. K. Dar*, for the Appellants.

Dr. *Tej Bahadur Sapru*, for the Respondents.

KALLA *v.* HARGIAN.

JUDGMENT.—On the 29th of January 1909, Hargian, Bhogi Ram, Paran Sukh and Khachera executed a mortgage with possession in favour of Manik to secure a sum of Rs. 1,500. The entire property mortgaged was 26 *bighas*, 5 *biswas*. The share of Hargian in that was 4 *bighas*, 18 *biswas*, that of Bhogi Ram, 1 *bigha*, 12 *biswas*, and the remaining 19 *bighas*, 15 *biswas*, belonged to Paran Sukh and Khachera. The mortgagors undertook a liability joint as well as several to pay the mortgage-debt. On the same day Hargian, executed a deed by way of *Mashrut-ul-rehan* (a further charge) in favour of Manik, in which he mortgaged his own share amounting to 4 *bighas*, 18 *biswas*, for a sum of Rs. 99. In this separate deed by way of *Mashrut-ul-rehan*, he stipulated that at the time of redeeming the mortgage executed jointly by him and three other persons, he would pay the money due under this separate deed. There is a recital in the mortgage-deed that a sum of Rs. 150 was due by Hargian to Kalla and others. The plaintiffs then brought a suit for the pre-mortgage of the share of Hargian under the mortgage-deed dated the 29th of January 1909, executed by four persons already mentioned. The plaintiffs in their plaint alleged that the share of Hargian in the mortgage-debt was only a sum of Rs. 153, out of which the plaintiffs were, according to the recital in the deed, entitled to a sum of Rs. 150, and that, therefore, they were entitled to pre-mortgage on payment of Rs. 3. The Court of first instance decreed the claim, and the decree of that Court was affirmed by the lower Appellate Court except as to costs. That Court directed that the plaintiffs, in order to succeed in their suit, were bound to pay a sum of Rs. 356-8, over and above the sum of Rs. 150, which was due upon their own mortgage. The plaintiffs have preferred a second appeal to this Court, and it is contended by their learned Vakil that the transaction by way of *Mashrut-ul-rehan* being a separate and independent transaction, the plaintiffs are entitled to pre-mortgage the prior transaction alone, and that the mode adopted by the Courts below of determining the amount which the plaintiffs are bound to pay under the mortgage is wrong. Both these pleas, in our opinion, are well founded. We have no doubt that the mortgage of 29th January 1909, is a transaction quite separate from the transaction evidenced by the deed of *Mashrut-ul-rehan* of the same date. The mortgagors under the mortgage are four persons, and every one of them has undertaken a liability joint and several. The mortgaged property is 26 *bighas*, 5 *biswas*. The mortgage is a mortgage with possession. In the deed of *Mashrut-ul-rehan*, Hargian only is the mortgagor. The mortgaged property is his share only, amounting to 4 *bighas*, 18 *biswas*. The consideration for the *Mashrut-ul-rehan* is quite distinct from the consideration for the joint mortgage. The mortgage under the *Mashrut-ul-rehan* is, strictly speaking, a simple mortgage, while the mortgage under the deed executed by Hargian and the three others, is a usufructuary mortgage. That being so, the plaintiffs in their suit for pre-mortgage are not liable to pay the sum of Rs. 99, secured by the *Mashrut-ul-rehan* deed. The share of Hargian in the property mortgaged by him along with three other persons, is 4 *bighas*, 18 *biswas*, and the entire sum of Rs. 1,500 is a charge upon the entire property amounting to 26 *bighas*, 5 *biswas*. The charge on the share of Hargian is, therefore, in the proportion of the value of 4 *bighas*, 18 *biswas*, to the value of 26 *bighas*, 5 *biswas*. We are supported in this view by the ruling of this Court in *Sita Ram* v. *Nand Ram* (1). As the lower Appellate Court has not come to any finding regarding the value of the share of Hargian and the value of the entire property mortgaged on the 29th of January 1909, we refer the following issue to that Court for a finding:—What are the proportionate values of the share of Hargian and of the entire mortgaged property? The Court will be at liberty to take such additional evidence as the parties may adduce. Ten days will be allowed for objections on return of the finding.

Issue remitted.

(1) A. W. N. (1881) 80.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2452 OF 1904.

August 18, 1905.

Present:—Mr. Justice Rampini and Mr. Justice Mookerjee.

GOBINDA CHANDRA GANGULY—DEFENDANT—APPELLANT

versus

KAILASH CHANDRA SANYAL—PLAINTIFF—RESPONDENT.

Bengal Municipal Act (III B.C. of 1884*) s.* 85, *cl. (a)* —*Assessment*—Naib *residing in* zemindar's *house adjoining* kacheri *without paying rent*—Zemindar *occupier and liable to tax, not* naib—*House and* kacheri, *separate holdings.*

The plaintiff as the *naib* of a *zemindar* occupied a small house adjoining the *zemindar's kacheri*, and paid no rent. The Municipality assessed him with Municipal taxes under section 85 clause *(a)* of the Bengal Municipal Act whereupon he brought this suit for a declaration that the imposition of the taxes is illegal:

Held, that the occupier of the house was the *zemindar*, and that he, and not the plaintiff, was liable to be taxed in respect of it.

Obiter dictum:—The plaintiff's house and the *kacheri* house were not one holding for the purposes of the assessment under section 85 clause *(a)* of the Bengal Municipal Act.

Appeal from the decree of the Subordinate Judge of Mymensingh, dated the 20th July 1904, reversing that of the first Munsif, Bajitpur, dated the 6th July 1903.

Babu *Tarak Chandra Chakravarty*, for the Appellant.

Babu *Gobinda Chandra De Roy*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises is one brought to have it declared that the Municipal tax imposed on a certain building is illegal and also for a refund of the amount realized from the plaintiff as municipal and latrine taxes.

The facts of the case are these. The plaintiff is the *naib* of the Maharaja of Mymensingh, and, as such, occupies a small house adjoining, the *kacheri* of the Maharaja. The Municipality have assessed him with municipal taxes on the ground that the house in which he resides and its site form a separate holding from the *kacheri* house belonging to the Maharaja, on which a separate assessment has been made.

The learned Subordinate Judge has come to the conclusion, *first*, that the house occupied by the plaintiff and the *kacheri* house are one holding, and *secondly*, that the plaintiff is not the occupier of the house in which he resides within the meaning of section 85 of the Municipal Act, but that the occupier is the Maharaja of Mymensinh. For these reasons, he has given the plaintiff a decree.

The Chairman of the Bajitpur Municipality now appeals to this Court and contends that the Subordinate Judge is wrong on both points.

In support of his contention that the Subordinate Judge is wrong on the first point, he calls our attention to clause (3) of section 6 of the Municipal Act, in which the term "holding" is defined, and in which it is also said that "provided that where two or more adjoining holdings form part and parcel of the site or premises of a dwelling-house, manufactory, warehouse, or place of trade or business, such holdings shall be deemed to be one holding for the purposes of this Act other than those mentioned in clause (*a*) of section eighty-five," Now, it is pointed out that the assessment which is disputed in this suit has been made under clause (*a*) of section 85, and that, therefore, the learned Subordinate Judge, in coming to the conclusion that the plaintiff's house and the *kacheri* house of the Maharaja are one holding, has fallen into a mistake. They may be one holding for purposes other than those mentioned in clause *(a)* of section 85; but they are not one holding for the purposes of the assessment which has been made in this suit.

We think that this contention has considerable force. But it is unnecessary for us to come to any definite finding on this point, because we think that the decision of the Subordinate Judge on the second point, which is impugned on this appeal, is right. The Subordinate Judge has held that the plaintiff is not the occupier of the house in question, because he is only the *naib* of the Maharaja and is residing in it in his capacity of servant of the Maharaja. He does not pay any rent for the house and is not a permanent occupier but can be removed at the Maharaja's pleasure. We, therefore, think that the Subordinate Judge has rightly held that the occupier of the house is the Maharaja, and not the plaintiff. That being so, the decision of the learned Subordinate Judge, in our opinion, upon the whole is right; and we dismiss this appeal with costs.

Appeal dismissed.

SURENDRA NATH ROY *v.* GIRIJA NATH ROY.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4389 OF 1910.
January 30, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.

SURENDRA NATH ROY CHOWDHURY AND OTHERS—JUDGMENT DEBTORS—PETITIONERS
versus
GIRIJA NATH ROY CHOUDHURY AND OTHERS—DECREE HOLDERS—OPPOSITE PARTY.

Decree—Amendment—Suit dismissed on preliminary point—Appeal—Judgment of first Court set aside and appeal allowed "with costs"—Meaning of "costs"—Costs of appeal only—Court Fees Act (VII of 1870), s. 13—Court-fee on memorandum of appeal to be refunded to appellant and not charged upon respondent.

A suit was dismissed on a preliminary ground by the first Court. Upon appeal, the High Court, in 1903, reversed that decision with costs. In the decree which was prepared in the High Court it was directed that the respondents in the appeal do pay the costs of the appeal and the costs incurred in the first Court, and in the schedule of costs, incurred in the High Court by the appellant, an item of Rs. 285, on account of Court-fee on the memorandum of appeal, was entered. On an application made in 1910 for amendment of the decree:

Held, that an order ought to have been made under section 13 of the Court Fees Act for refund of the fee paid on the memorandum of appeal, and that the amount ought not to have been entered in the decree so as to throw an unnecessary burden upon the unsuccessful respondent, and that such an order should now be made:

Held, also, that allowing an appeal with costs means the costs of the High Court only, and that that portion of the decree which directed the then respondents, to pay the costs of the then appellants in the Court of first instance should be omitted.

Rule obtained upon an application for the amendment of a decree made in the High Court on August 13th, 1903.

Babus *Dasarathi Sanyal*, *Amarendra Nath Rose* and *Delendra Narain Bhattacharya*, for the Petitioners.

Babu *Tarak Chandra Chuckravarty*, for the Opposite Party.

JUDGMENT.—This is a Rule for amendment of the decree of this Court in *Girija Nath Roy Chowdhury* v. *Surendra Nath Roy Chowdhury* (1). It has been contended, in the first place, that an order ought to have been made under section 13 of the Court-Fees Act for refund of the fee paid on the memorandum of appeal, to the then successful appellants and that the amount ought not to have been entered in the decree so as to throw an unnecessary burden upon the unsuccessful respondants. This contention is obviously just. We, therefore, now make an order under section 13 of the Court-Fees Act and direct that Rs. 285 which was paid on account of Court-fees on the memorandum of appeal to this Court by the plaintiffs-appellants be refunded to them. The decree of this Court will be amended by the omission of this sum.

It has been contended, in the second place, on behalf of the petitioners that the decree ought not to have contained a direction for payment of the costs of the Court below by the defendants to the plaintiffs. It appears that the suit had been dismissed on a preliminary ground, namely, that it had been improperly framed. Upon appeal, that decision was reversed, and the order of the Court was that the appeal be allowed with costs; that clearly means the costs of the High Court. It has been suggested, however, that the learned Judges intended to allow the then plaintiffs the costs of the original Court as well; such an interpretation is, in our opinion, entirely inadmissible. The learned Judges could not have intended to allow to the then appellants the costs of the original Court inclusive of the Cour-fees paid on the plaint, irrespective of the manner in which the suit might ultimately terminate. We must, therefore, allow this objection also and direct that the decree be amended by the omission of that portion of it which directs the then respondents to pay the costs of the plaintiffs-appellants in the Court of first instance.

There will be no order as to the costs of this Rule.

Rule made absolute: Decree amended.

(1) 16 C. L. J. 1; 16 Ind. Cas. 84.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 494 OF 1908.

July 27, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

MOHAMAYA PROSAD SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM KHELAWAN SINGH THAKUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malikana, *suit for—Calculation of* malikana—*Burden of proof—Previous litigation between parties—Decision on mixed question of fact and law, binding though erroneous*—Res judicata—*Interest on arrears of* malikana—*Damage for wrongful detention of money—Limitation Act (XV of* 1877), *Sch. II, Art.* 115—*Transfer of Property Act (IV of* 1882), *s.* 90—*Decree, personal, when to be made.*

In a suit for recovery of a sum of money claimed as *malikana*, the burden lies upon the plaintiff in the first instance to prove the amount of the net assets of the estate, with reference to which *malikana* is to be calculated. The burden is discharged on the production by the plaintiff of a judgment in a previous litigation between the parties in which it was determined that the net assets amounted approximately to a certain sum. The *onus* then shifts to the defendant to establish that since the date of the decision in question, the condition of the property had deteriorated and that the assets at the present time are smaller than at the time of the previous litigation.

In a previous litigation between the parties, it was decided that the defendants were not entitled to deduct the Government revenue and the cesses but only the collection charges from the gross income of the estate in order to determine the net assets upon which *malikana* was to be calculated:

Held, that this being a mixed question of fact and law, the decision upon it, though erroneous, was binding upon the parties and their successors.

Aghore Nath Mukerjee v. *Kamini Debi*, 11 C. L. J. 461; 6 Ind. Cas. 554, followed.

Although interest on arrears of *malikana* cannot be claimed under the provisions of the Interest Act, because the sum which the plaintiff seeks to recover is not due under a written instrument, nor has there been a demand of payment in writing, yet it is open to the Court to make a decree for damages for wrongful detention of the plaintiff's money.

Lala Chhajmal Das v. *Brijbhukhan Lal*, 22 I A. 199; 17 A. 511; *Jogeshur Bhagat* v. *Ghanasham Das*, 5 C. W. N. 356; *Mansab Ali* v. *Gulab Chand*, 10 A. 85; *Cook* v. *Fowler*, L. R. 7 H. L. 27, 43 L. J. Ch. 855; *Gudri Koer* v. *Bhubaneswari Coomar Singh*, 19 C. 19 and *Moti Singh* v. *Ramohari Singh*, 24 C. 699, 1 C. W. N. 437, relied upon.

The limitation applicable to a claim for damages is that provided by Article 115, of the Limitation Act, and the plaintiffs are entitled to damages upon each annual sum in arrear only for three years antecedent to the suit.

Mansab Ali v. *Gulab Chand*, 10 A. 85, *Sri Niwas Ram Pande* v. *Udit Narain Misr*, 13 A. 330, *Badibibi* v. *Sami Pillai*, 2 M. L. J. 235, *Gudri Koer* v. *Bhubaneswari Coomar Singh*, 19 C. 19 and *Moti Singh* v. *Ramshari Singh*, 24 C. 699; 1 C. W. 437, relied upon.

A decree, under section 90 of the Transfer of Property Act, can only be made after it has been found upon the sale of the hypothecated properties that the judgment-debt has not been satisfied thereby. Till that stage is reached, no question of a personal liability arises.

Therefore, at the preliminary stage of the suit, no personal decree can be made in favour of the plaintiff in addition to the decree for sale of the hypothecated properties.

Appeal from the decree of the District Judge of Darbhanga, dated the 6th July 1908.

Babu *Shoroshi Charan Mitra*, for the Appellants.

Moulvi *Muhammad Mustafa Khan* and Babu *Ganesh Dut Singh*, for the Respondents.

JUDGMENT.—This appeal is directed against the decree in a suit for recovery of a sum of money claimed as *malikana*. The Court below has found that the defendants are liable to pay the *malikana* to the plaintiff and the question of their liability has not been raised in this Court. But the decision of the District Judge has been assailed on four grounds; namely, *first*, that the amount of the net assets has been fixed at too high a figure; *secondly*, that the Government revenue and the cesses should have been deducted from the assets before the *malikana* was calculated; *thirdly*, that the plaintiffs are not entitled to claim any sum by way of interest, and, *fourthly*, that the decree as drawn up is not in accordance with the provisions of the Transfer of Property Act.

In support of the first point urged on behalf of the appellants, it has been contended that the burden was upon the plaintiffs to establish the amount of assets with reference to which *malikana* had to be calculated, that they have not discharged such *onus* and that the defendants have at any rate shown that the income is much less than has been adopted by the District Judge as the foundation of his judgment. In our opinion, there is no force in this contention. No doubt the burden lay upon the plaintiffs in the first instance to prove the amount of the net assets of the estate. But they discharged that burden when they produced the judgment in the previous litigation between the

parties in which it had been determined that the net assets amounted approximately to Rs. 4,000 a year. The *onus* then shifted upon the defendants to establish that since the date of the decision in question the condition of the property had deteriorated and that the assets at the present time were smaller than the assets at the time of the previous litigation between the parties. But the learned Vakil for the appellant has contended that the previous decisions are valueless, as they were based upon *teikhana* papers It is not open, however, to the appellant to impeach the correctness of the decision in the earlier litigation between the parties. It must be taken, therefore, that at that time the income of the property was approximately Rs. 4,000 a year. The question next arises whether the defendants have discharged the burden which lay upon them to rebut the evidence adduced by the plaintiffs. No doubt they have produced the survey record which shows that the amount of rent recoverable from the cultivating *raiyats* is Rs. 3,242 a year. This, however, is by no means conclusive. It appears that there are *zerait* lands within the estate and that income is derived also from other sources. A Patwari was placed in the witness-box who swore what the income was as derived from those sources. But he admitted that there were collection papers which were not produced. We are not prepared to place implicit reliance upon the figures given by the Patwari; and, in the absence of the collection papers, which admittedly existed but were withheld for some unexplained reason, the defendants have not been able to rebut the evidence produced by the plaintiffs. The conclusion, therefore, follows that the decision of the District Judge upon this part of the case cannot be successfully attacked.

In so far as the second point urged by the appellants is concerned, it has been argued that in order to determine the net assets upon which *malikana* is to be calculated, the Government revenue and the assets should be deducted from the gross income in addition to the collection charges. Here, however, the appellants are in a difficulty. In a previous litigation in 1894, this very question was raised, and it was then decided that the defendants were not entitled to deduct the Government revenue and the cesses from the gross income of the estate. But the learned Vakil for the appellant has contended that the decision was erroneous in law and does not, therefore, operate as *res judicata*. It is fairly clear, however, that even if the decision be assumed to have been erroneous in law, it was a decision upon a mixed question of fact and law and is, consequently, binding as between the parties and their representatives-in-interest. In that litigation a *parwana* was produced under which in 1788 the *malikana* had been granted. The Subordinate Judge held that the effect of this *parwana* was to show that the plaintiffs were entitled to *malikana* at the rate of 10 per cent. on the produce of the villages; and upon the construction of the *parwana* in the light of the provisions of the Regulations, the Subordinate Judge held that the defendants were entitled to deduct nothing beyond the collection charges from the gross proceeds. The decision, therefore, in substance related to the effect of the *parwana* as regulating the rights and liabilities of the parties. It is obvious that this is a decision on a mixed question of fact and law; and it cannot be disputed that the decision of such a question, even though erroneous, is binding upon the parties and their successors. In support of this proposition, we need only refer to the case of *Aghore Nath Mukerjee* v. *Kamini Debi* (1). The second contentions of the appellants, therefore, fails.

In so far as the third ground urged by the learned Vakil for the appellants is concerned, it has been argued that the plaintiffs are not entitled to claim any sum by way of interest on the arrears of *malikana* due. In support of this proposition, reliance has been placed upon the case of *Kallar Roy* v. *Ganga Pershad Singh* (2). No doubt, that case is an authority for the proposition that interest cannot be claimed under the provisions of the Interest Act because the sum which the plaintiff seeks to recover is not due under a written instrument; nor has there been a demand of payment in writing. Consequently, the plaintiffs are not entitled to the benefit of section 1 of Act XXXII

(1) 11 C. L. J. 461; 6 Ind. Cas. 554.
(2) 33 C. 998.

of 1839. It does not follow, however, that the plaintiffs are not entitled to claim any sum by way of damages for the detention of the money due to them. It was pointed out by their Lordships of the Judicial Committee in the case of *Lala Chhajmal Das* v. *Brijbhukhan Lal* (3), which was followed by this Court in the case of *Jogeshur Bhagat* v. *Ghanasham Dass* (4), that even though the claim of the plaintiffs is limited to interest which is not recoverable either under a contract or under the provisions of the Interest Act, it is open to the Court to make a decree for damages for wrongful detention of their money. It is clear, therefore, that the plaintiffs are entitled to claim damages in lieu of interest. In support of this view, it is sufficient to refer to the case of *Mansab Ali* v. *Gulab Chand* (5), where the learned Judges relied upon the decision of the House of Lords in the case of *Cook* v. *Fowler* (6) and upon the notes to the case of *Mounson* v. *Redshow* (Notes to Saunder's Reports Vol. I) (7). The same view has been adopted by this Court in the cases of *Gudri Koer* v. *Bhubaneswari Coomar Singh* (8) and *Moti Singh* v. *Ramohari Singh* (9). But here a question of some nicety arises. If the plaintiffs are not entitled to claim any sum by way of interest, is not their claim for damages for twelve years barred in part at least by the law of limitation? The learned Vakil for the respondent has suggested that damages should be treated as merely accessory to the principal amount due and that they should be treated as charged upon immoveable property in the same manner as the sum due on account of the *malikana*. In our opinion, this contention is fallacious. The plaintiffs become entitled to damages on the ground that the sum payable to them as *malikana* has been illegally withheld. The cause of action is entirely different from the cause of action for the recovery of *malikana*. Consequently, it cannot be suggested that the same rule of limitation must necessarily apply to the claim for recovery of the two sums. In fact, it has been ruled in a series of decisions in this Court, as well as in Allahabad and Madras, amongst which we may mention *Mansab Ali* v. *Gulab Chand* (5), *Sri Niwas Ram Pande* v. *Udit Narain Misr* (10), *Badibibi* v. *Sami Pillai* (11), *Gudri Koer* v. *Bhubaneswari Coomar Singh* (8) and *Moti Singh* v. *Ramohari Singh* (9), that in cases of this description, the limitation applicable is that provided in Article 115 or Article 116 of the second Schedule of the Limitation Act. We are not unmindful that, in the peculiar circumstances of the case of *Jogeshur Bhagat* v. *Ghanasham Das* (4), Article 120 was held applicable. But that was a case in which the original sum was recoverable under a registered contract and, consequently, it was immaterial whether Article 116 or Article 120 was applied. In the case before us, we are clearly of opinion that the plaintiffs are entitled to damages upon each annual sum in arrear only for three years antecedent to the suit. We may add that in the case of *Lala Chhajmal Das* v. *Brijbhukan Lal* (3), where damages were allowed in lieu of interest, the question of limitation was neither raised nor considered, apparently because the appeal was argued *ex parte*. The third ground taken by the appellants must consequently prevail in part.

In so far as the fourth ground urged by the appellant is concerned, it has been contended that the decree has not been properly drawn up, and that at this preliminary stage of the suit, no personal decree can be made in favour of the plaintiffs in addition to the decree for sale of the hypothecated properties. There is no room for controversy that this contention is well founded. A decree under section 90 of the Transfer of Property Act can be made only after it has been found upon the sale of the hypothecated properties that the judgment-debt has not been satisfied thereby. Till that stage is reached, no question of a personal liability arises. We may point out that the question is not one of form but of substance, because so far as the claim for recovery of money charged upon immoveable property is concerned, the rule of limitation is that provided in Article 132 of the second Schedule of the Limitation Act,

(3) 22 I. A. 199: 17 I. A. 511.
(4) 5 C. W. N. 356.
(5) 10 A. 85.
(6) 43 L. J. Ch. 855, L. R. 7 H. L. 27.
(7) (1644) 1 Wons. Saunders Report 186, 196.
(8) 19 C. 19.
(9) 24 C. 699; 1 C. W. N. 437.
(10) 13 A. 330.
(11) 2 M. L. J. 235.

whereas in respect of the claim for the enforcement of a personal remedy, a shorter period of limitation is applicable. The fourth ground, therefore, must prevail.

The result is that this appeal is allowed in part and the decree of the District Judge modified. The amount due must be determined on the principle here explained and the plaintiffs will have a decree for the principal amount claimed together with interest on such sum for not more than three years before the suit; and the clause in the decree which allows a personal decree in favour of the plaintiffs will be expunged. Upon the sum ascertained to be due on this principle to the plaintiffs at the date of the commencement of the suit, interest will run at the rate of 12 per cent. per annum up to the date of this judgment and thereafter at the rate of 6 per cent As the victory has been a divided one, there will be no order for costs either in this Court or in the Court below.

Appeal allowed in part; Decree modified.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE APPEAL No. 29 OF 1911-12.

April 15, 1912.

Present:—Mr. Fenton, F. C.

Musammat NIHAL DEVI—PETITIONER—APPELLANT

versus

KISHORE CHAND AND ANOTHERS—OPPOSITE PARTY—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 144—Punjab Tenancy Act (XVI of 1887), s. 17—Appraisement—Value of Record of Rights entries in revenue proceedings.

Under the joint force of section 17 of Act XVI of 1887 and section 144 of Act XVII of 1887, a co-sharer in a joint holding is competent to make an application for appraisement; it is not necessary for all the co-sharers to join in it.

In dealing with applications under sections 144, Land Revenue Act, XVII of 1887, and 17 of the Punjab Tenancy Act, XVI of 1887, the Revenue Officer should not go behind the entries in the Revenue Records. He should act as if the co-sharers recorded therein were in fact the co-sharers in the holding. A procedure is provided for those who dispute the correctness of the Record of Rights entries to have them altered. Pending alterations, the Revenue Officer should, in a proceeding under section 17, Tenancy Act, treat the entries as correct.

Appeal from the order of the Commissioner of Jullundur, dated 16th August 1910, reversing that of the Collector of Ferozepore, dated 25th May, 1911.

FACTS.—This was an application for appraisement of produce of lands of 32 villages in the Ferozepore District. The Collector ordered that the applicant should pay in Rs. 392 and arbitrators and establishment be appointed to work and apportion the shares of produce. On appeal to the Commissioner, the Collector's order was reversed.

Mr. *Anant Ram*, for the Appellant.

Mr. *Kirkpatrick*, for the Respondents.

JUDGMENT.—In the order appealed against, the Commissioner (Mr. Sykes) says that the original application of *Musammat* Nihal Devi for appraisement of produce under the Tenancy Act ought to have been rejected by the Collector because section 17 of the Tenancy Act does not apply to disputes between co-sharers. In saying this, the Commissioner overlooked the provisions of section 144 of the Land Revenue Act which make applicable the provisions of the Tenancy Act to disputes between co-sharers. The learned Commissioner also took exception to the Collector's order because all the landlords had not joined in the application. As in the case of a dispute between co-sharers, no question of *landlord* arises, the Commissioner should not have been influenced by this consideration. Finally the Commissioner was of opinion that *Musammat* Nihal Devi had lost her title by virtue of the Chief Court judgment in *Nihal Devi* v. *Kishore Chand* (1). I must say that I am unable, on a cursory perusal of that judgment, to take the same view of it as the Commissioner does. That judgment seems to me to amount to a ruling that a suit for possession of certain partnership property on a settlement of an account was barred by limitation, but there is a distinct finding that *Musammat* Nihal Devi is her husband's heir. Whether she is entitled to obtain possession of her husband's property in a suit brought by her as heir and not as co-partner, or whether, if already in possession, she is entitled

(1) 142 P. W. R. 1910; 97 P. R. 1910; 8 Ind. Cas. 999.

to retain possession, are questions which do not appear to me to have been decided by the Chief Court ruling referred to. I must say that I regard the position of *Musammat* Nihal Devi a very strong one in view of the provisions of sections 88 and 90 of the Indian Trusts Act of 1882. However, without going into the question of title, I must hold that in dealing with applications under section 144, Land Revenue Act, and section 17, Tenancy Act, the Revenue Officer should not go behind the entries in the Revenue Records. He should act as if the co-sharers therein recorded were in fact the co-sharers in the holding. A procedure is provided for those who dispute the correctness of the Record of Rights entries to have the entries altered. Pending alteration, the Revenue Officer's proceeding under section 17, Tenancy Act, should treat the entries as correct. As the harvest in respect of which the original application was made is long past and the appellant desires nothing more than the correction of the Commissioner's error in law and a pronouncement as to the correct procedure to be observed in such cases in future, no order is necessary beyond the acceptance of the appeal. I decree, however, costs of the appeal in favour of appellant against respondents.

Appeal allowed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 193 OF 1911.

March 20, 1912.

Present:—Mr. Shaw, J. C.

NGA PO GYI AND ANOTHER—APPLICANTS

versus

MI ON—RESPONDENT.

Contract Act (IX of 1872), ss. 23, 26, 57—Contract by husband to live with wife, to support her, and not take another wife—Breach of contract—Damages—Legal and illegal parts separable—Contract enforceable.

On a wife taking steps to divorce her husband, the latter agreed to live in her house, to work and support her, and not to take a lesser wife, but did not carry out the agreement in all three particulars. On these facts she sued him for damages for breach of contract:

Held, (1) that the suit was maintainable despite the subsistence of defendant's marriage with plaintiff;

(2) that a stipulation not to take a lesser wife was not contrary to the Buddhist law, and, therefore, did not contravene section 23 of the Contract Act;

(3) that, though the stipulation not to take a lesser wife may have been illegal as being in contravention of section 26 of the Contract Act, yet the promises to live in plaintiff's house and to work and support her, were good and lawful and, therefore, enforceable under section 57 of the Contract Act.

Mr. *J. C. Chatterjee*, for the Applicants.

Mr. *Banerjee*, for the Respondent.

JUDGMENT.—Plaintiff-respondent sued for Rs. 100 as compensation for breach of contract. The plaintiff-respondent and the defendant-applicant, Po Gyi, are wife and husband. Defendant-applicant, Nga Ton, is Po Gyi's father.

The alleged contract was one whereby defendants-applicants undertook to pay Rs. 100 damages to plaintiff-respondent, if defendant-applicant, Po Gyi, failed to live in her house and work and support her, and took a lesser wife.

The Courts below both found in favour of the plaintiff-respondent, and my predecessor having decided that no second appeal lay, the case now comes before me as one for revision.

It is contended on behalf of the defendants-applicants that the promise was illegal because there was no consideration, that a Burmese Buddhist wife cannot maintain a suit for damages against her husband while the marriage subsists, that if taking a lesser wife meant forming an illicit union, the contract would be immoral and opposed to public policy, and that if taking a lesser wife meant making a legal marriage, the contract was in contravention of section 26, Contract Act.

The plaintiff's allegations were that defendant-applicant, Po Gyi, did not work or support her, but deserted her and, she understood, was looking about for a lesser wife, whereupon she took steps to divorce him, but refrained from persisting in a claim for divorce on defendant-applicant, Po Gyi, undertaking to live in her house and work and support her and not take a lesser wife, and on the defendant-applicant, Nga Ton, his father, guaranteeing the performance of his promise or standing security for him, and that defendant-applicant, Po Gyi, thereafter broke his promise in every way. Clearly there was good consideration, namely, plaintiff-respondent refraining from suing for divorce; and this with respect to both defendants-applicants

(section 127, Contract Act). *Nga Ba* v. *Mi Ok* (1) is conclusive that a Burmese Buddhist wife can maintain a suit against her husband during the subsistence of the marriage.

There is nothing to show that "taking a lesser wife" meant doing anything immoral, and if it had meant this, a contract by which defendant-applicant, Po Gyi, bound himself under a penalty not to do the immoral thing could not have been an immoral contract.

These objections are, therefore, unsustainable.

The applicability of section 26 of the Contract Act is a much more difficult question, and it does not appear to have arisen before. There are no decisions in either Upper Burma or Lower Burma or apparently in India. Pollock observes that a contract by a Hindu or a Muhammadan not to take a second wife would seem to be within the section although such a result was probably never contemplated by the Legislature; but that, apart from section 26, agreements of this class would apparently be void under section 23 as tending to defeat the provisions of Hindu or Muhammadan Law. The Buddhist law also recognises polygamy but not perhaps quite in the same way as the Hindu or Muhammadan Law.

The Lower Burma case of *Mi San Shwe* v. *Po Thaik* (2), a suit for divorce, dealt with an agreement in which the husband undertook not to take a lesser wife, and there was ill-treatment as in the present case besides the taking of the lesser wife.

That is a feature of the contract which has been practically overlooked by the lower Courts, and also in this Court by the learned Advocates on both sides. The situation was one of those referred to in paragraph 303 of the Kinwun Mingyi's Digest:—The wife complains of ill-treatment; the husband has deserted her; he does not work and support her and he is looking about for a second wife; the wife, therefore, asks for a divorce, but instead of insisting on getting this at once, she accepts the husband's undertaking to behave himself in future towards her, that is, to live with and to work for her and support her; and he gives security to this effect.

It is evident that an agreement of the kind is in consonance with the rules of the Buddhist Law. The additional stipulation about the second wife, which was made in the Lower Burma case and in the present case, was merely a part of the undertaking, and without it, the wife had a good cause of action. I do not think that this stipulation is contrary to the Buddhist Law. On this point, I am disposed to concur with Mr. Justice Birks in the case above cited. The contract, therefore, is not, in my opinion, in contravention of section 23, Contract Act. With regard to section 26, it is first necessary to see whether section 24 applies. If it does, then plaintiff-respondent must fail in the event of the stipulation as to not taking a lesser wife being opposed to section 26.

Sections 24, 57 and 58 deal with parts of the same subject and the commentaries of Cunningham and Shephard and Pollock make it clear that "where several distinct promises are made for one and the same lawful consideration and one or more of them are such as the law will not enforce, that will not of itself prevent the rest from being enforceable". Pollock goes on: "The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. The general rule is that where you cannot sever the illegal from the legal part of the covenant, the contract is altogether void, but where you can sever them..... .....you may reject the bad part and retain the good".

There is an old Bengal case, *Musammat Poono Bibi* v. *Moulvie Faez Bukhsh* (3), not unlike the present case. There, a husband executed a bond by which he promised not to marry another wife or do anything without his wife's permission, and also to pay over all his earnings to her. It was held by Sir Richard Couch that section 24 did not apply, but that if any section of the Contract Act applied, it was section 57. He considered the promises not to do anything without the wife's permission as contrary to public policy, but the promise to pay over his earnings was a lawful promise and capable of enforcement.

On this high authority, I am of opinion that the contract in the present case must be held to fall within section 57 rather than section 24.

The promises by which defendant-applicant, Po Gyi, undertook to live in the plaintiff-

(1) U. B. R. 1902-03, II, B. L., Mar., 1.
(2) 8 Bur. L. R. 24.

(3) 23 W. R. 66; 15 B. L. R. Ap. 5.

respondent's house, to work, and support her, were good and lawfnl promises, and there is no reason why this part of the contract should not be enforced though the promise not to take a lesser wife may have been illegal as being in contravention of section 26.

It is, therefore, unnecessary for the purposes of the present case to decide whether in fact section 26 rendered the promise not to take a lesser wife invalid.

The application is dismissed with costs.

Application dismissed.

COURT OF JUDICIAL COMMISSIONER, N.-W. FRONTIER PROVINCE.

SECOND CIVIL APPEAL No. 6 OF 1912.

April 13, 1912.

Present:—Mr. Barton, J. C.

ABDULLA—PLAINTIFF—APPELLANT

versus

SAADULLA KHAN—DEFENDANT—RESPONDENT.

Mortgage—Mortgage for a fixed period of 150 *years—Right of the representative of mortgagor to redeem before the expiry of the term—Clog on the equity of redemption.*

In a suit for redemption in which the deed of mortgage contained the words "*tarikh imroza se miadi* 150 *sal rahn kardi*" and, "*bad inqiza miad mukarra jab zar-i-rahn* 1,600 * * * * *ada kiya to fak karakar kabiz wa dakhil loonga*";

Held, that the fixation of the period was of the essence of the contract and the right to redeem did not mature before the expiry of the term fixed in the deed.

Further appeal from the order of the Divisional Judge, Peshawar, dated the 31st October 1911.

Messrs. *Prabh Dial* and *Mufti Muhammad Yakub*, for the Appellant.

Lala *Hans Raj* and Moulvi *Saad-ud-din*, for the Respondent.

JUDGMENT.—The material facts of this case are briefly as follows:—By deed dated 11th December 1889, Amirullah of Mardan mortgaged 245 *kanals* of land described as *Nahri* to Subedar Major Zaman Shah for Rs. 1,600. It is recited in the document that the mortgage would run for 150 years, and mention is made of the fact that the same land was at the time in possession of the mortgagee by virtue of an earlier mortgage, dated 22nd May 1883, for a term of 16 years. The original executants of the deed have died, and Abdulla, son of the mortgagor, now comes forward with a claim to redeem the land, which has greatly enhanced in value, from Saadullah, grandson of the mortgagee. The Court of first instance (the Sub-Judge of Mardan), relying apparently on the principles laid down in No. 41 of the published rulings of this Court, held that the term fixed was intended for the benefit of the mortgagor rather than of the mortgagee, and decreed redemption accordingly. The case was then carried on appeal to the Court of the Divisional Judge where the opposite view found favour, the Divisional Judge holding that from the circumstances in which the contract was made, it must be inferred that time was of the essence of the agreement and that the right to redeem did not mature till the expiry of the term fixed in the deed, *viz.*, 150 years.

It may be taken as a settled principle of law that when a term is fixed in a deed of mortgage during which the mortgage is to have currency, the object is rather to protect the mortgagor against foreclosure than to secure to the mortgagee possession and enjoyment of the property mortgaged for the term agreed on. The principle is, however, qualified by the proviso that the construction of the agreement is not in the opposite sense; in other words, if the terms of the deed show clearly that the parties did in fact intend that the right to redeem should be deferred, then the mortgage cannot be redeemed till the period so fixed expires. This theory again is subject to the qualification that the equity of redemption is not unfairly or inequitably clogged by the restriction thus imposed on the mortgagor's rights, though it has not yet been clearly settled whether an inordinately long period during which redemption is to be deferred constitutes in itself a sufficient reason for holding the condition to be inequitable, and as such unenforceable in a Court of law.

Turning now to the deed on which the present suit is based, I fully endorse the view taken by the Divisional Judge that time was in fact of the essence of the contract between the parties. This may be gathered both from the wording of the deed and from the very large increase in the mortgage-money as compared with the amount secured under the earlier mortgage which was with possession. In fact, there can be little doubt that the contract was

intended for all practical purposes to take effect as a sale. There is no ambiguity in the terms of the deed. It is stated clearly, *firstly* that the mortgage is for 150 years "*tarikh imroza se miadi* 150 *sal rahn kardi*:" *secondly*, there is the clear stipulation that redemption shall be allowed on expiry of the term in question, *viz.*, "*bad inqiza miad muqir-ra jab zar-i-rahn* 1,600 * * * * *adakiya to fak karakar kabiz wa dakhil loonga*." I may notice in parenthesis here that Counsel for the appellant lays stress on the use of the first person singular "*loonga*" on which he bases the argument that the mortgagor must have contemplated the redemption of the land in his own life-time, and it, therefore, follows that the long term of 150 years was merely fixed for his benefit and for the benefit of his family. The consideration is not, however, entitled to much weight, and it may be argued with equal force that the construction used merely follows from the general wording of the bond and is purely a formal matter.

To resume: as already observed, it appears clearly from the language of the deed that the intention of the parties was that the mortgage should subsist, free from all danger of redemption for a period of 150 years. The case is distinguishable from the published ruling (No. 41) of this Court already cited in that in the deed, on which the earlier case was founded, there is no express mention of the fact that redemption would be deferred till the close of the stipulated period. For these reasons, I hold that the general principle applicable in cases of the kind does not govern the agreement between the parties to the present suit.

There remains the question whether the stipulation ensuring the currency of the mortgage for a period of 150 years constitutes an undue restriction on the right to redeem. I have already stated that there is no settled principle as regards the question whether an unusually long period suspending the right of redemption does in fact unfairly clog the equity of redemption. A period of fifty years has been held not to be unreasonable. [vide *Milkhi* v. *Fattu* (1)]. Similarly in the case reported as *Ralla* v. *Amin Chand* (2), a mortgage term for 60 years was held valid. Further, it is pointed out, in *Sayad Abdul Haq* v. *Ghulam Jilani* (3), that it has never been held that a stipulation operating to postpone the date on which redemption may be claimed is bad *per se* merely on account of the length of the term fixed. Reference may also be made in this connection to *Puran Singh* v. *Kesar Singh* (4), in which case the period was for twenty years. It must be admitted that the longest term in the published judgments which have come to my notice is 60 years; and the argument may very well be put forward that to defer the exercise of the equity of redemption for a longer period is to reduce the right to a mere shadow especially if it is suspended for a century and a half. At the same time it is unfair to the parties to decide the question apart from a consideration of the circumstances in which the contract was executed. Cases may occur in which the mortgagor, in order to secure to himself the most favourable terms possible may deliberately elect to surrender his right of redemption for all practical purposes without, however, expressly extinguishing it in favour of the mortgagee. In this Province, this course is frequently adopted in order to defeat pre-emption; and possibly this was the motive in the background of the present mortgage agreement. I do not think that such a covenant deliberately entered into by the parties should be barred from operation by principles of equity. We may assume that the mortgagee would have advanced a smaller sum had the equity of redemption not been weakened to the extent agreed upon: and, on the other hand, the mortgagor found it to his interest to diminish his ultimate rights to secure a larger sum, In the present case, there can be little doubt that the mortgagor was influenced by the considerations just referred to, and that he did, to all intents and purposes, surrender his rights, the agreement being intended to operate rather as a sale than a mortgage. In these circumstances, it would be against equity to allow redemption at this stage a privilege that would never have been claimed but for the enormous increase in the value of the land. For these reasons, I hold that the length of the period fixed for the mortgage does not operate as a clog on

(1) 40 P. L. R. 1903.
(2) 126 P. L. R. 1908.
(3) 20 B. 677.
(4) 39 P. R. 1907; 119 P. L. R. 1907.

the equity of redemption which should not be enforced, and I affirm the finding of the Divisional Court and reject the appeal. The appellants will pay the respondents costs in this Court.

Appeal rejected.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 60 OF 1911.

February 26, 1912.

Present:—Mr. McColl, A. J. C.

MI SAW MYIN AND ANOTHER—APPELLANTS

versus

MI SHWE THIN AND ANOTHER—RESPONDENTS.

Mortgage—Usual form in Upper Burma is usufructuary—Evidence Act (I of 1872), s. 92—Oral evidence to the effect that more money was paid for sale than is entered in the sale-deed, whether admissible—Buddhist law—Inheritance—Widow—Eldest son—Eldest-daughter—Power of widow to dispose of property inherited by the eldest son or reserved for the eldest daughter—Necessity.

In Upper Burma, the usual form of mortgage is not simple but usufructuary, and if an exception be set up, it should be proved.

Oral evidence is inadmissible to prove that a higher price was paid for a sale than is evidenced by the sale-deed itself.

Where there has been a complete divorce, a daughter, who goes to live with her mother and does not maintain filial relations with her father, is not entitled to inherit the latter's estate on his death.

The heir of a deceased husband, under Buddhist law, is his widow and not any of his children except the eldest son in respect of a fourth of the estate until the death of the widow. The three-fourths share which goes to the widow is her absolute property, to do what she will with.

But she has no right to dispose of the one-fourth share of the eldest son even in the case of necessity. To the eldest daughter also certain specified property is allotted and the remainder goes to the widow as her absolute property. But in the case of necessity, *e. g.*, for the maintenance of younger children, the widow can dispose of the special property reserved for the eldest daughter.

Mr. *Burjorjee*, for the Appellants.

Messrs. *Chatterjee and S. Mukerjee*, for the Respondents.

JUDGMENT.—The plaintiff-respondent, Ma Shwe Thin, is the daughter of Maung Tha Zin by his wife Ma Po. It has been suggested that her legitimacy has not been proved, but the defendants-appellants were not entitled to raise the point as they did not raise it in their written statement. In 1896, when Ma Shwe Thin was a child of about five, Maung Tha Zin, who lived with his wife, Ma Po, at Yenangyaung, went up to Mandalay to prosecute an appeal before this Court. He never returned; and died at Mandalay in 1263.

Before he went to Mandalay, he mortgaged an oil-well to the defendant-appellant Ma Saw Myin's father, Maung Chit Po, for Rs. 2,500. After his death, Ma Po executed a deed of sale of this well in favour of Ma Saw Myin, who had succeeded to a portion of Maung Chit Po's estate on his death.

In 1910, the plaintiff-respondent, Ma Shwe Thin, brought a suit for redemption of the oil-well, alleging that Ma Po had been divorced from Maung Tha Zin before his death, that she, therefore, had no power whatever to alienate his property and the sale was void and the mortgage was still in existence and capable of being redeemed.

Six days later, the plaintiff-respondent, Ma Shwe Tin, brought another suit for redemption alleging that she was a daughter of Maung Tha Zin by his wife, Ma Kyi deceased, that she was entitled to a share of his estate and that, therefore, she too had a right to redeem.

The two suits were tried together.

The defendants-appellants denied that Ma Po has been divorced, and pleaded that she had power to sell the well for a legal necessity. They also pleaded that they had done everything possible to obtain a good title, and for this purpose had insisted upon Ma Po's obtaining a Succession Certificate and that the sale, having been effected in good faith, could not now be impeached. They also pleaded that a suit for redemption would not lie as long as the deed of sale was uncancelled, and that a suit for its cancellation would be barred by limitation. They denied that the plaintiff-respondent, Ma Shwe Tin, was Maung Tha Zin's daughter, and alleged that even if she were his daughter, she was illegitimate, and that even if she were legitimate, she was not entitled to inherit.

The learned Additional Judge framed the following issues:—

1. Whether Ma Shwe Tin was the legitimate daughter of Maung Tha Zin?

2. Whether Ma Po had a right to sell the whole or any part of the well, and could pass a valid title thereto?

3. Whether Ma Po was divorced or not?

4. Whether the suit was time-barred?

He decided the first issue in the affirmative, and also the third. In dealing with the second issue, he went far astray owing to his failure to understand what a Succession Certificate is. A Succession Certificate is a certificate granted to a person entitled to succeed to the whole or part of the estate of a deceased person to enable him to collect debts due to the deceased. It does not empower the holder to alienate any of the deceased's estate or to do anything except recover the debts due to the deceased. The certificate has been produced, and the only debt entered in the schedule is the mortgage debt of Rs. 2,500. But that was a debt due by Maung Tha Zin, not *to* him. How the certificate came to be granted is not easy to see.

The learned Advocate for the defendants-appellants says that, of course, what Ma Po really required was Letters of Administration, and he contends that the District Court should have treated her application for a Succession Certificate as an application for Letters of Administration and granted her Letters, and he has gone so far as to suggest that the Succession Certificate should be treated by this Court as Letters of Administration. It is unnecessary to do more than mention this extraordinary proposition.

The learned Additional Judge found that Ma Po, having been divorced, had no power to dispose of the well, and that the sale was void.

He found that the suit was within time, and granted a decree for redemption to the two plaintiffs-respondents jointly.

The defendants-appellants have now appealed on various grounds, and the plaintiff-respondent, Ma Shwe Thin, has appealed separately against the findings of the District Court that the plaintiff-respondent, Ma Shwe Tin, is Maung Tha Zin's legitimate daughter, and that she is entitled to redeem the well.

The line of argument taken on behalf of the defendants-appellants is that the divorce set up was not proved and was inconsistent with Ma Po's conduct, that she being Maung Tha Zin's widow had power to dispose of his estate for a legal necessity, that as there is no evidence to the contrary (the mortgage-bond was not proved), it must be presumed that the mortgage was a simple one, because a simple mortgage is the ordinary form of mortgage; that the payment of the mortgage debt was thus a legal necessity; that as a matter of fact though the purchase-money is stated in the deed of sale to be Rs. 2,500, the amount of the mortgage-debt—a sum of Rs. 400 was paid in cash in addition. This is the main argument, but it is further urged that the plaintiff-respondent, Ma Shwe Thin, had failed to keep up filial relations with her father, and was, therefore, not entitled to inherit his estate.

In my opinion, the line of argument taken up cannot succeed at all, because it is clear that no legal necessity was proved. In Upper Burma, the usual form of mortgage is not simple but usufructuary, and if an exception be claimed in the case of mortgages of oil-wells, that exception should have been proved. Moreover, it is not suggested that any interest was provided for, and there is no evidence of any demand of the principal. Everything points to the mortgage having been usufructuary, and the fourth paragraph of the defendants-appellants' written statement shows clearly that it was so.

There was, therefore, no necessity whatever to pay off the mortgage-debt, and the sale was clearly not for Ma Shwe Thin's benefit. As to the payment of Rs. 400, I would say that, apart from Mr. S. Mukerjee's objection that if such a payment were made there was a fraud committed on the Stamp Revenue and the defendants-appellants should not be allowed to rely upon their own fraud, the payment of this sum as part of the purchase-money cannot be proved, as evidence of such payment would contradict the terms of the deed of sale. It is contended that payment of consideration can always be proved under Explanation 3 to section 91, Evidence Act. But that Explanation has no application, as the payment of Rs.400 is not mentioned in the document. The document says that the well was sold for Rs. 2,500, and oral evidence to the effect that it was sold not for Rs. 2, 500 but for Rs. 2,900 is clearly inadmissible under section 92, Evidence Act.

In reply to the second argument to the effect that the plaintiff-respondent, Ma Shwe Thin, was not entitled to inherit her father's

estate because she had not maintained filial relations with him, Mr. Chatterjee has urged that Ma Shwe Thin was a small child when her father went to Mandalay and had no opportunity of exercising any choice in the matter and Mr. S. Mukerjee on behalf of the plaintiff respondent, Ma Shwe Thin, against whom the same argument has been adduced, has cited *Ma Taik* v. *Ma Myin* (1), in which it was held that the Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion from inheritance. But in that case there was no divorce, and the question, therefore, was whether the child was excluded from inheritance as—to quote the *Dhammathats*—a "child like a dog" and it was held that mere absence of joint living was not sufficient to exclude: there must be proof of intentional neglect. It is, I think, established that where there has been a complete divorce, a daughter, who goes to live with her mother and does not maintain filial relations with her father, is not entitled to inherit the latter's estate on his death. It is not necessary to do more than cite *Ma Pon* v. *Maung Po Chin* (2) in support of this rule. The last words of the heading to that ruling are important: "When there has been a division of property at the time of the divorce." If there is no division of property at the time of the divorce, the divorce is not complete.

Now, in the present case, it is not alleged that there was any formal divorce. Maung Tha Zin left Yenangyaung for Mandalay on legitimate business and never returned, and after leaving Yenangyaung, he never had any communication with Ma Po. It is alleged that the separation, coupled with the neglect, gradually became desertion, and that after a time, Ma Po became automatically divorced. It is also alleged that Ma Po took another husband before Maung Tha Zin's death, and that this fact evidenced her intention of putting an end to the marriage tie, which she was entitled to do, and completed the divorce. The evidence that she took another husband before Maung Tha Zin's death is not very clear, but I do not think it is necessary to go into the point, because, for the purposes of this case, I think it is quite immaterial whether there was a divorce or not.

In the present case, there was apparently no quarrel and no intentional desertion at first, and, consequently, the texts cited in section 312 of U Gaung's Digest do not apply. In sections 244 and 245, a large number of texts are cited, which lay down the number of years which a wife must wait, when her husband has gone on a journey, before she is entitled to take another husband. They do not agree, but shortly the rule may be stated thus: if the husband takes another wife during his absence, the first wife must wait till three years, otherwise she must wait a longer time, depending upon the purpose for which the journey was undertaken. Though in many texts it is laid down that if the wife takes another husband without waiting the requisite number of years, she is to forfeit all the joint property, curiously enough, with the exception of the *Vicchedani*, none of the texts say what is to become of the joint property if the husband does not return. The text from the *Vicchedani*, runs as follows: "If the husband, who has gone on a journey, marries again, his former wife shall wait for him three years. If he does not return after the expiry of that period, let her take possession of all the property and free him from all conjugal obligations to her."

This seems to be the obvious rule, because the wife would be entitled to divorce owing to her husband's fault and would, therefore, be entitled to all the joint property. And it seems likely that the rule is not mentioned in the other *Dhammathats*, because as the joint property would naturally be left in the wife's possession or under her control, it was considered that the rule was so obvious that it was unnecessary to mention it.

Assuming then that Ma Po married again before Maung Tha Zin's death and that she thereby became divorced from him, the oil-well in suit became her property and not that of her daughter, and she had an absolute right to dispose of it, as she thought fit, and even if she had mortgaged it and not sold it, her daughter could have no right to redeem it during Ma Po's life-time.

As the plaintiff-respondent, Ma Shwe Thin, based her suit on her mother's divorce, the above finding is sufficient to dispose of her suit. But as it has been urged on behalf of the defendants-appellants, and tacitly admitted on behalf of the plaintiffs-respondents, that on the death of a husband, the widow has not an absolute right over the whole property

(1) U. B. R. (1897-1901) II, 193.
(2) U. B. R. (1897-1901) II, 116.

but only a limited interest in it and that she cannot alienate it except for a legal necessity for the benefit of her children, I think it is necessary to point out that though this view has been accepted in many cases in Lower Burma, the latest of which are *Ma Nyo* v. *Ma Youk* (3) and *Ma Pe* v. *Ma Thein Yin* (4), in which the ruling *Ma On* v. *Shwe O* (5) was followed and it was held that "a widow according to the Burmese Buddhist law of Inheritance has an absolute interest in half of the property which had been jointly owned by her deceased husband and herself, and that in the remaining half she has only a life-interest with power of selling it in case of necessity," it is opposed to the ruling of this Court in *Ma Min Tha* v. *Ma Naw* (6), in which it was held that "the heir of a deceased husband under Buddhist law is his widow and not any of his children (except the eldest son in respect of a fourth of the estate) until the death of the widow, and the children have no such interest in the estate as is contemplated in section 91, Transfer of Property Act."

The Chief Court of Lower Burma has followed *Ma On* v. *Shwe O* (5), and in that case the opinion of Mr. Jardine, expressed in *Nga Shwe Yo* v. *Mi San Byu* (7) on this particular point, was accepted, but it seems to have escaped the notice of the Special Court that Mr. Jardine to a great extent resiled from this opinion in *Maung Po Lat* v. *Mi Po Le* (8), in which he said: "Under the first issue, it is necessary, in deciding the present case, to allude to the doctrine in *Nga Shwe Yo's* case (7), that a widow may not, without the children's consent, unless for sufficient cause, alienate the joint property. Since then the Buddhist law has received great attention and new authorities are available. I would hesitate to apply that doctrine except very cautiously and to particular circumstances."

The text on which the doctrine is based is section 5 of the 10th Book of the *Manukye Dhammathat* (Richardson's translation), which deals with the partition of the estate on the death of the father and runs: "Let the eldest son have the riding horse, etc.,.....Let the residue be divided into four parts, of which let the eldest son have one and the mother and younger children three. This is the law when the mother does not marry again. If the mother uses the property for necessary subsistence, let her have the right to do so."

It was noticed that section 11 was apparently inconsistent with section 5, and an attempt was made to reconcile the two texts.

Since then a large number of texts have become available. Those most applicable to the present case are collected in section 31 of the Digest, which deals with the partition between mother and daughter on the death of the father.

The first text quoted is from the *Mano* and runs as follows:—

"The daughter shall get the bracelets, belt and ornaments given her before the death of the father and by both parents. She shall also get out of the estate one family of slaves, one pair of bullocks and a fair portion of seed paddy and peas. The mother shall get the rest of the property. Although the daughter is the offspring of the father, still it is the mother who has direct control over her. Should the mother exhaust the property during her life-time, let it be so; but if anything is left unexhausted, the daughter shall get it."

The *Pyu Dhammathat* gives the same rule. So also the *Kaingza*. The *Myingun* says: "The mother shall get the rest of the property and on her death, the daughter shall get what is left."

The *Dhammathat Kyaw* says: "The mother shall get the rest of the property, animate and inanimate."

The *Dhamma* runs as follows:—

"The eldest daughter shall have one female slave, two milchcows, one pair of buffaloes, one *pe* of land, and a quantity of Indian corn, paddy, millet, barley and sessamum sufficient for seed purposes. The mother and younger daughters shall get the rest of the property, animate and inanimate. Should there be no such property as enumerated above but only gold and silver, payment must be made in silver according to the following valuation .....But the mother is at liberty to sell them and maintain herself if such a course is necessary."

Clearly, in this passage it is to sell the special property reserved for the eldest

(3) 4 L. B. R. 256.
(4) 4 L. B. R. 287.
(5) S. J. L. B. 378.
(6) U. B. R. (1892-96), II, 581.
(7) S. J. L. B. 108.
(8) S. J. L. B. 212.

daughter in case of necessity that power is given. The passage relating to selling in a case of necessity does not refer to the bulk of the property at all.

The *Monukye* gives very much the same rule and ends thus: "Partition of each kind should be made only when there are three or four female slaves, ten each of buffaloes, bullocks and goats and 25 *pes* of land. The above is the mode of partition when the mother does not marry again. She is at liberty to exhaust (the property) when spent on necessaries. The word 'property' does not occur in the original text."

With this must be compared the rule given in the same *Dhammathat* for partition between mother and son on the death of the father in section 30 of the Digest. It runs: "The son shall get his father's elephant, pony, cup, sword, wearing apparel and bearers of the goblet and betel-box. The mother shall get her wearing apparel, cups, ornaments and female slaves. The rest of the property shall be divided into four shares and the mother and younger children shall take three shares. This is the rule of partition when the mother does not marry again. If the property is exhausted by the mother, nothing shall be said about it."

It is to be observed that no mention is made of any necessity.

The *Kandaw Dhammathat* says: "The mother shall get the rest of the property. Although the daughter is the offspring of the father, yet it is the mother, who controls her and brings her up from childhood. The daughter shall get on the death of the mother what is left unexhausted by her.

The *Vannadhamma*: "Why should not the eldest daughter, being like the eldest son an offspring of the father, get $\frac{1}{4}$th share of the inheritance? Because the daughter is entirely controlled by the mother and the property left unexhausted by the mother, after use during her life-time devolves on the daughter when the mother dies."

The *Rasi* says: "If the mother exhausts the property during her life-time, let it be so."

Viunicchaya says: "The rest of the property, animate and inanimate, shall be taken by the mother. Should the estate be large enough, the mother ought to give the daughter a suitable share in addition." This is plainly a moral precept.

The *Manuvannana* says: "If the daughter lives with the mother, she is not entitled to get any property although she is the offspring of her father. If the mother exhausts the property during her life-time in her own use, or in maintaining her second husband or in performing works of merit, she commits no fault."

The rest of the texts quoted in section 31 of the Digest are to the same effect with the exception of the *Amwebon* and the *Kyannet*. Of these, the former, after stating what particular property is to be given to the eldest daughter and that the rest is to go to the mother and younger daughters, says: "Partition should be made only when there are three or four female slaves, ten each of buffaloes, bullocks and goats and 25 *pes* of land. The above is the mode of partition, when the mother does not marry again. She is at liberty to exhaust the property when required for necessaries." The word "property" has been inserted by the translator.

It will be seen that this is the same rule as that given in the *Manukye*, and the rule given by this *Dhammathat* for the partition between mother and son on the death of the father is also the same as that given by the *Manukye*.

The last few lines of the text from the *Kyannet* are as follows in the English translation: "On the death of the mother, the daughter is entitled to her property. *Let the mother have a life-interest therein*; and should she exhaust the property during her life-time, let it be so; the unexhausted portion, if any, shall be enjoyed by the daughter subsequently."

I venture the opinion that this translation is not accurate. The underlined passage in Burmese is as follows: ..... The word ..... means literally to "eat", "corrode", "consume," and that it is not used in the special sense in which it is used in the expression ..... is shown by the words which immediately follow, *viz.*, ... I would say that the next English equivalent of the word ..... in this passage is "spend," and the translation should ran "let the mother spend (the property) as long as she is alive, and if she spends it all, let her do so."

It will thus be seen that the only *Dhammathats*, which lend any colour at all to the doctrine that the widow can only spend her

deceased husband's property in a case of necessity, are the *Dhamma*, the *Manukye* and the *Amwebon*, and that in each instance the passage is immediately preceded by a clause to the effect that if there is not a sufficient quantity of certain specified property, a portion of which should ordinarily be given to the eldest daughter on the death of her father, then this division is not to be made. The inference is irresistible that the clause in which necessity is referred to is governed by the clause, which immediately precedes it, and that the rule is as follows: "On the death of the father, certain specified property is allotted to the eldest daughter and the remainder goes to the widow and is her absolute property, but that if there should remain insufficient property for the maintenance of the widow and younger children, were the eldest daughter to take her allotted share, then the widow is at liberty to spend even this specific property for the maintenance of herself and her children."

This interpretation is borne out by the texts which relate to partition between the mother and the eldest son on the death of the father. The eldest son gets certain specified property, the mother gets other specified property, one-fourth of the remainder goes to the son and the rest to the mother. Nothing whatever is said in any of the *Dhammathats* about the mother having the right to dispose of any property whatever in a case of necessity. The inference is that in this case, the three-fourths share which goes to the widow is her absolute property to do what she will with, and that even in the case of necessity, she has not a right to dispose of the specified property, which goes to the eldest son or the one-fourth share which is his portion. Why should this difference be made between the eldest son and the eldest daughter? The answer is given by many *Dhammathats*: The eldest son is obtained through the prayers of the parents and has helped in the acquisition of the property. The eldest daughter is completely under the control of her mother, whereas the eldest son is not.

In the present case, the oil-well in dispute cannot possibly be brought into the category of property set apart for the eldest daughter, and I, therefore, hold that, assuming that Ma Po was not divorced from Maung Tha Zin, the oil-well became Ma Po's absolute property on his death unless he left other heirs besides Ma Po's daughter, and that on Maung Tha Zin's death, the first plaintiff-respondent, Ma Shwe Thin, acquired nothing more than a contingent interest in the oil-well and that she lost this contingent interest on Ma Po's selling the well.

Therefore, whether Ma Po was divorced or not, the plaintiff-respondent Ma Shwe Thin's suit was not maintainable.

With regard to the plaintiff-respondent, Ma Shwe Thin's claim to redeem, very little need be said.

The defendants-appellants denied that she was Maung Tha Zin's daughter. It was, therefore, necessary for her to prove this. There is evidence of a somewhat dubious nature that Ma Kyi was Maung Tha Zin's wife before he married Ma Po and that he had a daughter by her and that that daughter was named Ma Shwe Tin. But there is absolutely no evidence whatever that the plaintiff-respondent, Ma Shwe Thin, is that daughter. Ma Kyi is dead and the witnesses who depose to her giving birth to a daughter begotten of Maung Tha Zin lost sight of that daughter when she was a few months old. I am practically asked to decide that Ma Shwe Tin is Maung Tha Zin's daughter on the statements of a few witnesses to the effect that she resembled him. That I decline to do. I was also asked by her Advocate to summon her and the plaintiff-respondent, Ma Shwe Thin, before me, so that I might note whether there was a family likeness: I declined. If I had done so and had not noticed any resemblance, nothing would have been gained and if I had fancied that there was some or even a marked resemblance between the two, I should have declined to be guided by my fancy. For aught that appears to the contrary, Ma Shwe Tin may be an absolute impostor, who is using a possible resemblance to the plaintiff-respondent, Ma Shwe Thin, as a means of obtaining a share in an estate to which she has not a shadow of a claim.

I do not, of course, say that this is so, but there is not even the least particle of real evidence that Ma Shwe Tin is Maung Tha Zin's daughter, and, therefore, her suit must fail.

The decrees of the District Court are

accordingly set aside and both suits are dismissed with all costs.

Suit dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 302 OF 1910.

November 22, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

HASUN MOLLA—PETITIONER—APPELLANT

versus

TASIRUDDIN—OPPOSITE PARTY—RESPONDENT.

Land Acquisition Act (I of 1894), s. 54—Award or part of award—Decree ex parte—Default of claimant—Application for restoration, refusal of—Appeal against order refusing to restore case, whether competent.

Under section 54 of the Land Acquisition Act, an appeal lies only from an award or part of an award.

A claim was decided by the Land Acquisition Judge *ex parte*, as the claimant was not present when the case was called. An application to set aside the *ex parte* decree was refused and the claimant filed an appeal against the order of refusal:

Held, that no appeal lay, as the order was not an award.

Appeal from the order of the Special Land Acquisition Judge of 24-Pargannahs, dated June 6th, 1910.

Babu *Dhirendra Lal Khastgir*, for the Appellants.

Babu *Bhupendra Chandra Guha*, for the Respondents.

JUDGMENT.—The right of appeal in proceedings before the Court under the Land Acquisition Act of 1894 is defined by section 54. Therefore, we have to see whether the order, of which complaint is now made, is an award or any part of an award. That has not been and could not be contended, and, therefore, no appeal lies. We must accordingly dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION NO. 71 OF 1911-12.

March 29, 1912.

Present:—Mr. Fenton, F. C.

BHAG SINGH—PETITIONER

versus

JAURA SINGH—RESPONDENT.

Punjab Land Revenue Act (XVII of 1887), Rules under, rule 17 (ii)—Lambardari—*Succession to office—Primogeniture, rule of—Adopted son cannot succeed.*

The expression "nearest eligible heir according to the rule of primogeniture", in rule 17 (*ii*) of the rules under the Land Revenue Act, should be strictly construed; it does not apply to an adopted son.

The rule of primogeniture embraces only descent by brith and does not embrace descent by adoption.

Consequently, in the case of a vacancy in the office of headman, an adopted son cannot succeed to or through his adoptive father under any rule of primogeniture.

Hira v. *Wazira*, 9 P. R. 1892 Rev.; *Maula Dad* v. *Hayat*, 14 P.R. 1886 Rev.; *Sher Singh* v. *Subha*, 10 P.R. 1892 Rev.; *Suchet Singh* v. *Basant Singh*, 11 P. R. 1892 Rev.; *Shah Muhammad* v. *Diwan Baksh*, 12 P. R. 1892 Rev. and *Ramjas* v. *Nihala*, 13 P. R. 1892 Rev., explained and distinguished.

A., *B.* and *C.* were three brothers. *A.* was the eldest and *C.* the youngest. The last holder of the post of *Lambardar* was a descendant of *B.*, and he died childless.

D. and *E.*, the two sons of *C.*, claimed the office. *D.* was the elder son but *E.* had been adopted by *A.* who had no son of his own:

Held, (1) that *E.* could not succeed to the *lambardarship* as the adopted son of *A*;

(2) that *D.* was entitled to succeed and his title could not be postponed to *E.* in consequence of the latter's adoption by *A*.

Petition for revision of the order of the Commissioner of Jallundur, dated the 16th October 1911.

ORDER.—This is a question of succession to a *lambardarship*. The following pedigree-table shows the position of the claimants:—

SAHIB SINGH,

Lehna Singh, (deceased), respondent adopted as his son.	Kala Singh,	Nand Singh,
	Jawahar Singh,	
	Ishar Singh (deceased, lambardar, died childless.)	
Bhag (appellant).	Jaura (respondent.)	

It is unnecessary to investigate the question as to how the *lambardarship* came to Kala Singh's branch of the family, Lehna Singh being passed over. It is not seriously

contended that if Lehna Singh were now alive, he would still be liable to supersession, or that if the respondent were real son and not merely adopted son of Lehna Singh, he would not be the heir entitled to succeed according to the custom of primogeniture. The whole question in the case is, whether the fact of Jaura, the respondent, being an adopted son impairs his claim based on heirship by primogeniture through his adoptive father.

The wording of rule 17 (*ii*) of the rules under the Land Revenue Act is important, and it is important to notice the difference between this wording and that of rule A. I. 4 of the rules under the Land Revenue Act, 1871, which governed the appointment of headmen prior to 1887. Under the rules in force before 1887, the person who, subject to certain considerations which for present purpose are irrelevant, was to be appointed *lambardar* was "the heir who, *according to the custom of the village*, may have the first claim to succeed." Under the rule which is now in force, "the nearest eligible heir *according to the rule of primogeniture* shall be appointed unless some special custom of succession to the office be distinctly proved." There is no mention of any special custom of succession to the office in the present case, and, as remarked by Mr. Steedman in the case reported as *Hira* v. *Wazira* (1), it is difficult to see how a custom properly so called can have arisen in regard to the appointment of a successor to an office which dates only from annexation and appointments to which are made by the Collector.

The importance, which, as I have said above, attaches to the difference between the wording of the rules of succession prior to and after the year 1887, arises from the circumstance that the rulings, under which adopted sons have in the past sometimes successfully maintained their claims to succeed to the post of *lambardar*, are all referable to the leading case, *Maula Dad* v. *Hayat* (2), a ruling given when the Act of 1871 was in force. In the series of rulings, which are published as *Hira* v. *Wazira* (1), *Sher Singh* v. *Subha* (3), *Sucket Singh* v. *Basant Singh* (4), *Shah Muhammad* v. *Diwan Bakhsh* (5); *Ramjas* v. *Nihala* (6), it has been laid down that while an adopted, son who is of a different *got* from his adoptive father, is not entitled to succeed his adoptive father in the office of village headman, an adopted son who, being an agnate, is of the same *got* is, in accordance with the ruling of *Maula Dad* v. *Hayat* (2), entitled to succeed. In none of these rulings of 1892, is there any reference to the fact that since the date of *Maula Dad* v. *Hayat* (2), the law of succession to the office of *lambardar* had been altered. There is no allegation in the present case of any special custom of succession to the office of *lambardar*. In fact, the respondent no less than the appellant claims to succeed by virtue of the rule of primogeniture. The question then for decision in this case is whether the rule of primogeniture embraces descent by adoption as well as descent by birth. According to the etymology of the word 'primogeniture', the adoptive tie is not connoted. It is true that section 2 (19) of the General Clauses Act, 1868, provided that the word "son" should include an adopted son in all Acts made between 1868 and 1897 (when the present General Clauses Act came into force), but we have not got the word "son" in the Land Revenue Rule which we are now considering and, moreover, the General Clauses Act of 1868 did not apply to rules. There is ample warrant for applying strict canons of interpretation for the determination of the meaning of the expression "rule of primogeniture." In a somewhat analogous case under section 59 of the Tenancy Act, the Chief Court held, in *Fatteh Muhammad* v. *Musammat Jiwan* (7), that an heir appointed by any of the customary methods recognised among owners of land in the Punjab cannot be regarded as a "male lineal descendant in the male line of the descent" within the meaning of that section. Applying a similarly strict principle of interpretation to the present case, I am unable to hold that in the case of a vacancy in the office of a headmana, an dopted son can succeed to or through his father under any rule of primogeniture. In coming to this

(1) 9 P. R. 1892, Rev.
(2) 14 P. R. 1886, Rev.
(3) 10 P. R. 1892, Rev.
(4) 11 P. R. 1892, Rev.
(5) 12 P. R. 1892, Rev.
(6) 13 P. R. 1892, Rev.
(7) 43 P. R 1895.

conclusion, I have not sought for any customary interpretation of the meaning of the word 'primogeniture,' in connection with the adoptive relationship as it is very unlikely that there is any village custom on the subject, but it is not irrelevant to observe that where, as in the case of the Phulkian States, primogeniture was the custom of succession to the chiefship, the right of adoption did not confer on the person adopted a claim to inherit the chiefship. In fact, succession to a chiefship did not in any case go to an adopted son (*Inheritance to Chiefships*, by Sir Lepel Griffin, page 49), a precedent which justifies the view that succession to an office does not necessarily follow the rules of family inheritance.

Lastly, the position of the respondent, Jaura, in the present case is affected by the circumstance that the vacant *lambardarship* was not held by his adoptive father. The general custom of the Punjab appears to be that an adopted son succeeds only lineally, that is to say, to his adoptive father only, and does not succeed to his adoptive father's relations collaterally—vide *Budhawa Singh* v. *Ganesha* (8) *Imam Bakhsh* v. *Kasu* (9), *Fazla* v. *Ilam Din* (10), *Uttam Singh* v. *Wazir Singh* (11), *Fateh Muhammad* v. *Nizam-ud-Din* (12) and *Ram Ditta* v. *Takht Mal* (13), and many others. Under these rulings, Jaura, *qua* adopted son of Lehna Singh, could not succeed to the estate of the deceased *Lambardar*. *A fortiori*, he could not succeed to his *lambardarship*. In conclusion, I desire to note that from the point of view of expediency, there are good grounds for refusing to treat adoption as givig a claim to the office of headman, as observed by Mr. Steedman in *Hira* v. *Wazira* (1). "Adoptions are very often made to spite the heirs. I do not think that a *Lambardar* should be able to gratify private spite by imposing a *Lambardar* on the village whom the villagers must dislike."

The appellant, Bhag, has for many years acted as *sarbarah* of the deceased *Lambardar*, and it is anomalous that his title to succeed to the office should be postponed to that of a younger brother in consequence of the act of a third party.

For the foregoing reasons, I now, under section 16 (4) of the Land Revenue Act, direct that Bhag be appointed *Lambardar* in place of the respondent Jaura.

Petition accepted.

(8) 97 P. R. 1879.
(9) 9 P. R. 1880 Rev.
(10) 56 P. R. 1893.
(11) 84 P. R. 1887.
(12) 18 P. R. 1900; P. L. R. 1900 p. 49.
(13) 50 P. R. 1908; 104 P. W. R. 1908; 67 P. L. R. 1908.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION NO. 48 OF 1911-12.

January 21, 1912

Present:—Mr. Fenton, F. C.

GHIPI AND OTHERS—DEFENDANTS—APPLICANTS

versus

SIGARU—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 5 (1) (b)—Owner losing ownership by inability to pay revenue—Occupancy-tenant.

An owner, who through inability to pay the revenue loses his ownership, ceases to be a landowner by an involuntary act within the meaning of section 5 (1) (*b*) of Act XVI of 1887.

Shadi v. *Kasim Ali*, 19 P. R. 1871 and *Bhallan* v. *Sohna*, 6 P. R. 1881, distinguished.

Revision from the order of the Commissioner, Jullundur Division, dated 11th September 1911, rejecting defendant's petition for revision of the order of the Collector, Kangra District, dated 22nd March 1911, dismissing an appeal from the decree of the Assistant Collector, 1st Class, Kangra, dated 8th December 1910.

FACTS.—The plaintiff in this case sued to contest a notice of ejectment and to establish rights of occupancy in certain land situate in *Tika* Siwana, Tehsil Dehra. The first Court decreed the claim by declaring the plaintiff an occupancy-tenant under section 5 (1) (*b*) of Act XVI of 1887.

Mr. *Duni Chand*, for the Applicants.

Mr. *N. C. Mehra*, for the Respondent.

JUDGMENT.—The Pleader for the applicant has cited *Shadi* v. *Kasim Ali* (1) and *Bhallan* v. *Sohna* (2). I can find in neither of these any reason for not accepting the view of the lower Courts that an owner, who through inability to pay the revenue loses

(1) 19 P. R. 1871.
(2) 6 P. R. 1881.

his ownership, has ceased to be land-owner, otherwise than by voluntary act. I accordingly reject this application.

Application rejected.

COURT OF JUDICIAL COMMISSIONER N.-W. FRONTIER PROVINCE.

CIVIL REVISION PETITION NO. 19 OF 1912.

May 1, 1912.

Present:—Mr. Barton, J. C.

NARANJAN SINGH—DEFENDANT—PETITIONER

versus

Musammat GUJRI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II—Arbitration—Award—Objection to award—Award set aside—Power of Appellate Court to go behind the order setting aside the award.

A Court of Appeal has power to consider the validity of an order setting aside an award and to restore the award if it has been set aside on insufficient grounds.

Case-law on the subject discussed.

Petition for revision of the order of the Divisional Judge, Peshawar, dated the 26th February 1912.

Maulvi *Saad-ud-din*, for the Petitioner.

Babu *Sunder Singh*, for the Respondents.

JUDGMENT.—The parties to this suit agreed in the Court of first instance (the Honorary Munsif of Peshawar) to submit the case to arbitration. The award was in plaintiff's favour but on objection by defendant No. 2, the award was set aside and the suit decided on the merits against the plaintiff. The latter appealed to the Divisional Judge who, going behind the order of the Munsif setting aside the award, held the award to be valid and passed a decree in accordance therewith in plaintiff's favour.

The point for decision before this Court is whether the Divisional Judge's action in accepting the award, after its rejection by the Court of first instance, is legally sustainable or not. This question has been frequently before the various High Courts during the past thirty years without any approach to finality. There is some conflict of opinion on the subject between the High Courts themselves and in some cases the same Courts have committed themselves to opposite rulings. Most of the decisions belong to a period prior to the passing of the present Code of Civil Procedure and in view of the doubt surrounding the question, it is a matter for regret that the point was not definitely decided by the Legislature.

I shall briefly discuss the leading cases before deciding the issue. The earliest case decided in the Punjab is that published as *Sher Jang* v. *Maihun* (1). It was then held that a Court of Appeal can under section 591 (105 of the present Code) consider the validity of an order setting aside an award, and if it holds that the award was overridden on insufficient grounds, it can reverse the order of the first Court and give effect to the arbitrator's finding. The issue was not, however, fully discussed, and the reasoning is not convincing. For the plaintiff-respondent, much weight is placed on a later ruling [*Municipal Committee, Lahore* v. *Buta* (2)] of the Chief Court, in which case the Chief Court itself overruled the order of the District Judge setting aside an award, and gave effect to the arbitrator's decision. The case had been decided on the merits by the District Judge and the invalidity of his order was made one of the grounds of appeal. This ruling is directly in point but its value is to some extent depreciated by the fact that the question whether the Court had jurisdiction to deal with the award on appeal was not discussed at all. In a third case *Sobha Ram* v. *Ram Das*(3), the learned Judges observed that "the authorities on this question seem to be conflicting." The issue before the Court was whether the Divisional Judge had wrongly decided that he could not go behind the order of the Court of first instance setting aside the award. A decision was, however, avoided as the Chief Court found that the first Court was fully justified in setting aside the award. In view of this attitude of the Court, it may perhaps be asserted that the question is still open to argument in the Punjab Courts. Two early rulings, *Nanak Chand* v. *Ram Narayan* (4)

(1) 72 P. R. 1881.
(2) 65 P. R. 1899.
(3) 63 P. R. 1907.
(4) 2 A. 181.

and *Abdul Rahman* v. *Yar Muhammad* (5) are in favour of the view that an Appellate Court has jurisdiction to restore the award on appeal, but these rulings refer to the old Code of Civil Procedure (1859) and are, perhaps, not strictly in point. The later decisions of the Allahabad High Court are, however, almost uniformly against the earlier rulings. These decisions will be referred to further on. Two rulings of the Madras High Court are in favour of plaintiff-respondent. The first, *George* v. *Vastian* (6), is to some extent similar to the present case. It was then held that under section 591 of the Code of Civil Procedure, the legality of the order of the first Court remitting the award for re-consideration could be challenged on appeal. In this case, however, the issue was not examined, the Court contenting itself with referring to a small group of authorities in support of its view, without any discussion at all, and without any reference to rulings in the opposite sense. The case was decided in 1898. In 1908, the same Court *Achuthayya* v. *Thimmayya* (7) affirmed the view previously taken dissenting from *Ganga Prasad* v. *Kura* (8) and *Abdul Rahman* v. *Yar Muhammad* (5). Here, again, there is no discussion of the issue. The Court merely refers to eight published rulings of the various High Courts and states that it prefers to follow these decisions as against the two rulings from which it expressed its dissent. It may be noted that the rulings cited with approval emanated from all four High Courts. Among these is a decision of the Allahabad High Court of 1903, published as *Ram Jiwan* v. *Nawal Singh* (9), in which on second appeal the award, which had been set aside by the Court of first instance, was accepted and a decree passed in conformity therewith. The authorities are not, however, discussed in the judgment and there is no reasoning on the particular issue with which I am now concerned. A case decided in the Calcutta High Court, published as *Shyama Charan Pramanik* v. *Prohlad Darwan* (10), is quoted by plaintiff-respondent's Counsel. Here a Single Judge of the High Court held by implication that an Appellate Court could restore the award; but that it must before doing so consider the objections urged against it. Finally, it is sought to derive assistance from an *obiter dictum* in *Dimodar Trimbak Dharap* v. *Raghunath Hari* (11) to the effect that an erroneous order on an award may form a ground of appeal against any decree that may be passed in the suit.

I now pass on to consider the rulings in support of the opposite theory. Taking *Ganga Prasad* v. *Kura* (8) in the first instance. Here the District Judge had on appeal restored an award set aside in the first Court. The High Court held that no appeal lay under section 521 to the District Judge from the order of the Munsif setting aside the award. It is not altogether clear whether the Munsif's order setting aside the award had been made the subject of appeal or merely a ground of appeal under section 591, Civil Procedure Code. The general trend of the argument is, however, towards the view that an award cannot be restored on appeal. The same view was stated with greater definiteness in *Kalyan Das* v. *Pyare Lal* (12), in which *Ganga Prasad* v. *Kura* (8), decided by the same Court, was cited with approval.

It is not an easy matter to give appropriate weight to the authorities examined in the preceding paragraph. In the Punjab Courts, as already noted, the question appears still open to argument though it must be admitted that the Chief Court have twice assumed that an Appellate Court had the jurisdiction in question. The Madras High Court appears to hold that an award set aside in the first Court can be given operation in appeal, and on the whole, it may be said that the Calcutta High Court has taken up a similar position though there is not so clear a series of rulings. As regards the Bombay High Court, there occurs in *Damodar Trimbak Dharap* v. *Raghunath Hari* (11) an *obiter dictum* in a similar sense, and it may be assumed that the view therein expressed would ordinarily be followed in that Court. In fact, the general trend of opinion in the three High Courts, Madras Bombay and Calcutta, and in the Chief Court of the Punjab, appears to be in

(5) 3 A. 636.
(6) 22 M. 202.
(7) 31 M. 345; 3 M. L. T. 315; 18 M. L. J. 223.
(8) 28 A. 408; 3 A. L. J. 168; A. W. N. (1906) 64.
(9) 5 A. L. J. 644; A. W. N. (1908) 242; 4 M. L. T. 400.
(10) 8 C. W. N. 390.
(11) 26 B. 551; 4 Bom. L. R. 267.
(12) 4 A. L. J. 256; A. W. N. (1907) 110.

favour of the theory that an award can be given effect to in appeal. In the Allahabad High Court, the position is different, but in view of the decision of 1908, their attitude is somewhat undecided. On the whole, looking to the above considerations, I am inclined to the view that the balance of judicial authority is in favour of the view that Appellate Courts have the power referred to.

The intention of the Legislature in the matter is not altogether clear. It is, however, manifest that there was no intention to allow an appeal from an order setting aside an award, otherwise this would have appeared among the orders from which an appeal is expressly allowed by section 104, Civil Procedure Code. On the other hand, the terms of section 105 are sufficiently wide to support the theory that an order setting aside an award may be impeached on appeal. It can scarcely be argued that the words "affecting the decision of the case", which limit the operation of the privilege, do not apply in the case of an order setting aside an award. Clearly, the supersession of arbitration proceedings has a direct connection with the decision of the case. *Prima facie*, then, there is nothing in the law as it stands to prevent an aggrieved party from challenging in appeal an order setting aside an award, and in the interests of justice, it is doubtless desirable that the principle involved should receive recognition. In view of these considerations, and seeing that the weight of judicial authority is in favour of the theory, I decide that a Court of Appeal has authority to consider an order setting aside an award and to restore the award if it has been set aside on insufficient grounds. I, therefore, decline to interfere with the finding of the Divisional Judge in this case and I reject the application for revision. Defendant-petitioner will pay costs in this Court.

Application rejected.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 962 OF 1910.

February 1, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

DEVIDITTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NATHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Previous suit decreed only against some defendants and dismissed against the rest for non-disclosure of cause of action, whether adjudication between parties—Subsequent suit, whether barred.

Where a declaratory suit was decreed against only some of the defendants—who compromised their dispute with plaintiffs—and was dismissed against the remaining defendants on the ground that no cause of action had been disclosed against them, and it was also stated in the judgment that the plaintiffs were at liberty, if so advised, to bring another suit against these latter defendants:

Held, that there was no adjudication between the plaintiffs and defendants against whom the suit was dismissed, and that, consequently, a subsequent suit by plaintiffs against the same defendants was not barred either by the rule of *res judicata*, or by Order II, rule 2 of the Civil Procedure Code.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 1st April 1910.

Mr. *Sundar Das*, for the Appellants.

Mr. *Tek Chand*, for the Respondents.

JUDGMENT.—Plaintiffs' suit for a declaratory decree to the effect that they are entitled to 10 *kanals*, $9\frac{1}{4}$ *marlas* of certain land has been dismissed by the lower Courts, the Subordinate Judge holding that their claim is barred both by limitation and by the provisions of Order II, rule 2, Civil Procedure Code, and the Divisional Judge holding that it is barred under the last-mentioned provisons of the Civil Procedure Code. They have preferred a further appeal to this Court and we have heard the case argued at some considerable length.

The facts are as follows:—

The land in suit belongs to a joint holding of which, in 1869, two branches of the same family were proprietors, plaintiffs are members of one branch being descendants of one Bishna Singh; defendants Nos. 1—7 are descendants of Ram Sahai and belong to the other branch. Some time between 1879 and 1906, Darbara Singh, Hazari Lal, Basant Singh, Haranam Singh, and Sundar Singh purchased a share in this holding from one of

the descendants of Ram Sahai and in 1907, three persons applied to the Revenue Authorities for partition of the joint holding and contended that the said partition should be effected in accordance with the entries in the Revenue Records of 1879 and subsequent years. In this contention, they were supported by all the other descendants of Ram Sahai, but plaintiffs objected that the said entries were erroneous, and that partition must be effected in accordance with the entries in the Settlement Record of 1869, which differed radically from the later entries upon this point.

The Revenue Officer, who dealt with the application for partition, referred plaintiffs to the Civil Courts to establish their contentions, and as a result the descendants of Bishna Singh (with the exception of three persons who refused to sue and were, therefore, made *pro forma* defendants) instituted a suit on the 3rd December 1907 against Darbara Singh, Hazari Mal, Basant Singh, Haranam Singh and Sundar Singh, and the descendants of Ram Sahai (present defendants Nos. 1—7) and certain mortgagees holding under the latter. In this suit, plaintiffs claimed that a declaratory decree should be passed in their favour to the effect that partition should be made according to ancestral shares as specified in the Settlement Record of 1869, and in their original plaint, they claimed relief only as against Darbara Singh and his covendees. In their amended plaint, however, which was filed on the 27th March 1908, they asked for relief against all the defendants, but in other respects the terms of their plaint remained unamended.

In June 1908, Darbara Singh and his covendees compromised their dispute with plaintiffs and the Court thereupon passed a decree against all defendants to the effect that plaintiffs were entitled to 41 *kanals*, 18 *marals* of land; Darbara Singh and his co-vendees to 20 *kanals*, and the other defendants to 27 *kanals* 11 *marlas*. This decree was passed *ex parte* as against the latter defendants who applied in August 1908 to have the decree set aside in so far as it affected their interest. Their prayer was granted and on the 12th December 1908, the Munsif granted plaintiffs a decree against Darbara Singh and his covendees alone, declaring that the latter were entitled only to 20 *kanals* of land. The Munsif dismissed plaintiffs' suit as against all other defendants on the ground that no cause of action had been disclosed as against them, and in his judgment he stated that plaintiffs were at liberty, if so advised, to bring another suit against these defendants.

In January 1909, plaintiffs accordingly brought the present suit and have impleaded as co-defendants all the persons who were defendants in the former suit, with the exception of the three members of their own branch of the family who refused to join as plaintiffs in that suit. These three persons (Gurditta, Kanshi Ram and Lachman Das) have now joined forces with plaintiffs. These being the facts of the case, the question which we have to decide is, whether the present suit is entertainable. The lower Courts held that it is not, and that it is barred by the provisions of Order II, rule 2 of the Civil Procedure Code. Mr. Sundar Das contends that this decision is erroneous, inasmuch as in the former suit there was no adjudication by the Court upon the question now at issue between plaintiffs and the descendants of Ram Sahai (defendants Nos. 1—7), who are the principal defendants in the present case, and in support of his contention, he relies mainly upon the decision of this Court in the case reported as *Bhola Singh* v. *Gurdit Singh* (1). In that case, the plaintiff sued defendants for a declaration of title to a share in the offerings of a certain shrine, and his suit was dismissed upon the preliminary ground that it was not cognizable with reference to section 42 of the Specific Relief Act, as there was consequential relief which the plaintiff could have claimed and had not claimed. This decree having been affirmed on appeal, plaintiff instituted a subsequent suit claiming the consequential relief which he had omitted to claim in the first suit, and it was held by this Court that the second suit was not barred, either under section 13 or under section 43 of the Civil Procedure Code of 1882. Plowden, J., in his judgment, points out that in such cases, one of three courses may be adopted by the Court. *In the first place*, it may reject the plaint *in limine*, in which case it would clearly be open to plaintiffs to institute a fresh suit. *In the next place*, the Court may entertain the suit and adjudicate upon the matters in dispute. "In this case," the learned Judge remarks, "if the plaintiff institutes a

(1) 66 P. R. 1884.

second suit founded on the same cause of action and involving a claim omitted or relinquished in the first suit, or seeking a remedy not sought in the first suit, he brings himself directly within the operation of the final clauses of section 43. So far as the suit regards any relief claimed in the first suit and not granted by the decree, it is governed by section 13, Explanation III. As regards any portion of the claim omitted or relinquished or any remedy not sued for in the first suit, the suit is expressly prohibited by clauses 2 and 3 of section 43."

In the third place, the Court instead of rejecting the plaint entertains it, but eventually dismisses the suit as the plaint is defective in form, at the same time refusing to adjudicate upon the subject matter in dispute. In this case the learned Judge holds that the position of the plaintiff would be precisely the same as if his first suit had been rejected *in limine*. The learned Judge continues:—"The object of section 42 (*i. e*, Order II, rule 1) is not to prevent any litigation, but to prevent further litigation which can be avoided by a plaintiff duly framing the suit, so as to permit a final decision in a single suit. When in the first suit, there has been no decision at all on the subject-matter in dispute, the second suit is not further litigation within the meaning of section 42, and the second suit is, therefore, beyond the scope of the operation of the final clauses of section 43, even though the plaint may seek some remedy or contain some claim omitted ir or relinquished in the first plaint.

"The difference between the first and third cases supposed, namely, where the plaint is rejected and when the suit is dismissed, either order being passed on the same ground, is one of form and not of substance. The difference in the form of the order, provided that in each case the Court refuses to adjudicate upon the matter in dispute, seems to be immaterial. This difference cannot enlarge the scope of the operation of the final clauses in section 43, and these clauses, in my opinion, do not apply to either case. The object of these clauses is to prevent further litigation concerning the subject matter of dispute and there has been no previous litigation regarding the subject matter in dispute within the meaning of section 42 when the Court has refused to exercise its function by giving a decision between the litigants on the subject-matter in dispute. In either case, the plaintiff is, as it seeems to me, at liberty, section 43 notwithstanding, to commence proceedings *de novo* and that without any express permission."

Both learned Judges were of opinion that to such a case section 13 of the Civil Procedure Code of 1882 had no applicability, and Elsmie, J., (while concurring generally with Plowden, J.), added that section 43 does not operate to prevent a man who has lost "a suit merely because it was brought in a wrong form from repairing his error and suing for the proper remedy."

In our opinion, this authority is directly in point and supports appellants' contention. In the former suit, their amended plaint distinctly asked for relief against all the three defendants but the Munsif held that the claim as against present defendants Nos. 1—7 must be dismissed because no cause of action was in express terms alleged against them. That he did not in any sense adjudicate upon the subject matter of dispute between plaintiffs and defendants Nos. 1—7 is obvious from the fact that in his judgment he expressly stated that plaintiffs were at liberty to bring a fresh suit against these defendants, if so advised. The plea of *res judicata* in such a case is clearly untenable, for [as observed by their Lordships of the Privy Council in *Parsotam Gir* v. *Narbada Gir* (2)], "it would be a contradiction in terms to say that a Court had finally decided matters which it expressly left untouched and undecided." The Munsif in the former suit would probably have rejected the plaint so far as defendants Nos. 1—7 were concerned, had he not been placed in a dilemma. Some of the defendants had compromised matters with plaintiffs and consequently a decree, based on the compromise, had to be passed, and the Munsif obviously felt the difficulty of rejecting a plaint, upon which, so far as some defendants were concerned, he had perforce to pass a decree. He could not, in other words, both accept and reject the plaint and in this position of difficulty, he endeavoured to do justice to all parties by passing a decree against the defendants who had come to terms with plaintiffs and by dismissing the suit against the other defen-

(2) 21 A. 505 at p. 514 (P. C.); 26 I. A. 175; 3 C. W. N. 517.

dants, granting plaintiffs at the same time liberty to sue the latter *de novo*. Admittedly, the Munsif did not attempt to adjudicate upon the subject-matter of dispute between plaintiffs and the latter defendants and, in the circumstances, we hold, upon the authorities above cited, that the present suit is not barred either under section 11 or under Order II, rule 2 of the Civil Procedure Code. We accordingly accept the appeal and under Order XLI, rule 23, we remand the case to the Divisional Judge for decision of the appeal before him. Court-fee stamp to be refunded, and costs to abide the event.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 41 OF 1911.

July 27, 1911.

Present:—Mr. Drake-Brockman, J. C.

VITHAL—APPELLANT

versus

SIWA—RESPONDENT.

Hindu Law—Joint family—Presumption that the family has capital for money-lending—Presumption that business carried on by a co-parcener is a family business—Contract Act (IX of 1872), s. 23—Patwari prohibited from lending money—Mortgage in favour of Patwari *opposed to public policy.*

There is no presumption that a joint family has capital for money-lending and no presumption that a business carried on by a co-parcener is a family business.

Where by statute a penalty for doing or omitting any act is imposed solely or partly for the protection of the public, such act or omission is impliedly prohibited by the statute and is illegal.

Therefore, a mortgage in favour of a *Patwari*, who, under the Revenue rules, is liable to dismissal for money-lending, is void as being opposed to public policy.

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 20th October 1910, confirming that of the Subordinate Judge, Nagpur, dated the 30th June 1910.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *M. K. Padhye*, for Respondent No. 1.

JUDGMENT.—This second appeal arises out of a suit for foreclosure based upon a mortgage by conditional sale, executed in July 1895, in favour of Jaikrishna, brother of the plaintiff Vithal. The property mortgaged consists of two absolute occupancy fields in the circle of which Jaikrishna was *patwari*. Jaikrishna died in or about the year 1900. According to the plaint, Vithal and Jaikrishna were members of a joint family when the latter died and Vithal became his brother's heir. In the pleadings, this description was amended, Vithal being said to claim by survivorship. The defendants alleged that Jaikrishna and Vithal were separate and that the proper person to sue was the former's widow. The main defence, however, was that the contract was void as being opposed to public policy, and this point has been decided in the defendants' favour by both the Courts below. Their decision is based upon the rules relating to *patwaris* which were made by the Chief Commissioner under sections 144 and 146 of the Land Revenue Act, 1881, and will be found in *Central Provinces Gazette* Notification No. 4604, dated the 18th September 1884, as amended by No. 6009, dated the 23rd September 1890, and No. 7192, dated the 13th October 1891.

In appeal to this Court, the plaintiff urges that the mortgage transaction was really one to which the joint family consisting of Ramchandra, Jaikrishna, Vithal and two others since dead were parties. For this contention, I can find no proper basis in the plaint, the pleadings or the evidence. The mere fact—if it be a fact—that Jaikrishna was member of a joint family in 1895 does not show that any lending done in his name was done by or on behalf of the joint family. There is no presumption that a joint family has capital for money-lending and no presumption that a business carried on by a co-parcener is a family business: see *Vadilal* v. *Shah Khushal* (1). Nor does the plaintiff's evidence show that the family possessed a nucleus of joint property. In these circumstances, I think it must be taken that the lending was done by Jaikrishna alone for his own benefit.

Next, it is urged that failing a declaration in the Notifications cited to the effect that a transaction of loan or mortgage is void, such a transaction cannot be regarded as illegal. To this the answer is that where by a statute a penalty for doing or omitting any act is imposed solely or partly for the protection of the public, such act or omission is impliedly prohibited by the statute and

(1) 27 B. 157 at p. 161; 4 Bom. L. R. 968.

is illegal; see *Victorian Daylesford Syndicate* v. *Dott* (2), approved and followed by the Court of Appeal in *Bonnard* v. *Dott* (3). No doubt in No. III* of the rules in question the expression that no person shall be "allowed to work as a *patwari*" is consistent with the retention by him of his post. But I agree entirely with the learned Divisional Judge in his interpretation of rule XIV†, which shows that dismissal would necessarily follow on disobedience of the prohibition against lending money, unless the transaction was cancelled within a time allowed for the purpose. As stated in *Shiam Lal* v *Chhaki Lal* (4), no *patwari* can do his duty properly if he has a direct interest in property in his circle. It is equally undesirable for the same reason that he should occupy the position of a lender, which must inevitably lead to his devoting part of his time to dunning and suing debtors.

In my opinion, the contract has rightly been pronounced illegal under section 23 of the Indian Contract Act. The appeal accordingly fails and is dismissed with costs. In the Courts below, costs will be borne as already ordered.

Appeal dismissed.

(2) (1905) 74 L. J. Ch. 673; 2 Ch. 624; 21 T. L. R. 742; 54 W. R. 231; 93 L. T. 627.

(3) (1906) 75 L. J. Ch. 446; 1 Ch. 740; 94 L. T. 656; 22 T. L. R. 399.

(4) 22 A. 220 at p.221.

* This is practically identical with rule V of the Notification at present in force (No. 3815, dated the 1st August 1901.)

† This is practically identical with rule XVI of the Notification at present in force (No. 3815, dated 1st August 1901.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 494 OF 1909.

February 7, 1912.

Present:—Mr. Justice Shah Din.

UDHO RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RODA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom — Pre-emption — Dasuha town, District Hushiarpur.

The custom of pre-emption, in respect of house property, obtains in the town of Dasuha.

Second appeal from the order of the Divisional Judge, Hoshiarpur, dated the 25th June 1908.

Rai Sahib Pundit *Sheo Narain*, for the Appellants.

Rai Bahadur Lala *Sukh Dial*, for the Respondents.

JUDGMENT.—A return has now been received to my order of remand, dated the 16th March 1910. The learned Divisional Judge has discussed in chronological order 15 instances in which the custom of pre-emption in respect of house property was held to exist in the town of Dasuha, and his opinion is that the custom is fully established. In summing up the result of the inquiry in the concluding portion of his return, he says:—

"In cases (1), (3), (6) and (12), the point of custom was in dispute, and the custom was in each case found to exist. There is no case in which a decision has been given against the existence of the custom. In cases (4), (5), (7) to (10) and in (14), the custom was admitted. In case (15), the precedent of No. 12 was followed, and the custom was found to exist throughout the town. In case (1), moreover, it was found that there had been instances before 1869 in which the pre-emptors had stepped in."

The learned Advocate for the respondents is obliged to concede that there is overwhelming evidence on the record of the existence of the custom of pre emption in Dasuha, and he has, therefore, refrained from addressing me on behalf of his clients with a view to shew that the return submitted by the Divisional Judge is not based on correct *data*. I, therefore, hold that the custom of pre-emption in respect of house property does exist in the town of Dasuha, and I, accordingly, accept this appeal and, setting aside the decree of the lower Appellate Court, send the case back for a fresh decision under Order XLI, rule 23, Civil Procedure Code.

The stamp on this appeal will be refunded and other costs will be costs in the cause.

Case remanded.

MAHU *v.* KISHAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 254 OF 1911.

March 30, 1912.

Present:—Mr. STANYON, A. J. C.

MAHU—APPELLANT

versus

KISHAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2 (2)—Decree—Preliminary decree—Decision on preliminary issues—No decree drawn up—Remedy of aggrieved party—Appeal.

A judgment under the Civil Procedure Code is only the basis of a decree or order. The decree which itself is the *formal expression* of the judgment, is, and the order may or may not be, appealable, but the judgment itself gives no right of appeal.

The drawing up of a decree is a conscious and formal act, whereby the Court notifies its disposal of matter in controversy in accordance with its adjudication thereupon; and no right of appeal arises until such decree has been drawn up.

In certain cases, the passing of a preliminary decree is imperative but in other cases, it is a matter within the discretion of the Court. But unless a preliminary adjudication is finally expressed by a decree, or followed by an appealable order, no right of appeal can arise.

In a redemption suit brought by sons of a Hindu to redeem a mortgage, which had already been foreclosed by a decree against their father, the mortgagee pleaded, *inter alia*, that he had no notice of the plaintiffs' interest at the time of bringing his foreclosure suit, that the foreclosure decree was binding on the plaintiffs, and that the father of the plaintiffs was the managing member of his family. The Court framed preliminary issues on the above points and found against the defendant. No formal decree was drawn up:

Held, that the decision of the Court on the preliminary issues was not a preliminary decree, and, therefore, was not appealable.

Obiter.—If a Court, having written a judgment, which should be followed by a decree, fails to draw up such decree, the remedy of the party who wants that decree, whether for appeal or execution, is to apply for it, and, if it is refused, to move the High Court in revision. But until the decree has been drawn up, there can be neither appeal nor execution.

Appeal against the decree of the Divisional Judge, Nerbudda Division, dated the 12th May 1911, confirming that of the District Judge, Chhindwara, dated the 13th March 1911.

Sir *B. K. Bose*, for the Appellant.

Mr. *J. Mittra* and Rao Bahadur *V. R. Pandit*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises, the plaintiffs are the sons of one Dhuria Gaoli. They sue to redeem a mortgage executed by their father in favour of the defendant. Upon this mortgage, the defendant has already obtained a foreclosure decree in a suit against the father alone. The plaintiffs claim that this decree does not bind them owing to the defendant's failure to comply with the provisions of section 85 of the Transfer of Property Act, 1832.

The defendant pleaded, *inter alia*, that he had no notice of the plaintiffs' interest at the time of bringing his foreclosure suit, that the decree is binding on the plaintiffs, and that Dhuria was the managing member of his family. The first Court (District Court of Chhindwara) framed three preliminary issues, thus:—

> "(1) Whether the defendant had notice of the existence of the present plaintiffs at the date of his suit?
> (2) Does the decree in the previous suit against the plaintiffs' father bind them?
> (3) Was the father of the plaintiffs the manager of the joint property?"

The object of trying out these preliminary issues was to ascertain whether the suit was tenable before entering upon the mortgage accounts. The learned District Judge found,—

(1) that the defendant had notice of the plaintiffs' interest when he sued out foreclosure;

(2) that the foreclosure decree is not, therefore, binding on the plaintiffs; and

(3) that plaintiffs' father was the manager of the family property at the time of the foreclosure suit.

In consequence of these findings, the first Court framed further issues and made the following entry in its order sheet of the 13th March 1911:—

> "Plaintiffs by their Pleader.
> "Defendant in person.
> "Findings on preliminary issue delivered.
> "Issues framed and explained. For evidence 26th June 1911.
> "Process-fees within four days."

No formal decree of any kind was drawn up in accordance with the above findings. The defendant appealed to the Divisional Court against the findings, and the learned Divisional Judge dismissed the appeal on the

ground that, as the findings constituted neither a decree nor an appealable order, no appeal lay against them.

The defendant has now made this second appeal, and it is urged that the findings constitute a preliminary decree, because, so far as regards the first Court, they conclusively determine the rights of the parties in respect of the matters in controversy to which they refer. This raises the much discussed question as to the definition of a decree. It cannot be disputed that, owing to the infirmities of language, it is not always easy to say what is, and what is not, an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit. But such an adjudication is not by itself the decree. It is really a judgment which constitutes the basis of the decree; and from the definition given of the word "judgment" in the Code of Civil Procedure, it is clear that their can be no decree without a judgment. But the decree itself is the *formal expression* of the judgment. In the very recent case of *Tuljaram Row* v. *Alagappa Chettiar* (1), a Full Bench has considered and defined what is a "judgment" under clause 15 of the Letters Patent, and the gist of the ruling is that it is not the *form*, but the *effect*, of the adjudication in the suit or proceeding in which it is made, that affords the test by which it can be found to be, or not to be, a judgment. That is a test which may serve equally well in deciding upon what is, and what is not, a judgment as defined in the Code of Civil Procedure. But, so far as the Full Bench *dictum* has reference to a judgment which gives a right of appeal under the Letters Patent, it has no application to the present case. A judgment under the Civil Procedure Code is only the basis of a decree or order. The decree is, and the order may or may not be, appealable; but the judgment of itself gives no right of appeal. In the creation of a decree, form is of the first importance. As I read the present Code, nothing can be a decree which the Court passing it does not expressly intend to be so. Every decision requires some consequential order: in some cases, the order is merely processual; in others, it is interlocutory; in others, where it involves some finality, or something which makes immediate appellate consideration expedient, an appeal from it is expressly allowed by the Code: and the eventual order, disposing of the suit, or of a well recognized stage or division of the suit, and drawn up in a formal manner is the decree. So far as the final decree is concerned, the question of definition presents little difficulty. But complexity can be easily introduced into the identification of a preliminary decree by juggling with the language of the definition of "decree" given in the Civil Procedure Code. That difficulty will always be present while the view prevails—if it does prevail—that a Court may *unconsciously* pass a decree and give a right of appeal, even though it does not intend its decision to be a decree, and does not, therefore, employ the form necessary for a legal embodiment of the particular decree with which it is credited. I am not in favour of this view. In my opinion, as already stated, the drawing up of a decree is a conscious and formal act, whereby the Court notifies its disposal of matter in controversy in accordance with its adjudication thereupon, and no right of appeal arises until such decree has been drawn up. If a Court, having written a judgment which should be followed by a decree, fails to draw up such decree, the remedy of the party who wants that decree, whether for appeal or execution, is to apply for it, and, if it is refused, to move the High Court in revision. But until the decree has been drawn, there can be neither appeal nor execution. This view obviously commended itself to the Bombay High Court in the very recent case of *Bai Divali* v. *Vishnav Manordas* (2), though it must be conceded that it is not easy to understand how, after this, the same High Court came to the conclusion it did in *Krishnaji* v. *Maruti* (3), in which a formal *finding* was treated as a preliminary decree. It is clear that, as regards the final decree, the Court has no option. Section 33 of the Code clearly refers to the final disposal of a suit by the Court trying it, and it is imperatively laid down that such disposal shall

(1) 35 M. 1; 8 Ind. Cas. 340; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

(2) 34 B. 182; 4 Ind. Cas. 829; 11 Bom. L. R. 1326

(3) 12 Bom. L. R. 762; 7 Ind. Cas. 966.

be by a judgment followed by a decree. Then, there are certain cases where the passing of a preliminary decree is made equally imperative, *e.g.*, under Order XX, rule 13 or Order XXXIV, rule 2. But, for the most part, and except where expressly made imperative, the passing of a preliminary decree is a matter within the discretion of the Court. Where the Court passes such a decree, an appeal will lie against it, and the provisions of section 97 of the Code will apply. But where any preliminary adjudication is not formally expressed by such a decree, or followed by an appealable order, no right of appeal can arise.

In the present case, the findings of the District Court constitute a judgment, but no decree in accordance with that judgment was ever drawn up. The only consequential order passed was one that the suit should proceed to the further stages of its trial. This is not an appealable order. Therefore, there is at present no right of appeal in respect of the points adjudicated upon. In ordinary course, the only preliminary decree in favour of the plaintiff which can be passed is a decree under Order XXXIV, rule 7. If the findings on the preliminary issues had gone in favour of the defendant, they would have constituted the final judgment of the Court, and formed the basis of a final decree dismissing the suit. In favour of the plaintiffs, they amount to only a fractional part of the judgment referred to in Order XX, rule 1 of the Code, and they need not yet be given formal expression by means of a decree. They are a foundation partially laid for a decree to be drawn up hereafter when the other points calling for judgment have been tried and decided. There is nothing which has yet called section 97 of the Civil Procedure Code into operation, and the defendant will be hereafter entitled to question these findings, so far as they are adverse to him, if and when he appeals from any decree which may be founded upon them so as to be the formal expression of the adjudication which they involve.

This appeal, therefore, fails and is dismissed with costs. I allow two sovereigns as Pleader's fees in this Court.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE APPEAL No. 4 OF 1911-12.

March 27, 1912.

Present:—Mr. Fenton, F. C.

AHMAD—APPELLANT

versus

AHMAD—RESPONDENT.

Punjab Land Revenue Act (XVII of 1887), *ss.* 15 (1) (*a*) & (3), 118 (3) & (4)—*Civil Procedure Code (Act V of* 1908), *s.* 2(14)—*Sanction to review, whether an order—Review—Revision—Appeal—Partition, permission to withdraw application for—Discretion—Circumstances.*

An order passed on review is appealable, provided that it does not merely confirm the previous order. A mere sanction, however, given by a controlling to a Subordinate Revenue Officer to review an order is not in itself an "order" and is, therefore, not appealable, though it may be open to revision.

Where a Revenue Officer allowed an application for partition to be withdrawn, because numerous irregularities had occurred in the conduct of partition proceedings and the original second party had alienated his share to other persons, who represented him in the proceeding:

Held, that the Revenue Officer had exercised a sound discretion in allowing the withdrawal of the application, and that no action, under section 118 (4), Land Revenue Act, was necessary, because there was no applicant other than the first party who had been permitted to withdraw his application.

Appeal from the order of the Commissioner, Rawalpindi Division, dated the 5th September 1911.

ORDER.—I concur in the substantial justice of the Commissioner's order and, for the reasons and on the grounds which are mentioned below, I propose to give effect to it; but there has been a technical irregularity in the procedure which it is necessary to notice. I think that a sanction to review given under section 15 (1) (*a*), Land Revenue Act, is not an "order" and is, therefore, not appealable. There is an appeal from a review, *i. e.*, from an order passed in review, provided that it is not an order confirming on review a previous order, *vide* section 15 (3), Land Revenue Act. It would be anomalous to treat as subject to appeal the mere granting of permission to undertake the review procedure when, as sometimes happens, the order resulting from such procedure may be one which under section 15 (3) is not appealable. An order is, in section 2 (14) of the Civil Procedure Code, defined as "the formal expression of any decision of a Civil Court which is not a decree." It does not appear to me, having regard to this definition, that the sanction given by a controlling to a

subordinate Revenue Officer to review an order is in itself an order. If this view be correct, it follows that the action of the Commissioner was premature and that no appeal lay to his Court so long as the sanction given by the Collector had not been acted upon. He could, of course, have taken up the case on the revision side.

The case having now come before me, I find it to be one in which an applicant for partition desires to withdraw his application. Under section 118 (3), Land Revenue Act, it is within the discretion of the Revenue Officer to allow withdrawal. In the circumstances of the present case, it is right and proper to allow the application of the first party (Ahmad, son of Manga), more especially as numerous irregularities have occurred in the conduct of the case, and also because the original second party, Tahir, has alienated his share to the persons who now represent the second party. No action is necessary under section 118 (4), Land Revenue Act, because there is no other "applicant" than the first party. My order, therefore, is that the proceedings be consigned to the Record-Room. The second party can, at any time, file a fresh application for partition when proceedings would commence *de novo*.

Appeal rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 77-B OF 1911.

February 20, 1911.

Present:—Mr. Stanyon, A. J. C.

RAJABKHAN—APPLICANT

versus

LANGDAJI—NON-APPLICANT.

Small Cause Court—Record of evidence—Judgment—Procedure.

The reason why the Judge of a Small Cause Court, is not required to record more than a brief memorandum of the substance of the evidence given before him, or to give any reasons for his judgment on that evidence, is that the law pre-supposes a prompt and continuous trial, usually finished in one hearing, followed by an immediate decision while the evidence of both sides, most of it unrecorded, is still fresh in all its details in the mind of the Judge. This is of the very essence of the Small Cause Court procedure.

Where the judgment in a case was delivered by a Small Cause Court Judge seven months after he had heard the evidence in the case and the record of evidence was very incomplete and imperfect:

Held, that his judgment was without the basis necessary for a legal decision, and, therefore, a re-trial should be ordered.

Revision against the order of the Judge, Small Cause Court, Amraoti, dated the 20th March 1911.

Mr. *P. S. Kotwal*, for the Applicants.

Mr. *M. R. Dixit*, for the Non-applicant.

JUDGMENT.—This suit was instituted in a Court of Small Causes on a bond purporting to be executed by two brothers (1) Wailaji and (2) Langdaji. The plaint was filed on the 1st July 1910, the amount claimed being Rs. 775 8 0. Wailaji filed a written statement pleading that execution of the bond had been obtained from him by physical force and wrongful confinement, and that Langdaji had not executed the deed. The substance of this statement is reproduced in the Trial Register, apparently as the statement of the 2nd defendant. The case was set down for final disposal, and the parties and one witness for each were examined on the 24th August 1910. The Judge then recorded "defendants given one more chance to produce their evidence. Case for 8-11." The date intended was 8th November 1910. On that date, the Judge had no time for this case, and an adjournment was ordered to the 20th March 1911, when some utterly useless witnesses for the defence were examined, and the claim decreed against Wailaji, but dismissed against Langdaji on the ground that proof of execution by him was not satisfactory. The plaintiffs have applied for revision against Langdaji on the ground that the evidence of their witness has been incompletely recorded and misconceived. It appears that the scribe and one attesting witness are dead, and W. P. No. 1 was the surviving attesting witness. The record made of his evidence was incomplete and imperfect, a palpable contradiction being left unexplained. But the Judge of a Small Cause Court is not required to record more than a brief memorandum for his own guidance of the substance of the evidence given before him. He is also not required to give any reasons for his judgment on that evidence. But in making these provisions, the law pre-supposes a prompt and continuous trial, usually finished in one hearing, followed by an immediate decision

while the evidence of both sides, most of it unrecorded, is still fresh in all its details in the mind of the Judge. This is of the very essence of Small Cause Court procedure. In the present case, the Judge delivered judgment seven months after he had heard the only evidence relevant to the case, and as he could not possibly have carried in his mind anything which does not appear in his memorandum of that evidence, the judgment is without the basis necessary for legal decisions in a Small Cause Court. I, therefore, reverse the decree and order a re-trial. I make no order as to the costs of this revision.

Decree reversed.

COURT OF JUDICIAL COMMISSIONER, N.-W. FRONTIER PROVINCE.

SECOND CIVIL APPEAL No. 8 OF 1912.

April 29, 1912.

Present:—Mr. Barton, J. C.

SHAKARULLAH KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDULLAH KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Inheritance - Applicability of custom or of Muhammadan Law to Bara Mohmands of Chamkani, Peshawar District.

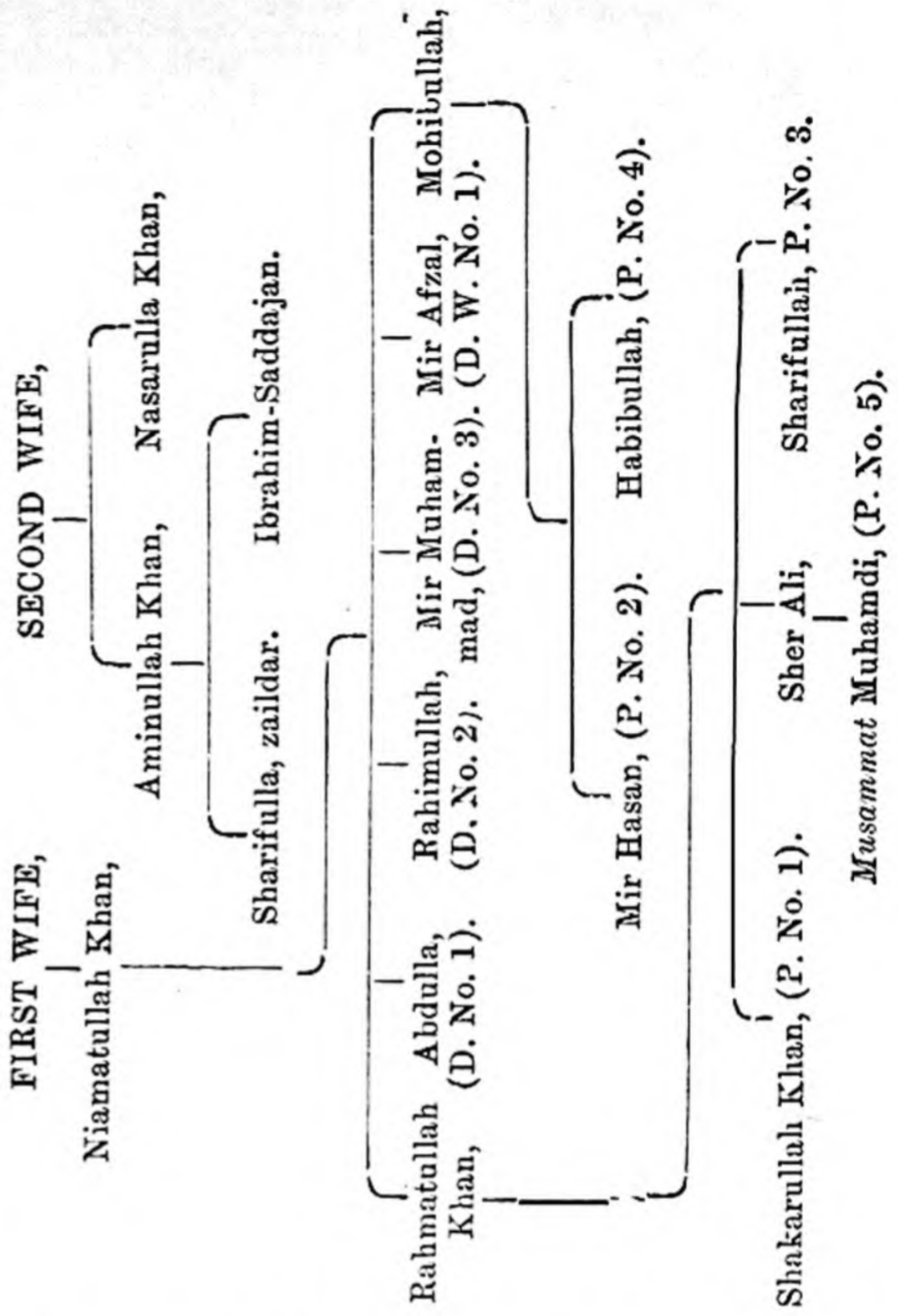
Bara Mohmands of the village of Chamkani in the Peshawar District are governed in matters of inheritance by custom and not by Muhammadan Law.

Second appeal from the order of the Divisional Judge, Peshawar, dated the 2nd January 1912.

Mian *Sami-ul-din*, for the Appellants.

Mufti *Muhammad Yakub*, for the Respondents.

JUDGMENT.—The pedigree-table of the parties in this case is as follows:—



The parties to the present suit are Bara Mohmands of the village of Chamkani in the Peshawar District. Th pedigree-table above given illustrates their relationship. The claim was for a 2/5ths share in the land owned by Niamatullah Khan, ancestor of the parties. It was resisted on the ground that the family of the parties is bound by Muhammadan Law in matters of inheritance, and as the fathers of the plaintiffs predeceased Niamatullah, the inheritance devolved in its entirety on the surviving sons of the latter to the exclusion of his grandsons. This contention was traversed by plaintiffs, who alleged that the custom usually followed in the Mohmand Tappa governed the devolution of property by inheritance in their family. The District Judge who tried the suit held that the family had adopted the Muhammadan Law in matters of succession and dismissed the suit. The Divisional Judge on appeal concurred in this finding, while

holding that in Chamkani village, the proprietary body followed custom generally to the exclusion of the Muhammadan Law.

It may be accepted as practically axiomatic that agricultural tribes in this Province are bound by custom in matters of succession and the onus of proving that a different rule is followed must, in ordinary circumstances, lie on the person asserting the rule. As regards the Bara Mohmands, it is interesting to note that in 1871 a preference was expressed by the tribe for Muhammadan Law as opposed to custom; but by 1895, a change of feeling had asserted itself, and the *Riwaj-i-am* of the Mohmands generally is now in line with the general Customary law of the Peshawar District as given in Lorimer's Compilation. In fact the attitude taken up in 1871 never received concrete expression except in a few sporadic cases, and there can be little doubt that the members of the tribe were at the time influenced by ecclesiastic forces or perhaps by the abnormal bigotry of the few of the leading men. The position being as above described, the ordinary presumption is that plaintiff's family follows the general rule of the tribe [*Sayad Rahim Shah* v. *Sayad Hussain Shah*(1) and *Kartar Singh* v. *Mathar Singh*(2)]. This presumption can, however, be rebutted, and if there is *prima facie* reason for holding that a particular family usually follows its personal law in preference to custom, the onus of proving that custom is still adhered to would lie on the party asserting it. On the whole, in the present case, I think the presumption is in favour of custom, and the main question for determination is whether the defendants have established the contrary rule. In the first place, there is the definite assertion of Amirullah, one of the elders of the family, in 1871 in favour of Muhammadan Law. It is further alleged that the land in suit was gifted by Arsalah Khan to Niamatullah, his son, in accordance with the provisions of the *Shariat*. The assertion will not, however, stand the test of criticism. The gift which was made over 60 years ago does not profess to have been made expressly in accordance with Muhammadan Law. The assertion that the sacred law would defeat any one who should dare to oppose the gift is a stereotyped phrase and conveys little more than a pious wish. Next comes the statement of Shakurullah Khan, plaintiff, dated 20th July 1910, before Muhammad Khan, Munsif 1st class, Peshawar, in the course of the trial of the case between Azim Khan and *Musammat* Daurana, widow of Sheikh Amir, to the effect that his family followed the Muhammadan Law. It may be noted in parenthesis that custom was found to be the rule of decision in that case. No appeal was presented from the Munsif's finding. The parties belonged to Chamkani, but it is not shown that they were related to the family of the parties. This statement is not, I think, of much value in evidence. Section 31, Evidence Act, lays down that admissions are not conclusive proof, but may operate as estoppels. Now it is an essential element of the doctrine of estoppel (section 115, Evidence Act) that to bring the principle into operation, the declaration, act or omission alleged in estoppel must have had the effect of causing some other person to act thereon, and it is further provided that the consequences must have been intended. Now, it is not alleged that any such consequences have resulted from the statement of Shakurullah, and it follows that there is nothing in the nature of estoppel in his conduct. Further, the statement has to be regarded as a whole, and it is distinctly qualified by the assertion that in a particular case in the family of the parties, *viz.*, Sharifullah's wife and daughters, Muhammadan Law was not strictly followed, and in the end these women merely received a share of the produce of the land of Sharifullah; in other words, custom rather than Muhammadan Law was observed. In these circumstances, Shakurullah's statement cannot be held to have much probative force. Most emphasis is perhaps laid on the decided cases in the family of the parties and these will now be noticed briefly:—

(1) *Musammat Aiman* v. *Gulab Khan, Pathan.* This was not a judicial case, but arose out of mutation proceedings. *Shariat* was followed, but there does not appear to have been a full inquiry, and the result is of little value. Apparently, too, the parties were only remotely connected with the plaintiffs' family. The Revenue Officers, moreover, were, it would appear, influenced by the now discredited statement of the *Riwaj* in 1871.

(2) *Musammat Hawa Jan* v. *Ata Jan.* In

(1) 102 P. R. 1901; 119 P. L. R. 1901.
(2) 94 P. R. 1898.

this case, the Rule of 1871, was followed by the Assistant Judicial Commissioner, but the issue of law and custom was not fully investigated, and there was no appeal.

(3) No. 3 of 1909 of Chamkani. This was a mutation case. The inquiry was defective throughout and did not go up on appeal to the Revenue Commissioner. Moreover, the shares respectively assigned to the step-son and widow were not according to Muhammadan Law.

(4) *Badr-ud-din* v. *Musammat Khanam Jan* and *Musammat Begum*. The defendants in this case were widows of Qamr-ud-din, maternal uncle of Shakurullah Khan. Badr-ud-din was son of Qamr-ud-din. The dispute was about a house belonging to Qamr-ud-din. The house was left conditionally with the widow. The records are somewhat vague, but this much is clear that the widow's possession was in accordance with a family arrangement, and more weight appears to have been given to custom than to Muhammadan Law.

(5) *Musammat Sada Jan* v. *Sharifullah*. This case went up to the Chief Court (No. 1566 of 1887). In this case, Muhammadan Law was specifically followed. Defendant admitted in his pleas that such law was the personal law of his family and by consent the case was decided by *Shariat*. There was no inquiry as to whether Sharifullah's statement was correct.

Finally, it is alleged for defendants that the house in which Shakurullah is living was inherited from his mother, who acquired it by operation of the Muhammadan Law of inheritance.

On the other hand, it is argued that had Muhammadan Law been candidly and wholeheartedly adopted by the family, the operation of the law would have been clearly reflected in the present conditions of ownership of the family land, whereas this is not the case. No judicial instances peculiar to the family are asserted in which custom was followed, the case *Musammat Momna* v. *Abdulla Khan* (defendant in the case) not being in point, as Abdulla Khan was sued in his capacity as morrgagee of alien land.

Passing on to consider the effect of the evidence, I think it may be conceded that within the last half century, there has been in the family of the parties at least an inclination to substitute Muhammadan Law for custom, but this has hardly amounted to a tendency; and it is beyond question that there has been no definite and final adoption of the Islamic Law in preference to tribal rules. This is clear enough from the fact that since the declaration of 1871, the devolution of property has not uniformly followed the principles of *Shariat*. There have, it is true, been occasions when the Muhammadan Law has operated in matters of succession, but these are too few and unimportant to establish a rule. The value of the decided cases has been criticised in a preceding paragraph, and it cannot be asserted that they form a sufficient basis for the theory of defendants. Shakurullah's statement, as already shown, is of little use as evidence; and it was probably not intended to do more than indicate a preference in the family for the rule of the *Shariat*. In existing conditions, as above shown, it cannot be said that the family has definitely divorced itself from custom, and custom must, therefore, be held to govern their relations at the present time. I accordingly reverse the finding of the Divisional Judge on the issue under discussion. The question as to the share to which plaintiffs are entitled by custom has not been decided in the Divisional Court, nor has the point as to whether defendants have proved that they have a set off in the funeral expenses they allege they have paid. I accept the appeal on the point of custom and remand the case to the lower Appellate Court for decision on the issues just referred to. Stamp on appeal to be refunded. In the circumstances of the case, the parties will bear their own costs in this Court.

Appeal accepted; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 6 OF 1910.

June 8, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge.

HUKAM CHAND AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

HAYAT AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148—Extension of time after decree.

JANGI *v.* DALIPA.

After passing a final decree, a Court cannot extend the period fixed by the decree for the doing of any act.

Narendra Bahadur Singh v. *Ajudhya Prasad*, 5 Ind. Cas. 443; 13 O.C. 28; *Bibi Sharofun* v. *Mahomed Habib-ud-din*, 15 C. W. N. 685 at p. 690; 10 Ind. Cas. 148; 13 C. L. J. 535, relied upon.

Second appeal from the order of the Divisional Judge, Shahpur, dated 30th October 1909, reversing that of the Munsif, 1st class, Shahpur, dated 1st July 1909, rejecting the appellants' petition for execution of a decree.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Ganpat Rai*, for the Respondent.

JUDGMENT.—The question for consideration is whether section 148 of the Code of Civil Procedure empowers a Court to extend the period fixed by a decree passed on a compromise for the payment of a sum of money, as a condition for the cancellation of a lease, the penalty for the failure to pay within the period fixed being dismissal of the suit with costs. The lower Appellate Court held that the period, which had expired before its enlargement was sought, could be enlarged. Counsel for the appellants has cited *Bibi Sharofun* v. *Mahomed Habibuddin*(1) and *Narendra Bahadur Singh* v. *Ajudhya Prasad*(2) as authority for the proposition that section 148 does not apply to periods fixed by a decree. In *Bibi Sharofan* v. *Mahomed Habibuddin* (1), the judgment runs:—

"We may add that, at one stage of the proceedings, we were inclined to make an order for the reversal of the sale under rule 89 of Order XXI of the Code. We are unable to do so, however, because under rule 92, sub-rule 2, the deposit must be made within thirty days from the date of sale, and we have no power, either under section 5 of the Limitation Act, or under section 148 of the Civil Procedure Code of 1908, to enlarge the time. We are, therefore, constrained to hold that the appeal to the District Judge was competent and that no grounds have been established for our interference with his order in the exercise of our revisional jurisdiction."

In the case of *Narendra Bahadur Singh* v. *Ajudhya Prasad* (2), a Division Bench of the Oudh Judicial Commissioner's Court, of whom one member has officiated in the Allahabad High Court, held that the general provisions of section 148 related only to proceedings antecedent to the passing of a final decree and were never intended to give a Court power to alter the terms of a decree already passed, the decree being unalterable except under the provisions of section 152 or Order XX, rule 3 or those relating to review of judgment or special provisions of a similar nature under the alteration.

As remarked by Mr. Justice Johnstone, who admitted this appeal, the Court passing the decree was *functus officio* as an original Court and the general rule is that no executing Court can vary a decree except by consent of parties.

I concur in the decisions cited which conclude the question under consideration and decree the appeal with costs.

Appeal decreed.

(1) 15 C. W. N. 685 at p. 690; 10 Ind. Cas. 148; 13 C. L. J. 535.

(2) 5 Ind. Cas. 443; 13 O. C. 28.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION No. 78 OF 1911-12.

April 1, 1912.

Present:—Mr. Fenton, F. C.

JANGI AND OTHERS—DEFENDANTS—PETITIONERS

versus

DALIPA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Regulation XI of 1825—Alluvion and diluvion—Occupancy-holding re appearing after submersion—Occupancy-tenant, whether loses his right to recovered land—Custom—Agreement in contravention of custom—Consideration—Onus *of proof of custom.*

The general custom in the Punjab is that an occupancy-tenant does not lose his right by reason of the land of his holding being submerged. Therefore, he has the same rights after alluviation as he had before diluviation of the holding. If a custom to the contrary is alleged, it must be very strictly proved by the landlord.

The *Wajib-ul-arz* of a village recorded an agreement that occupancy-tenants will have no right to land re-appearing after being carried away by the stream:

Held, that the entry was inoperative, because,

(1) the agreement was void for want of consideration:

(2) the parties to the agreement, who were subject to the Customary Law in alluvion and diluvion matters, were not at liberty to enter into a contract pro-

viding that they and their descendants shall not in future be subject to that rule of decision.

Petition for revision of the order of the Commissioner, Jullundur Division, dated the 11th November 1911.

ORDER.—The facts of this case are given in the following extract from the judgment of the Collector who reversed, on appeal, the decree of the first Court :—

"Briefly, the suit is for the possession of land amounting to 28 *kanals*, 12 *marals* on the ground that by reason of its having been encroached upon by the bed of a torrent, the defendants who are now in possession have no longer rights of occupancy as they originally had, and as they have again recently taken possession, they are now liable to ejectment. The lower Court has found that the defendants took possession again as soon as they could and that the custom recorded in the *wajib-ul-arz* is inoperative. Against this order, the plaintiffs appeal. On examining the record, I find it alleged in the plaint that the land in question has been subject to the action of the *khad* or torrent and not to that of the Sohan stream. There are separate alluvion-diluvion rules as to these streams. The *wajib-ul-arz* lays down as follows :—

"On behalf of tenants it is written :—

'When the land of any occupancy-tenant is engulfed, he will bear the loss if it is less than 5 per cent. *ghumaos* of the tenancy. When more than 5 per cent. *ghumaos* of the tenancy is engulfed, the tenant will receive compensation (or reduction of rent-*mujrai*) from the owner. We will have no further right to the land if recovered. And in the event of our not receiving any compensation (or reduction of rent) by reason of the slight nature of the damage, we will maintain our (tenancy) rights in the land if recovered.' * * *

"There seems no reason for not applying the terms of the *wajib-ul-arz* to the present case. It is a formal agreement signed by both parties at the time of the settlement."

The Collector accordingly held that the defendants were liable to ejectment and this finding was upheld by the Commissioner on appeal. The present application for revision has been made to this Court by the defendants. The Collector's decision practically amounts to a finding that the defendants are bound by the agreement to which their predecessors in the occupancy-tenancy were parties in 1869, when the *wajib-ul-arz* containing the entry cited by the Collector was drawn up. Now there are two reasons for holding that the defendants are not bound by this agreement. The first is that the agreement was without consideration. Under it, the tenants consented to abandon a valuable right—the right to resume possession of their occupancy lands when restored by alluvion. This right has been established by a series of rulings of the Chief Court and in Sir L. Tupper's Ruling, published as *Roshan* v. *Pohlo* (1), it is declared to be the general rule of the Punjab. It may be argued that the remission by the landlord of the rent payable in respect of the diluviated land was the consideration for the tenants' promise not to claim the land on re-appearance. But under section 14 of the Punjab Tenancy Act, 1868, the tenants had a statutory right to abatement of rent in respect of any areas included in the tenancy that might be diluviated, and, therefore, a promise to allow tenants the benefit of a statutory right which they already possessed cannot be regarded as a consideration for the tenants' promise. Under section 25 of the Contract Act, an agreement made without consideration is void.

But the main reason for treating the agreement recorded in the *wajib-ul-arz* of 1869 as inoperative in the present case, is the legal one that questions of alluvion and diluvion are governed by custom or by statute, and parties are not at liberty to enter into agreements binding on future generations by which a different rule of decision shall be made applicable. Under Regulation XI of 1825, the rule of decision in alluvion and diluvion cases is declared to be *firstly*, custom, *secondly*, the provisions of the Regulation where they apply, and *thirdly*, "general principles of equity and justice." In this connection *Rama* v. *Shere Singh* (2), may be referred to. I know of no provision of law which would empower parties who are subject to Customary Law in alluvion and diluvion matters to enter into a contract providing that they and their descendants shall not in future be subject to that rule of decision. An Act of Legislature (Descent of Jagirs Act) was

(1) 8 P. R. 1901 Rev.; 54 P. L. R. 1901.
(2) 15 P. R. 1872.

necessary to enable a person subject to the ordinary Customary Law of succession to introduce a rule of primogeniture or descent to a single heir. Similarly statutory provisions have been found necessary in the Colony Bill for the purpose of enabling tenants to dispose of their property otherwise than in accordance with their Customary Law. A still more relevant illustration of the principle under discussion is available. Legislation—the Punjab Riverain Boundaries Act of 1899—was necessary to overrule the provisions of the Regulation of 1825 in so far as it made custom and usage the rule of decision in cases affecting the boundaries of estates. Accordingly, I must hold that the rule of decision in the present case is custom, and that the agreement recorded in the *wajib-ul-arz* of 1869 cannot prevail if it be looked upon merely as an agreement. But, it may be argued, the entry in the *wajib ul-arz*, besides being an agreement, is evidence of custom. In form, the entry does not purport to be a statement as to custom. There is no assertion that the forfeiture of rights by the occupancy-tenants is an incident of existing tenure. It is the future tense that is used. Nothing in the language of the agreement justifies our regarding it as a statement of current custom. At the previous Settlement of 1859, a *wajib-ul-arz* was also prepared, but it contains no entry corresponding to that now under consideration. There is no evidence that prior to 1869, the practice was in accordance with the unusual conditions inserted in the *wajib-ul-arz* of that year.

The question of *onus* of proof as to custom arises here. In *Roshan* v. *Pohlo* (1) already referred to, Sir L. Tupper says: "I hold that the general rule in the Punjab is that an occupancy-tenant does not lose his right by reason of the land of his holding being submerged. A custom to the contrary may be proved, but such a custom is plainly inequitable and very strict proof of it should be required before it is acted upon." It is impossible for reasons explained above to hold that an agreement looking to the future amounts to "very strict proof" of a custom which, like all customs, should have some root in past practice. Nor have the plaintiffs otherwise discharged the obligation to furnish "very strict proof" in support of their contention. They have cited one similar case in which in another village the Collector gave a decree in favour of the landlord on a similar cause of action. The Collector was the same officer (Col. Egerton) who dealt with the present case in the first instance, and the view which he took was, as in the present case, based on the sanctity of the *wajib-ul-arz* agreement. On the other hand, there is a mass of evidence in decided cases to the effect that occupancy-tenants are entitled to recover diluviated land. In his judgment, dated 28th August 1900, in a *tahsil* Una case, *Nihal Chand* v. *Jhalla*, S. Aziz Din, Extra Assistant Commissioner, remarks that out of 27 plots of land restored by the hill torrent, 24 had been recovered by the occupancy-tenants notwithstanding an entry in the *wajib-ul-arz* to the effect that occupancy-tenants had no concern with alluviated land. In another case, *Lachman* of *Mauza Basal*, *tahsil Una*, v. *Gulaba*, in which the *wajib ul-arz* contained an entry to the effect that when land under the possession of occupancy-tenants is rendered unfit for cultivation by the Cho or Sohan stream, the occupancy rights of the tenants therein cease to exist, Mr. Fagan, the Collector, in his judgment, dated 25th July 1901, which was given in favour of the occupancy-tenants, noted, that in at least 58 cases in the village, occupancy-tenants had, contrary to the provisions of the *wajib-ul-arz* recovered possession of land on its re-appearance after having been carried away by the stream. All indications seem to point to the conclusion that the provisions regarding forfeiture of occupancy rights contrary to the general custom of the Punjab, which found a place in the *wajib-ul-arz* of so many villages of the Una *tahsil* in 1869, were inserted without due care and attention in a routine manner—probably at the instance of interested landowners.

In view of all the foregoing considerations, I must hold that the plaintiffs in this case have failed to discharge the *onus* which lay heavily upon them of proving a special custom, contrary to the general custom of the Province, entitling them to treat as irrecoverable by their occupancy-tenants land carried away by torrent action and subsequently restored. I accordingly, under section 84 (5) of the Punjab Tenancy Act, direct that the plaintiffs' suit be dismissed, with costs to the defendants against the plaintiffs throughout.

Revision accepted.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 116 OF 1911.

May 9, 1912.

Present:—Sir Charles Fox, KT, Chief Judge, and Mr. Justice Hartnoll.

HAJI AHMAD MOOLA DAWOOD AND OTHERS—APPLICANTS

versus

POKER MULL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), Sch. I, O. XXI, r. 32—Limitation Act (IX of 1908), Sch. I, Art. 182—Injunction—Application for enforcement of permanent injunction granted by decree—Easement—Obstruction of ancient lights, when actionable.

An application to a Court to exercise its powers under Order XXI, rule 32 of the Code of Civil Procedure, is an application for the execution of a decree and as regards limitation is governed by Article 182 of the 2nd Schedule of the Limitation Act (IX of 1908).

Ram Saran v. *Chatar Singh*, 23 A. 465 at p. 466; A. W. N. (1901) 142, distinguished.

To constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before: there must be a substantial privation of light, enough to render the occupation uncomfortable according to the ordinary notions of mankind.

Colls v. *Home and Colonial Stores*, (1904) App. Cas. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475, relied upon.

Appeal against the judgment of Mr. Justice Young, sitting on the original side of the Chief Court.

Mr. *Alexander*, for the Appellants.

Mr. *Giles*, for the Respondents.

ORIGINAL SIDE JUDGMENT.

In a decree passed in C. R. No. 63 of 1899, Pokermull Ramrickdas, Premsookhdass Bhujaj, Govindram Mon, the then trustees and managers of the Hindu temple of Seth Narain, were restrainedfrom continuing the erection of the building, (known as No. 8, Mogul Street) in such a way as to obstruct or diminish the access of light and air to certain windows in No. 7, Mogul Street. The result has been that No. 8, Mogul Street, was left as it was, a ground floor building and these windows retained an unobstructed access of light and air over the roof of No. 8. In 1910, however, the trustees commenced to build again and there was now existent a wall of some 15 inches in height running east and west along the flat roof of No. 8 at a distance of some eleven feet from the protected windows which applicants claim to be a breach of this injunction and they have accordingly applied that the injunction may be enforced.

It has been objected by Mr. Giles, on behalf of the trustees, that this is an application for the execution of the decree within the meaning of Article 182 of the Limitation Act, that it is barred in that it has not been made within any of the periods prescribed thereby. Mr. Giles was unable to adduce any authority in support of his contention and admitted that the reported cases were against him, and that the effect of his contention would be in the case of a Chief Court to limit the duration of a so-called perpetual injunction to three years, but relied upon the wording of the article in question and suggested that it was a *casus omissus*. Mr. Alexander for the applicants relies on Article 181 as being applicable, and urges that the application is in time. In *Ram Saran* v. *Chatar Singh* (1), the applicants raised a similar plea to that now raised by Mr. Giles, but the High Court dismissed the contention as being without force, and stated that in its opinion when a Court (in that case a Mofusil Court) issued an order for abstention from any particular act and when the person, to whom that order had been issued, disobeys that order, he is guilty of contempt of Court and the Court could take proceedings to enforce its authority notwithstanding anything contained in Article 179 of the Indian Limitation Act XV of 1877 (corresponding to Article 182 of the present Act). In *Bhagwandas* v. *Sukhdei* (2), Mr. Justice Banerjee equally summarily dismissed a similar contention stating that the Article 182 did not apply and that under section 260 of the former Code of Civil Procedure, the decree-holder was entitled to ask the Court to enforce the decree for abstention from a particular act and all that the Court had to see was whether the party had an opportunity of obeying the decree and wilfully failed to obey it. The Madras High Court also holds that in such cases, Article 178 of the former or Article 181 of the present Limitation Act applies agreeing with the Allahabad High Court [Vide *Venkatachalam Chetty* v. *Verrappa* (3)]. Both the High Courts, therefore, support Mr. Alexander's contention, though in none of the cases is the

(1) 23 A. 465 at p. 466; A. W. N. (1901) 142.
(2) 28 A. 300, 3 A. L. J. 836; A. W. N. (1906) 10.
(3) 29 M. 314.

reason for the conclusion arrived at vouchsafed.

Now, Article 182 relates solely to applications for the execution of a decree and Article 181 relates to applications not otherwise provided for. The question, therefore, is whether an application to punish a person, who is alleged to have done something which he is by a decree forbidden to do, is an application to a Court to execute a decree. I think there is a distinction between the procedure applicable to the failure to perform a positive decree and the procedure applicable to the breach of a negative decree. When a man is ordered to do something and fails to do it, the Courts would, as a general rule, cause that thing to be done by their own instrumentality, *i. e.*, if the decree is for the payment of money and the debtor does not pay, the Courts will attach and sell sufficient of the debtor's property to satisfy the debt. (*Vide* rule 30, Order XXI). If the decree is for the delivery of any specific moveable and the debtor does not deliver it, the Court will seize it and deliver it. (*Vide* rule 31). If the decree is for the execution of a document and the debtor fails to execute it, the Court will execute it on his behalf. (*Vide* rule 34). If the decree is for delivery of immoveable property and the debtor fails to deliver it, the Court will oust him and deliver the property to the decree-holder itself. (*Vide* rule 35). When, however, a decree is negative and forbids a man to do a thing and the man goes and does that thing, the Court cannot execute the decree in the same sense. It cannot compel him not to do it for it has already been done; it can only punish him for his disobedience and restore the matter to their former state. It is true that in the case of affirmative decrees, a debtor who fails to obey a decree may usually be imprisoned, but this is not at all by way of punishment, but solely as an ancillary method of compelling him to do what he has been ordered; for, however long he may have evaded compliance with the Court's order, his detention is not increased but he is released the moment he obeys, and if imprisonment fails in its object, he must be released after the lapse of a certain time. In the case, however, of a negative decree, the proceedings on disobedience seem to me to be purely penal. The Court does not and cannot excuse or specifically perform the decree; it can only punish the breach and restore matters to their former condition. If the proceedings taken to enforce the negative decree were in execution of a decree, the defaulter can only be imprisoned for six weeks. (*Vide* section 586). Yet, if the same individual fails to obey a temporary injunction, he may be imprisoned for six months. (Order XXXIX, rule 2). Disobedience of a temporary injunction can hardly be regarded as more heinous than disobedience of a perpetual injunction. Yet the maximum penalty in the one case will be imprisonment for six months, in the other for six weeks, if the procedure adopted to enforce a negative decree is to be regarded as the execution of a decree. Again, in the former Code, in the sections corresponding to the rules 30 and 31 dealing with the mode of execution of a decree for the payment of money or delivery of moveables, the term *enforced* was used. Thus section 254 ran:—"Every decree for the payment of money might be *enforced*, etc.," and similarly section 259. In rules 30 and 31, which correspond to those sections, the word *executed* is now substituted. Both of these rules relate to positive decrees. In rule 32, however, which deals with negative decrees as well as with positive decrees, the word *enforced* is retained. It seems to me that the term *enforced* has been retained of set purpose and is of wider import than the term *executed*. Every decree may be *enforced* but only positive decrees can be *executed*. Article 182 only applies to the execution of decrees. This application is not, in my opinion, an application to execute a decree, and, therefore, it does not apply and the application is propely made under Article 181 and is in time.

The question then arises whether the light has been obstructed or diminished within the meaning of the injunction for the purposes of an application under Order XXI, rule 32 and, on the authority of *Grand Junction Canal Co.*, v. *Dimes* (4), I ruled that an intention to violate an injunction was immaterial, unless the breach was actually carried into effect. At present, the breach alleged consists in the erection of a wall running east and west and facing petitioner's northern wall at a distance of about 11 feet. For the most part, this

(4) 18 L. J. Ch. 419; 17 Sim. 38; 13 Jur. 779.

wall is about 15 feet in height but in one part it is 27 feet in height. Applicant had two windows in this north wall of his house and Mr. Ballardie tells us that the wall is of the same height opposite the centre of each window, but that the space from the wall to the eastern window is 11 feet, 7 inches, while that between the wall and the western window was 11 feet, 10 inches, with the result that the former window received 38 degrees, 47 minutes of unobstructed light and latter 39 degrees, 20 minutes. The model and plans put in show, and it is not disputed, that the building is intended to be much higher. The fact that the wall at the eastern end was 27 feet in height also shows this intention. It does not appear, however, according to the evidence, to have been prolonged sufficiently to the west to impair the eastern windows' lights. I suggested to the parties, with a view to avoiding possible subsequent applications, that they might be well advised to state under section 90 a case in which respondents might show the building proposed to be erected, so that if the Court held the present unfinished wall to be no breach, parties might have some guide as to how much further they could go. The respondents were willing to adopt this course but the applicants were convinced that the present erection already constituted a breach and declined. It is obvious that if the injunction is to be construed literally, the present erection would certainly constitute a breach. Neither party, however, contended for an absolutely literal construction. Mr. Alexander admitted that a diminution of light might be so small that no Court would take cognizance of it. Mr. Giles, however, for the respondents went further. He argued, and as I think correctly, that the case of *Colls* v. *Home and Colonial Stores* (5) has definitely settled that a person possessed of ancient lights was not entitled to the whole cone of light but only to such portion as was necessary for the comfortable enjoyment of his house and for the carrying on of the accustomed business, if any, as beneficially as before (*vide* Lord Macnaghten at p. 187) or, in other words, that the deprivation sufficient to give a right of action must amount to a nuisance (*Vide* per Lord Halsbury at p. 185). It is indisputable that the decisions in England prior to this case had been very conflicting. (*Vide* per Lord Macnaghten at p. 189).

In India, I think the decisions have always approximated to those now laid down by the House of Lords. But, however that may be, it must be taken that the decision embodies what is and always has been the correct view; in other words, that the right of a person possessed of ancient lights is not infringed unless and until the deprivation amounts to a nuisance.

He then argued, and also as I think correctly, that an injunction could never have been intended either by the Court or the parties to do more than secure to a person the enjoyment of his legal rights and could not be construed as increasing those rights, and instanced the case of *Dent* v. *The Auction Mart* (6).

In this case, the injunction was, at any rate, more specific and detailed than the one under consideration, for it restrained the defendants from erecting any building so as to darken, hinder or obstruct the free access of light as *theretofore enjoyed*. One would have thought that any obstruction, not being so trivial as to be beneath notice, would have fallen under the ban, yet that it was not so construed is evidenced by the fact that the Court, as part of the same order, directed an inquiry as to whether any buildings had been erected—not so as to obstruct the access as heretofore enjoyed—but so as to materially interfere with the access of light and an order that such and such only should be pulled down.

He, therefore, argued that the present injunction forbidding obstruction so as to diminish the access of light must be similarly qualified. That the diminution must not be absolute, but material as laid down in *Dent* v. *The Auction Mart* (6) or such as to constitute a nuisance as laid down in *Colls* v. *The Colonial Stores* (5).

There is direct Indian authority for this contention in the case of *Pranjivandass Harjivandas* v. *Mayaram Samaldas* (7),

(5) (1904) App. Cas. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475.

(6) L. R. 2 Eq. 238 p. 255; 35 L. J. Ch. 525; 12 Jur. (N. S.) 447; 14 L. T. 827; 14 W. R. 709.

(7) 1 B. H. C. R. O. C. J. 148.

where there was an injunction restraining the defendants from darkening or obstructing light of certain windows followed by an application to commit for breach and in which case the sole question argued was the quantum of the obstruction and whether it amounted to a breach.

Somewhat analogous instances of the introduction of similar qualifications may be found both in the Limitation Act and the corresponding portions of the English Prescription Act. Both of these Acts, if construed literally, imply that a person is entitled to the whole of his ancient lights. Neither has, as a matter of fact, been so construed. As Lord Halsbury speaking of the Prescription Act said:—"The Statute literally construed by the use of the words 'the light' would mean all the light; * * * yet singularly enough there has been a complete uniformity of decision upon the construction of the Statute that it has made no difference in the right conferred but is only concerned with the mode of proof."

The petitionors called Mr. Martin and Mr. De Paulson as experts and Mr. Ahmed Moola Dawood as a person who knew the rooms.

Mr. Martin said: "The effect of the wall as it exists now has diminished already the light and air. Light and air have been reduced and will be reduced. The air will not be so easily enjoyed, it will naturally be less than if it were all open space."

Mr. De Paulson says: "The rooms are not very well lighted now. The amount of light has been considerably reduced."

Mr. Ahmed Moola Dawood stated that the rooms were not so lighted as they were.

This is all the evidence that was called on the point. Mr. Alexander, in his final address, feeling, I think, its weakness, impressed me with the fact that in the case of *Pranjivandas Herjivandass* v. *Mayaram Samaldas* (7), Sausse, C. J., in a conflict of evidence, used his own common sense, but if that case be looked at, it will be seen that the experts gave much stronger evidence than they do here—one went so far as to say, 'no breeze or sun could ever enter'—and there the obstructing wall was within 2 feet of the ancient lights whereas here it is about 11 feet away. It was, therefore, a far easier case than the present.

In my opinion, therefore, this injunction must be construed not as increasing but only as maintaining the applicant's rights, and as prohibiting not every noticeable obstruction but only such obstruction as would interfere with the applicant's legal rights; that is to say, such as would amount to a nuisance. What then is a nuisance? I think it must be such an obstruction as to cause hurt or harm in person or pocket. The amount of light taken is not so important as the amount left. It is in evidence that if this wall of 15 feet in height is suffered to remain, one window will get 38 degrees, 47 minutes and the other 39 degrees, 47 minutes of unintercepted light measured to the sill of the window. Each, therefore, would receive slightly more if the angle were measured from the centre. That amount is not far short of 45 degrees and if a person is left with this amount, it is, as Lord Lindley states in *Coll* v. *Colonial Stores* (5), a fair working rule to hold that he has received no substantial injury especially if there is good light from other directions as well. In the rooms lit by these windows, there was little or no other light but nevertheless the case stands on the border line and it is particularly one requiring expert or other evidence.

The question to be determined is, in my opinion, whether these rooms have been shown to have been rendered uncomfortable according to the notions and habits of the class of the people who have and who are likely to inhabit them [*vide Chhotalal Mohan Lal* v. *Lallubhai Surchand* (8)] Would they let for less if let out to tenants? I am not prepared to say and I cannot say that the evidence assists me to an affirmative conclusion and I must, therefore, hold that the applicants have failed to show that the wall as at present erected constitutes a nuisance and must dismiss the present application with costs—10 gold *mohurs* in all. Respondents will, however, bear in mind that any further heightening of the wall may result in a nuisance with the result entailed by law.

The case coming on appeal before the Chief Judge and Mr. Justice Hartnoll, they passed the following

JUDGMENT.

Fox, C. J.—On November 6, 1899, the appellants' father obtained a decree against respondents in the Court of the Recorder of

(8) 29 B. 157; 6 Bom. L. R. 633.

Rangoon, the material portion of which was in the following terms:—"It is ordered and decreed that the defendants, their contractors, agents and workmen be and are hereby restrained from continuing the erection of the building in such a way as to obstruct or diminish the access of light and air to the said windows or any of them, or to interfere with or destory the said projecting eaves, and that defendants do pull down so much of the said house as may be erected hereafter and as shall interfere with access of light and air or eaves." On February 16, 1911, the appellants petitioned this Court stating that on January 10, 1911, the first respondent had started re-erecting the said building in contravention of the decree, in particular in building above the previous building as it existed before the suit, and as it stood after the defendants had removed the part in respect of which the injunction was obtained. The appellants asked that notice might issue to the first respondent to show cause why he should not be arrested for contempt of Court, and ask for orders for the enforcement of the decree by detention in the Civil Prison, and for the attachment of his property under the provisions of Order XXI, rule 32 of the Civil Procedure Code, 1908 and for an order authorising the appellants to enter the respondent's adjoining house and to remove all the building and building material erected since January 2, 1911, at the cost of the respondent; and that the proceeds of the attached property might be held liable for such costs of removal when ascertained, as if they were costs in the decree in respect of which the said property was asked to be attached. At first the sole respondent was a trustee only of the property adjoining the appellants' property. Notice was accordingly directed to be issued to the other trustees as well as to the first respondent. At the hearing, objection was first of all taken on their behalf that the application, being an application for execution of a decree, was barred by Article 182 of the Indian Limitation Act, 1908, corresponding with Article 179 of the Indian Limitation Act, 1877. In consequence of there being three decisions of High Courts to the effect that applications under section 260 of the previous Code of Civil Procedure were not regulated by Article 179 of the Limitation Act, 1877, the learned Judge did not sustain the objection although as he says, in none of the cases is the reason for the conclusion vouchsafed or clear. The learned Judge himself drew a distinction between *executing* and *enforcing* decrees, which seems to be a distinction without a difference.

The first question we have to decide is, whether an application to the Court to exercise its powers under Order XXI, rule 32, is an application for the execution of a decree. Order XXI deals with the execution of the decrees and orders. Rules 30 to 36 inclusive deal with the modes of execution. Under the circumstances, I fail to see how an application to a Court to exercise one of the modes laid down can be other than an application for execution of a decree or order. If it is such, then it falls under Article 182 of the Limitation Act. In the case of *Ram Saran* v. *Chatar Singh* (1), it was said that a Court might enforce its decree in such a case as the present by process for contempt of Court but I am not aware that Courts in India other than Chartered High Courts have such power. I would hold that the application in the present case was barred by limitation, but even if this were not so, there is no ground for interfering with the order of the learned Judge. The decree by itself is not intelligible. To understand it, reference has to be made to the pleadings in the suit to ascertain what buildings and what windows were referred to, and in respect of what acts on the part of the defendants, the plaintiff complained, and what remedy he sought.

It appears from the record of the case that the defendants then proposed to put up a building on their land which would have had a wall quite close to the northern wall of the plaintiff's building, and this must have shut out practically all access of light and air to the two small windows in the plaintiffs' northern wall. The plaintiff proved that he had by prescription gained a right to light and air to those windows, and in consequence he obtained the decree. The respondents have now put up a building which still leaves access of light and air to the windows, although there may be not so much coming to them as came when there was no building there. In *Colls* v. *Home and Colonial Stores* (5), the House of Lords decided that the law was and always had been that to constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before. There must

be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind. The respondents have left a space of between eleven and twelve feet free opposite the windows in the north wall of the appellants' house, and the light from the sky comes to the bottom of them at angles of 33 degrees, 47 minutes and 39 degrees, 20 minutes. There is no rule that entitles ancient lights to access of light at an angle of 45 degrees. None of the witnesses said that the diminution of light would be such as to make occupation of the house uncomfortable. It is clear that the appellants' rights had not been infringed at the time of the application. I would dismiss the appeal with costs, three gold *mohurs* Advocate's fee.

HARTNOLL, J.—I concur.

Appeal dismissed.

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT No. 892 OF 1910.
February 20, 1912.
Present:—Mr. Justice Beaman.
JETHA BHIMA AND CO.—PLAINTIFFS
versus
LADY JANBAI—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 64, 73—Execution of decree—Private alienation—Subsequent application for rateable distribution by other creditors—Attachment of same property by other creditor—First attaching creditor paid off—Rights of subsequent creditors—Insolvency—Effect of vesting order—Attachment after vesting order.

Where there is an attachment, and after that attachment a private alienation, and after that private alienation again other creditors obtain decrees and put in claims for rateable distribution, then although those claims are made by persons different from the original attaching creditor and referable to different decrees, nevertheless they are, by the new Code of Civil Procedure, expressly made *claims enforceable* under the first attachment, provided that the first attachment is carried out and assets are in execution actually realized under that attachment and so made available for distribution rateably. In such circumstances, the main private alienation is void against all the claims of the creditors who have put in petitions for rateable distribution of assets after that private alienation was made.

Where, however, there has been an attachment, and after that a private alienation and after that again petitions for rateable distribution by other creditors, and the first attachment is swept away by reason of the attaching creditor declining to proceed with it, or accepting satisfaction privately, then all the subsequent claims to rateable distribution go with the attachment.

In this case, the subsequent creditors obtain no protection under section 64, Civil Procedure Code, against private alienation, for their claims to rateable distribution are only claims enforceable under the attachment, provided that attachment results in the realisation of assets which the Courts can rateably distribute.

Semble:—Where a creditor has attached the property of a judgment-debtor, who thereafter privately alienates the property, and after that alienation other creditors of the judgment-debtor impose attachments, then subsequent attaching creditors will not be entitled to the protection of section 64, when the prior attachment has fallen through.

A claim by way of second attachment cannot be said to be enforceable under a prior attachment when a condition precedent for enforcing the former is removal of the latter.

Bibi Miyakhan v. *Gulab Chand*, 13 Bom. L. R. 1189; 12 Ind. Cas. 923, explained and discussed.

Upon a vesting order being made, all the property of an insolvent passes to the Official Assignee and all decrees and other proceedings against the insolvent are ordinarily stayed.

After a vesting order has been made, any subsequent attachment on the property of the insolvent is, for all legal intents and purposes, a nullity in itself, and does not confer any advantage thereby under any of the sections dealing with ordinary execution proceeding under the Code of Civil Procedure.

In 1894, *A.* obtained a decree against *B.* and in execution of the decree attached certain property of *B.* Shortly after *B.* assigned the whole of his right, title and interest to *C.* In 1898, *D.* obtained a decree against *B.* In 1899, *B.* took the benefit of the Insolvency Act and his insolvency continued up to the present. In 1904, *D.* levied an attachment on the property already attached by *A.* *A.*'s debt was paid off and his attachment raised in 1907. *C.* thereupon applied to the Court and got *D.*'s attachment on the property raised. *D.* then brought the present suit to have it declared that the property upon which his attachment had been placed was the property of his judgment-debtor and was, therefore, still liable to attachment:

Held, (1) that *D.*'s attachment of 1904, while the insolvency was still continuing, was a nullity in itself and of no service to *D.* under the attachment of *A* to be made a ground of claiming the protection of section 64 against the private assignment to *C*;

(2) that the private assignment to *C.* was not void against *D.*

Mr. *Talyarkhan*, with him Mr. *Setalvad*, for the Appellants.

Mr. *Shortt*, with him Mr. *Desai*, for Defendant No. 1.

Mr. *Bhandarkar*, with him Mr. *Jaffarbhai*, for Defendant No. 2.

JUDGMENT.—The material facts and dates may be very briefly stated.

In 1894, Balkrishna brought a suit against Mahomed Medhi, obtained a decree for the sum of Rs. 7,000, and attached the right, title and interest of his debtor in certain pro-

perties, the said right, title and interest being variously computed in the arguments before me at from one to three lacs in the year 1896. Shortly after that attachment, the judgment-debtor, Mahomed Medhi, assigned the whole of his right, title and interest to the defendant in this suit, Lady Janbai. I may neglect the decree in attachment of Moti Gulabdas, which attachment was subsequent to the private assignment to the defendant. In 1898, the present plaintiff brought a suit and obtained a decree against his debtor, Mahomed Medhi. In 1899, Mahomed Medhi took the benefit of the Insolvency Act, and his insolvency, with a short break, which is not material to any point or argument in this case, continued until Balkrishna's attachment was finally raised in the year 1907 and indeed is still subsisting. In 1904, the present plaintiff levied an attachment on the property already attached by, and still lying under the attachment of, Balkrishna. After Balkrishna's debt had been paid off and his attachment raised, Lady Janbai applied to the Judge in Chambers and got the present plaintiff's attachment raised in 1910. The plaintiff has, therefore, been obliged to bring this suit to have it declared that the particular property upon which his attachment had been placed is the property of his judgment-debtor, and is, therefore, still liable to attachment.

It is quite clear, upon this short statement of facts, that unless the assignment of 1896 to the defendant Lady Janbai is void under section 64 of the Civil Procedure Code, the plaintiff has no case, for if he wished to impeach that assignment upon any other ground, it is clear that he would be now time-barred. The question then is whether, in the facts and events that have happened, the private assignment of 1896 is void against the plaintiff's attachment of 1904, because that latter attachment is a claim enforceable under Balkrishna's attachment of 1896. It will be convenient to leave aside for a moment the complication introduced by the insolvency and to deal with the rights of the parties in this suit as though no insolvency had occurred.

I will, therefore, briefly state what I conceive to be the law governing the rights of the plaintiff and the defendant under section 64, read with section 73 of the Civil Procedure Code. My conclusion has been arrived at after a very careful and exhaustive study of all the leading authorities upon this head of the law, and it can be stated very simply and in a very few words. Where there is an attachment, and after that attachment a private alienation, and after that private alienation, again, other creditors obtain decrees and put in claims for rateable distribution, then although those claims are made by persons different from the original attaching creditor and referable to different decrees, nevertheless they are now expressly made claims enforceable under the first attachment provided that the first attachment is carried out and in execution assets are actually realized under that attachment and so made available for distribution rateably. In such circumstances, the main private alienation is void against all the claims of the creditors who have put in petitions for rateable distribution of assets after that private alienation was made. Where, however, there has been an attachment, and after that a private alienation, and after that again petitions for rateable distribution by other creditors, and the first attachment is swept away by reason of the attaching creditor declining to proceed with it, or accepting satisfaction privately, then all the subsequent claims to rateable distribution go with the attachment. Subsequent creditors, where that has happened, obtain no protection under section 64 against private alienation, for their claims to rateable distribution are only claims enforceable under the attachment, provided that attachment results in the realisation of assets which the Court can rateably distribute. I do not think that a single authority among the many I have consulted could be found the other way.

The next question is whether where subsequent creditors, instead of applying merely for rateable distribution, impose attachments of their own during the continuance of a prior attachment, those later attachments are claims enforceable under the first. It is to be observed that the practice of this Court on its Orignal Side, as explained to me by the Prothonotary, is that where property has already been attached and other creditors issue subsequent attachments, those attachments, so long as the first continues, are entered in what is called the Negative Book, where they are left to be dealt with as events turn out. If the first attachment falls through, then the first in date of the subsequent applications for attachment in the Negative

Book is substituted for it. But if the first attachment runs its full course, then all three subsequent attachments are treated as prayers for rateable distribution. That being the practice, I am to consider whether the subsequent attaching creditor is in a better position under section 64 than a subsequent creditor who has only applied for rateable distribution. I think it is clear that he is, for while an application for rateable distribution goes altogether when the original attachment falls through, an application for attachment, which may have to be converted into a prayer for rateable distribution, always stands ready to take the place of the first attachment should that creditor desist from proceeding with it. So that we arrive at this position. Suppose *A.* has attached the property of *X.* and *X.* has thereafter privately alienated that property, and after that alienation again *B.*, *C.* and *D.*, other creditors of X. impose attachments, *A.*'s attachment continuing in force the while, will the main private alienation by *X.* be void against the attachments of *B.*, *C.* and *D.* in order, should *A.*'s attachment be withdrawn or fall through? And the answer to that clearly depends upon whether those subsequent attachments are really claims enforceable under the first attachment. In a sense they may certainly be said to be claims enforceable "under" it, because so long as *A.* prosecutes his attachment, the hands of *B.*, *C.* and *D.* are tied and they can do nothing but wait realizations and rateable distribution. So that in fact, whatever may be said in law, the subsequent attaching creditors are under, that is to say, subject to, the attachment firs timposed. But assuming that attachment to have been withdrawn or satisfied in any way short of realisation in execution, then the questionis, whether the first of the subsequent attachments, which is there to take its place, is to take its place as from its own date or the date of the first attachment. If the latter, then doubtless it would be prior in point of time to the private alienation and the private alienation would, of course, without further need of argument be subject to it. But it may still be doubted, I think, whether subsequent attachments of this kind, waiting their turn in the event of the prior attachment falling through, can be said in strictness to be claims enforceable under that attachment, for it is a pre-requisite of their being enforceable at all that that attachment should first disappear. This is, of course, not the case where, instead of attachments, prayers have been made for rateable distribution. Those are in strictness claims enforceable under the existing attachment, and had there been any doubt upon the question, since the introduction of the new Code of Civil Procedure, that doubt has been finally removed.

This somewhat nice question, whether a subsequent attachment nominally, though not really, imposed during the continuance of a prior attachment, is a claim enforceable under it, never, as I am aware, has been made the subject of a judicial decision except in one very recent case of *Bibi Miyakhan* v. *Gulabchand* (1). There the facts were that during the continuance of an attachment which was, I believe, although this does not appear from the report, being conducted by the Collector, the judgment-debtor made a private sale of the attached property which was not certified to the Court at the time it was made. Then a very few days after that private alienation, another creditor put in a *drakhast* asking in the alternative for rateable distribution or for a second attachment. The first attachment, appears to have lasted for nearly two years after this transaction, and the lerrned Judges. Chandavakar and Batchelor, JJ., held that although the second *drakhast* could not have been granted where it asked for a second attachment and as regards its prayer for rateable distribution, no question of that kind could arise when the first attachment had fallen through, yet when that first attachment was swept away, the alternative prayer of this *darkhast* was there to take its place, and upon that principle, which seems to imply that they referred the date of the second attachment back to the date of the first, the learned Judges held that the main private alienation was void. As this is the only case directly in point which I have been able to find (for I think that the other case decided a month earlier by Chandavarkar and Hayward, JJ., is of a different character and distinguishable), since the conclusion the learned Judges arrived at does not agree or does not seem to agree with the view of the law I have expressed, I consulted those learned Judges as to the true scope and intention of the judgment. It

(1) 13 Bom. L. R. 1189; 12 Ind. Cas. 923.

then appeared that this case was really the case of a decree transferred for execution to the Collector under the old section 325A of the Code and in dealing with cases of that kind, it may well be that different considerations arise and may influence the decision. Were I sure that those learned Judges had intended to lay down the rule that any subsequent attachment imposed during the continuance of a prior attachment is a claim enforceable under it and the main prior private alienation is, therefore, void against the second attachment, when the first has fallen through, under section 64 of our Code, I should, of course, feel myself bound by that decision. When I first studied it, I thought that was what the learned Judges had meant to decide and I was inclined to think that the decision was right. It was not until after very long reflection and minute examination of many other authorities that I began to doubt the correctness of the decision. Whether it be right or wrong, however, is not a question for me to answer. I should be bound by it and it could only be overturned, if wrong, by a decision of a Full Bench. It will be seen how closely the facts of that case (excepting the method of execution) resemble the facts of the case I have to deal with, for supposing that the decrees there were being executed in the usual way, there would be an attachment corresponding with Balkrishna's attachment, a private assignment corresponding in time with Lady Janbai's, and a subsequent attachment corresponding with the attachment upon which the plaintiff relies. In both cases, the assignment came between the first and the second attachment and in both cases the first attachment, although it was finally settled privately and so fell through, was in force and subsisting at the time of the second. So that I should have felt it extremely difficult to distinguish that case from the present, and although I understand that the learned Judges did not really mean to lay down quite so broad and far-reaching a principle, I think, I should have been compelled to say that the present facts fell under that judgment, and that, as there, so here, the main private alienation was void against the subsequent attaching creditors. It appears to me in principle to make no difference that Balkrishna's attachment in this case dragged on for eleven years and the plaintiff had not even obtained a decree, much less imposed his attachment, until some years after the private alienation.

But there is another ground, upon which, without distinguishing the Bench decision I have referred to, I think, I may safely dispose of this case. So far I have treated the facts and the law as though none of the arguments were affected or the conclusions disturbed by the fact that the debtor in this case became an insolvent after the private alienation but before the second attachment. I have now to consider how far an otherwise entirely general conclusion must be modified by that special factor. I have already said that in my own view, if I can see my way to distinguish the case of *Bibi Miyakhan* v. *Gulabchand* (1), the result would be the same, for I feel very grave doubt whether a subsequent attaching creditor is really entitled to the protection of section 64 of the Code, when a prior attachment has been obtained and fallen through. I see no reason either in law or in equity why this should be so. I have explained that in law I see no reason, for as a pure question of interpretation, I think, it is impossible to say that a claim by way of second attachment is enforceable under a prior attachment when a condition precedent for enforcing the fromer is the removal of the latter. In equity, that is to say, upon general principles of justice, I also fail to understand why a dilatory creditor should have the benefit of the protection which is accorded to one more diligent. There is nothing that I know of to prevent a dozen creditors levying attachments on the same day and although no doubt, the first in point of time would still be called the attaching creditor, yet if his attachment fell through, the others would come in as from the same date and would all be equally protected. Now, no consideration of this kind appears to me to apply to the case of a creditor who imposes an attachment no less than eight years after the attachment and after the private alienation, on the strength of the one and against the other of which he invokes the protection of section 64.

I turn now to the consideration of the somewhat singular state of affairs brought about by the insolvency of the judgment-debtor in 1899. At that time the whole of his interest had been attached under the

decree of 1896 and had been assigned away subject to that decree in the same year. The Official Assignee appears from the first to have recognised the *bona fides* and legal validity of the assignment, subject, of course, to the claim of the first attaching creditor, although the Official Assignee took no steps to have that attachment raised. It was not until five years after the insolvency that the present plaintiff, who had obtained a decree in 1898, levied the attachment upon which he now relies; and it is certainly an extraordinary, and I should think, very anomalous, state of affairs which discloses the attachment of 1896 still subsisting and apparently not finally raised until 1907. What, then, is the effect of an attachment imposed by the creditor of a judgment-debtor, who has taken the benefit of the Insolvency Act, after the vesting order has been made? As to all existing attachments, I think it may be said generally that they ought to be raised either by the Courts *suo motu* or at the instance of the attaching creditors or of the Official Assignee, for it is well understood that such attachments ordinarily give no preference, still less create any title; and when they are found to be existing, the Official Assignee usually acting on behalf of all the creditors gets them removed, so that all the funds may be available for rateable distribution. In the present instance, this was not done, because the Official Assignee, as I have said, adopted a view from the first that, so far as this attached property was concerned, it had been validly assigned away before the insolvency. But had the usual course been followed, then there would have been no attachment subsequent to the assignment of 1896 of which the present plaintiff could have availed himself even for the purposes of a technical argument in 1904; and it might be contended that although the Official Assignee did not, he ought to have raised Balkrishna's attachment of 1896, for that attachment was admittedly good against the subsequent assignment to the extent of the decreed claim, and inasmuch as the attachment itself gave no preference, it might be thought that that decreed claim was thus an asset realisable for the benefit of all the creditors. My present point, however, is by insisting upon what would have followed had this attachment been raised, to extract the position I now propose to take that the later attachment of 1904, while the insolvency was still continuing, was for all legal intents and purposes a nullity in itself and of no service to the plaintiff under the attachment of 1896 to be made a ground of claiming the protection of section 64 against the private assignment. Upon the vesting order being made, all the property of an insolvent passes to the Official Assignee and all decrees and other proceedings against the insolvent are ordinarily stayed. Whether they are stayed by express order or by operation of law, it appears to me that no progress could in any case be made with them, for the property of the insolvent debtor is no longer there to be attached and the decree-holders must wait until the insolvency terminates, if they wish to enforce their decrees against the persons of whom the law has indirectly, but very clearly, announced to the whole world that no property is attachable at all.

I do not think, therefore, that the plaintiff can rely upon his attachment of 1904 as bringing him within the scope and meaning of section 64 of the Civil Procedure Code and so making the private assignment void against him. I do not think myself that he could have done so had there been no insolvency; but as there was an insolvency, and, therefore, no property belonging to his judgment-debtor upon which any legal attachment could have been levied in 1904 or against which any legal process issuing from any Court could have gone, the whole of that attachment appears to me to be suspended so long as the insolvency exists and to have no legal effects or consequences whatsoever. We need not, however, go too finely into the question of the general principle upon which I am now basing this judgment, and that is this, that while the insolvency continued, no attaching creditor purporting to attach the insolvent's property could take any advantage thereby under any of the sections dealing with ordinary execution proceedings under the Code of Civil Procedure.

In this view of the law, I think the plaintiff's case entirely fails and must now be dismissed with all costs.

Costs of one Counsel for the Official Assignee up to the first hearing.

Suit dismissed.

RODRICKS *v.* SECRETARY OF STATE.

Attorney for the plaintiffs: Mr. *M. B. Chothia.*

Attorneys for the defendant: Messrs. *Mulji* and *Khambatta.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT NO. 118 OF 1911.

April 2, 1912.

Present:—Mr. Justice Chaudhuri.

B. E. M. RODRICKS—PLAINTIFF

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT.

Jurisdiction—High Court—Cause of action arising wholly outside jurisdiction—Letters Patent, clause 12—*Leave of Court obtained when plaint filed—Defendant's right to question propriety of leave—Secretary of State, whether mere name or body corporate and person—Suit for damages for malicious prosecution against Secretary of State in High Court, whether maintainable—Government of India Act* (21 & 22 *Vict. C.* 106), *s.* 65.

Leave under clause 12 of the Letters Patent cannot be granted where the whole cause of action in a suit for damages for malicious prosecution has arisen outside the local limits of the ordinary original jurisdiction of the High Court. If such leave is granted in the absence of the defendant, he is not bound thereby and can object to it at the hearing of the suit.

Held, following *Doya Narain Tewari* v. *Secretary of State*, 14 C. 256, that the Secretary of State cannot be held to dwell or carry on business or personally work for gain at the capital or head-quarters of a Government, and that section 65 of the Government of India Act does not constitute the Secretary of State a body corporate.

Obiter dicta—(1) The Secretary of State is not a mere name but a body corporate and a *person* within the meaning of clause 12 of the Letters Patent, and for purposes of suit, represents the Government.

(2) The Secretary of State, namely, the Government, is to be deemed to dwell and carry on business at the capital of the Government, and is, therefore, amenable to the High Court whose original jurisdiction embraces the capital.

Bipro Dos Dey v. *Secretary of State*, 14 C. 262*n*, relied upon.

Mr. *N. Sirkar*, instructed by Messrs. *B. N. Bose & Co.*, Solicitors, for the Plaintiff.

Mr. *Kenrick, K. C.*, Advocate-General, instructed by Mr. *Kesteren*, Solicitor for the Defendant.

JUDGMENT.—The plaintiff in this suit seeks to recover the sum of Rs. 10,000 by way of damages for a false and malicious prosecution, said to have been conducted against him in the District of Rungpur, in which he says he was falsely accused of criminal breach of trust in respect of certain articles belonging to the Eastern Bengal State Railway, when he was employed as a servant of the Railway. He states that the criminal proceedings terminated in his acquittal, that such proceedings were taken maliciously and without reasonable or probable cause, and claims to be entitled to judgment against the Secretary of State for India in Council, for damages. It has not been argued before me, whether or not such a suit is maintainable against the Secretary of State for India in Council, the only point urged being that this Court has no jurisdiction under the Charter to entertain it. The argument on both sides has also proceeded upon the basis that the whole of the cause of action in this suit arose outside the local jurisdiction of this Court. I find, however, from the 9th paragraph of the plaint that the plaintiff asked for leave under clause 12 of the Letters Patent "to safeguard himself against any contention" that part of the cause of action arose outside Calcutta. I find also from an endorsement on the plaint that such leave was granted by a learned Judge of this Court then sitting on the Original Side. I do not, however, find anything in the plaint upon which such leave could have been granted. It may be, there are facts which have not been fully set out in the plaint, upon which the plaintiff could have legitimately asked for such leave, but, as the matter now stands, I must hold that leave under clause 12 was not rightly granted and the Secretary of State for India in Council cannot be bound by the leave so given. The order was made in his absence, and he can, undoubtedly, question it. As I have said before, the argument has proceeded on the basis that no part of the cause of action in this suit arose within the local limits of our jurisdiction. The learned Advocate-General contends that this Court has no jurisdiction to try an action of this character against the Secretary of State for India in Council, the cause of action having arisen wholly outside our local jurisdiction. He says that unless it can be shown in cases like this, that the Secretary of State for India in Council is a person who dwells, or carries

on business, or personally works for gain within the local limits of Calcutta, this Court cannot try a suit instituted against him, and relies upon *Doya Narain Tewary* v. *The Secretary of State for India in Council* (1). That case was decided by two Judges sitting on the Original Side of this Court composing a Bench constituted by the then Chief Justice on the 10th August 1886. There were three other similar cases which were referred to the same Bench for disposal, in all of which the Secretary of State for India in Council was defendant. The Bench was so constituted, I take it, upon a reference by one of the Judges, who was then sitting on the Original Side of this Court under rule 54 (Original Side), although I have not been able to find the order of reference. There is no doubt that the case of *Doya Narain Tewary* v. *The Secretary of State* (1) is direct authority for the proposition that no such suit is maintainable. The learned Judges there hold that the Secretary of State for India in Council does not dwell within the local jurisdiction of this Court, or carry on business, or personally work for gain. In so deciding, the learned Judges discussed the decision of Mr. Justice Pigot in *Bipro Doss Dey* v. *The Secretary of State for India in Council* (2). Pigot, J., had taken a directly opposite view. He held that such a suit was maintainable. He held further that if the Secretary of State for India in Council in this country was a legal person in any sense, he could not possibly hold that he did not carry on business in Calcutta. So far as I am concerned, I am bound by the decision of the two learned Judges, Mitter and Trevelyan, JJ., who constituted the Bench to whom the matter was referred, but as I am not convinced in my mind that the decision is correct, I state my reasons. However differently the word "business" may have been construed at different times, I do not think there is any question whatever that a carrier's business is "business" within the meaning of section 12 of the Letters Patent, nor is there any doubt that a Railway Company, or other Corporate Body, or even a body of individuals, whether incorporated or not, is a "person" within the meaning of that section. See the definition of the word "person" in the General Clauses Act, 1897. It cannot also be doubted that a Railroad Company, apart from the fact of having a Registered Office, "carries on business" at its principal office where the Directors meet and the general business of the Company is transacted. Jessel, M. R., in *Erichsen* v. *Last* (3), said that where the "Brain Power" is, there a trade or business is carried on. The question, therefore, is as to whether the Secretary of State for India in Council, is a "person" within the meaning of section 12 of the Letters Patent, and if so does that "person" carry on business in Calcutta, which at the time of the institution of this suit was the capital of the Government of India.

I shall, therefore, first consider the position of the Secretary of State for India in Council as a defendant in suits. In order to understand the position of the Government in this country, it is necessary to refer to certain old Acts. At the time that 21 Geo. III, C. 70, and 37 Geo. III, C. 142 were enacted, the Governor-General, the Governors of Bombay and Madras and their Councillors were servants of the East India Company, and it was necessary to protect them by special enactments from suits on account of things done by them in the exercise of their *quasi*-political functions. By Statute 3 and 4 Wm. IV. C. 85, the trading capacity of the Company was abolished except as to such trade as was necessary for purposes of the State. By 21 and 22 Vic., C. 106, the Government was transferred from the East India Company to the Crown. Section 65 of that Statute provides as follows:—"The Secretary of State in Council shall and may sue, and be sued as well in India, as in England by the name of the Secretary of State in Council as a Body Corporate; and all persons and Body politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would

(1) 14 C. 256.
(2) 14 C. 262*n*.

(3) (1881) 51 L. J. Q. B. 86; 8 Q. B. D. 414; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357.

while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company." By the words of the Statute, a clear right of suit is given against the Secretary of State for India in Council as a Body Corporate. Mitter and Trevelyan, JJ., however, hold that this section does not constitute the Secretary of State for India in Council a Body Corporate. Perhaps not so for all purposes, but it is quite clear that they were constituted a Body Corporate for purposes of suits, and as such represent the Government of India in such suits as may be maintained against the Government. Sir Richard Garth in *Judah* v. *The Secretary of State for India in Council*(4)says—"It seems to me that since the Statute 21 and 22 Vic., C. 106, the Secretary of State for India in Council represents the Government here to all intents and purposes. He is the officer of the Crown authorized to sue and be sued in respect of all Crown debts and contracts." On page 452, he says:—"Section 1 of that Act deals only with the manner in which suits are to be brought and has nothing to do with substantive rights. The latter part of the section says nothing as to what rights may be acquired either by the Secretary of State or by the Crown through the Secretary of State, nor as to the nature or character of rights so acquired. It leaves that to be governed by the ordinary principles of law. But with regard to liabilities which may be enforced against the Secretary of State there are express words."

The East India Company was in its origin a Trading Company, which became vested with sovereign powers. There is no question that the Company was liable to suits in respect of acts done in their trading capacity.

In *Gibson* v. *The East India Company* (5), Chief Justice Tindal distinctly points out that the power of the East India Company was of a two-fold nature—one political and the other commercial. By 21 and 22 Vict. C. 106, such right of suits, as individuals had against the East India Company, was continued as against the Secretary of State. This was an exceptional enactment. Colonial Governments have been held not to be liable to such suits. They are not subject to any similar provision. See *Sloman* v. *The Government of New Zealand* (6).

The East India Company at the time, that the Government was transferred from them, had power to carry on trade for purposes of the State. After the transfer, such trade has been carried on by the Government of India in this country, and, as pointed out by Pigot, J., in the case of *Bipro Doss Dey* v. *The Secretary of State for India in Council* (2), the Government is a frequent litigant in the Indian Courts in respect of matters arising out of such trade.

The Secretary of State for India in Council cannot in this country claim on behalf of the Crown the prerogative of immunity from suits. As is pointed out in *The Secretary of State for India in Council* v. *Hari Bhanji* (7), two principles regulate the maintenance of proceedings at law by a subject against the Sovereign—the one, having a relation to the personal status of the defendant—the other, to the character of that in respect of which relief is sought. In England the form of procedure permitted to a subject who considers himself aggrieved by an act of the Crown, is by petition of rights. In this country the Crown has consented to submit some of its acts to the jurisdiction of the Municipal Courts. It is not necessary in this case to discuss the nature of the acts for which Government can be sued in our Courts. The defendant concedes for the present, that such a suit as this is maintainable against the Government. I am, therefore, of opinion that for purposes of such a suit, the Secretary of State for India in Council is a *Body Corporate* and a person within the meaning of clause 12 of the Letters Patent.

Just before the Letters Patent of 1862, the first Civil Procedure Code (Act VIII of 1859) had come into operation so far as the Mofussil Courts were concerned. Section 5 of that Act dealt with the jurisdiction of those Courts. In that Act there was no provision as to how the Government might sue or be sued. The Civil Procedure Code of 1877, Chapter 27, section 416, introduced the provision which we now find in section 79 of our present Code. It laid down

(4) 12 C. 445 at p. 450.

(5) (1839) Bing (N. C.) 262 at p. 273; 7 Scott, 74; 1 Arn. 493; 8 L. J. C. P. 193; 3 Jur. 56.

(6) (1876) 1 C. P. D. 563; 46 L. J. Q. B. 185; 35 L. T. 454; 25 W. R. 86.

(7) 5 M. 273.

that suits against the Government were to be instituted in the name of the Secretary of State for India in Council. The Secretary of State for India in Council, therefore, is more than a "mere name." He is, for purposes of suits, to be treated as a "person," and represents the Government. The learned Advocate General referred me to Ilbert's Government of India (2nd edition), pages 176-177, which does help to decide the point. I notice that on page 146, the learned author says this: "the office of the Secretary of State is constitutionally a unit, though there are five officers." Reference was made by the learned Judges in *Doya Narain Tewary's* case (1) to *Kinloch* v. *The Secretary of State for India in Council* (8), in which the plaintiff sued for an account and distribution of "booty of war" come to the hands of the Secretary of State under a Royal Warrant. It was argued that the defendant thus became "trustee" and the "booty" was "trust fund." James, L. J., held it was not a trust, and that the Secretary of State for India in Council (the name by which the Government can be sued) was not a person capable of being *trustee*, because according to that learned Judge, the Government of India was not capable of being the trustee of such a fund. The property in that case had vested in the Crown, and was to be distributed by the servants of the Crown according to the Crown's directions, and that, therefore, no Municipal Court had jurisdiction to entertain the suit. The observations made in the course of the judgment refer to the matter which was before the Court of appeal and cannot be considered of general application. To hold that where suits are actually maintainable against the Secretary of State for India in Council, he is a "mere name," I consider erroneous. He is a "Body Corporate" in such a suit according to the express words of the Statute. If, however, the Secretary of State for India in Council is a "mere name", it is quite clear that a name can never be said to "dwell" anywhere or "carry on business." It is also clear that a "mere name" can do nothing. The name cannot sue or be sued, nor can there ever be a cause of action against a mere name, but as I hold it is not, I shall consider whether the Secretary of State for India in Council, who is "legal person" in such suits, can be said to dwell in Calcutta, or carry on business there. It seems to me difficult to say that the Government does not dwell in its own capital, and that a Government engaged in trade, though it may be for purpose of the State, does not "carry on business," if Sir George Jessel is right that where the "Brain Power" is, there a trade or business is carried on. That the Brain Power of the Government of India is at its seat of Government, is not an unjustifiable assumption. I would have had, therefore, no hesitation in holding that the Secretary of State for India in Council, namely, the Government, dwells at its capital and carries on business there, and is thus amenable to the jurisdiction of this Court, in cases where a suit can be maintained against the Government.

I have gone through the cases referred to by Mr. Justice Pigot in his judgment, and I may say I generally agree with the view expressed by him. In the case of *The Peninsular & Oriental Steam Navigation Co.* v. *The Secretary of State for India in Council* (9), the question has been elaborately discussed. The learned Judge points out that there are several cases decided in our Courts against the Secretary of State in spite of the ruling in *Rundle* v. *The Secretary of State for India in Council* (10). The observations in that case were made for the guidance of the profession and are *obiter*. About the same time, the Madras Court, in the case of *Subbaraya Mudali* v. *The Government* (11), took a different view, after which came the cases of *Brito* v. *The Secretary of State for India* (12), in which the question of jurisdiction does not appear to have been raised, *Hari Bhanji* v. *The Secretary of State* (13) and *Secretary of State for India* v. *Hari Bhanji* (7). *Rundle* v. *The Secretary of State for India in Council* (10) was cited during argument but was not commented upon in the judgment. It appears that in spite of the decision in *Rundle* v. *Secretary of State for India in Council* (10), the other High Courts continued to exercise jurisdiction over the Secretary of State. This Court also did the same in the case of

(8) (1880) 15 Ch. D. 1 at p. 8; 49 L. J. Ch. 571; 42 L. T. 667; 28 W. R. 619.

(9) 1 Bourke, Pt. VII 165; 5 B. H. C. R. App. 1.
(10) (1862) 1 Hyde 37.
(11) 1 M. H. C. R. 286.
(12) 6 B. 251.
(13) 4 M. 344.

SHANUMUGAM CHETTY *v.* ANNAMALAY CHETTY.

Ross Johnson v. *The Secretary of State* (14), although how it came to do so, in direct conflict of the decision in *Rundle* v. *The Secretary of State for India in Council* (10), is not clear. See also Hukumchand's Civil Procedure Code, page 319, where the references are collected. I may also refer to *Doss* v. *The Secretary of State for India in Council* (15), see page 535, in which Sir R. Malins, V. C., allowed the demurrer, one of the grounds being that the plaintiff was a resident of India and the Secretary of State "was also in India". Reference was made, during the argument in that case, to *Holmes, in re* (16), in which a demurrer was allowed on the ground that the Queen was as much "resident" in Canada as in England.

Having regard to what I have said before, and with great respect to the learned Judges who decided the case of *Doya Narain Tewary* v. *The Secretary of State for India in Council* (1), I venture to dissent from the views therein expressed, but as I hold that I am bound by the decision of a Bench so constituted, I must hold that this Court has no jurisdiction. The suit will accordingly be dismissed with costs, unless the defendant will consent to waive costs.

Advocate-General.—I am not in a position to consent.

BY THE COURT.—Then the costs must be paid by the plaintiff.

Suit dismissed.

(14) (1864) 2 Hyde 153; Cor. 71.
(15) (1875) 19 Eq. 509; 32 L. T. 294; 22 W. R. 773.
(16) (1861) 2 J. and H. 527; 31 L. J. Ch. 58; 8 Jur. (N. S.) 76; 5 L. T. 548; 10 W. R. 39.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 125 OF 1910.

March 11, 1912.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

K. M. T. T. SHANMUGAM CHETTY—APPELLANT

versus

C. T. A. ANNAMALAY CHETTY AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Adjustment—Reference to arbitration without intervention of Court—Acceptance of award by parties.

The question, whether there has been an adjustment, should be decided by a consideration of the terms and the meaning of Order XXIII, rule 3, of the Code of Civil Procedure apart from a consideration of the provisions of the Code which relate to arbitration.

If the parties to a suit agree to refer matters in dispute to arbitration without the intervention of the Court and subsequently accept the award, such acceptance is an adjustment within the meaning of rule 3, Order XXIII.

Rukhanbai v. *Adamji Sheikh Rajbhai*, 33 B. 69; 10 Bom. L. R. 366; 1 Ind. Cas. 622, followed.

Mr. *J. R. Dass*, for the Appellant.

Mr. *McDonnell*, for the Respondents.

JUDGMENT.

HARTNOLL, J.—C. T. A. Annamalay Chetty sued K. M. T. T. Shanmugam Chetty and A. R. S. Sathappa Chetty for dissolution of partnership and the other usual reliefs consequent on such a decree being passed. In the course of the suit and without any reference to the Court, the parties referred the matters in dispute to arbitration on the 27th April 1910. The arbitrators duly made an award on the 23rd May 1910. From the 29th April 1910, adjournments were given by the Court as there was a prospect of settlement. On June 14th, Shanmugam's Counsel presented an application stating that the case had been referred to arbitration, and that an award had been passed and asking for time to file the award for a decree in accordance with its terms. The Judge noted that Annamalay's Counsel admitted that there was an award but objected to its being filed, because the matter was referred to arbitration without the leave of the Court as required by the provisions of the second Schedule of the Civil Procedure Code. Sathappa's Counsel also objected on the same ground. The learned Judge allowed the objections and ordered a preliminary decree to be drawn up in the terms of Form 21, Appendix D, to the Code with certain modifications. Then on July 1st, an application was made by Shanmugam for an order of an adjustment under the provisions of Order XXIII, rule 3 of the first Schedule to the Civil Procedure Code. The application set out that the parties had referred the matters in dispute to arbitration, that such were finally settled by an award of the 23rd May, that Shanmugam had complied with the award by handing over to the arbitrator all the documents, jewellery and other properties which the other parties were entitled

to receive in accordance with its terms except a sum of Rs. 2,600, which was by the award to be paid on the 23rd June and that the arbitrators had handed over to the other parties whatever Shanmugam had handed over to them, that this took place on the 23rd and 24th May and that before and on the 23rd June, Shanmugam had offered to pay the Rs. 2,600 to the other parties who had refused to accept it. The learned Judge heard Counsel on the application and dismissed it. From that order of dismissal, this appeal has been laid. It was objected at the hearing that the order that should have been appealed from was the order of the 14th June which directed the drawing up of a preliminary decree and so that this appeal does not lie. The order directing the drawing up of the preliminary decree was not based on a consideration of any application under Order XXIII, rule 3. The application then before the Court was for time to file an award, which application was objected to. I am not prepared to hold that it was not within the power of the appellant to file an application for an adjustment under Order XXIII, rule 3, subsequent to the order directing the drawing up of the preliminary decree and if it was within his power, it had to be adjudicated on and an appeal would lie from such adjudication. I cannot, therefore, hold that this appeal does not lie.

In order to assist us to arrive at a decision as to whether an order of an adjustment should be made under Order XXIII, rule 3, the following cases were brought to our notice, *Pragdas Sagurmall* v. *Girdhardas Mathuradas* (1), *Ghulam Khan* v. *Muhammad Hassan* (2), *Tincowry Dey* v. *Fakir Chand Dey* (3) and *Rukhanbai* v. *Adamaji Shaik Rajbhai* (4). It seems to me that the matter must be decided on a consideration of the terms and meaning of Order XXIII, rule 3, apart from the consideration of the provisions of the Code which relate to references to arbitration. It is not asked now that any of the provisions relating to arbitration be applied. Order XXIII, rule 3, is as follows:—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as relates to the suit." Now, the agreement to refer the matters in dispute to arbitration certainly did not finally settle the suit. It only was a means towards that end. Again, the award following on the agreement, to my mind did not adjust the suit within the meaning of Order XXIII, rule 3. Taken by itself, it was merely an award by arbitrators and not an agreement between the parties. Taken in conjunction with the agreement it cannot be said to form an agreement, between the parties. It was certainly open to any of the parties to refuse to be bound by the award for any good reason such as corruption and misconduct of the arbitrators. But, if the parties did accept the award, then, I think, that such acceptance would come within the meaning of Order XXIII, rule 3. The acceptance by the parties of the award would mean that they agreed to be bound by its terms, or that they agreed to compromise in accordance with its terms. This view is in accordance with that of Beaman J. in the case of *Rukhanbai* v. *Adamji Shaik Rajbai* (4). The appellant alleges here that the respondents did accept and agree to the award. Whether they did or not has not been required into.

I would, therefore, fix the following issue:—

"Did respondents agree to refer the matters in dispute to arbitration and did they subsequently accept the award of the arbitrators ?"

This issue should be tried and a finding on it should be recorded by the District Judge and the proceedings with his finding thereon should be re-submitted to this Court in due course

Fox, C. J.—I concur.

Case remanded.

(1) 26 B. 76; 3 Bom. L. R. 431.

(2) 29 C. 167; 29 I. A. 51; 25 P. R. 1902; 12 M. L. J. 77: 4 Bom. L. R. 161; 6 C. W. N. 226.

(3) 30 C. 218; 7 C. W. N. 180.

(4) 33 B. 69; 10 Bom. L. R. 366; 1 Ind. Cas. 622.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 133 OF 1912.
May 1, 1912.
Present:—Mr. Justice Holmwood and
Mr. Justice Imam.
EMPEROR
versus
MOTI LAL CHANDER AND ANOTHER—
APPELLANTS.

Excise Act (V, B. C. of 1909), ss. 2 (14), (20), 9 (2), 10, 46, 52, 55, 57—Exciseable liquor, meaning of—Tinctures, whether liquor—Prevention of smuggling of drugs prepared in French territory, how to be effected—"Juice drawn from any cocoanut," meaning of—Taking order for foreign goods, whether constitutes abetment of transport.

The definition of "Exciseable liquor" given in the new Excise Act (V B. C. of 1909), prevents chemists and vendors of drugs selling intoxicating liquors or otherwise dealing with them as medicinal preparations.

Tinctures of Cinchona, Cardamom or Ginger and Spirits of Nitric Ether are not exciseable liquor.

The smuggling of drugs prepared in French territory with French spirits in Bond into British territory can be prevented under the customs law. Therefore, those articles ought to be dealt with by the Customs Authorities; but the omission of these authorities to do so does not render the accused liable to punishment under the Excise Act.

"Juice drawn from any cocoanut" in section 2, clause 20, of the Excise Act, does not refer to the milk of the cocoanut itself but means the juice of the palm tree of whatever species and not its fruit.

The act of taking an order for foreign goods does not constitute an abetment of their transport, though it might be an abetment of their import.

Gonesh Chundra Sikdar v. *Queen-Empress*, 24 C. 157, is good law.

Appeal against the order of the Second Presidency Magistrate, dated January 25th, 1912.

Mr. *J. N. Roy* and Babus *Manmotha Nath Mukherji* and *Probodh Chandra Chatterjee*, for the Appellants.

Mr. *P. L. Roy* and Babu *Jatindra Mohun Ghosh*, for the Crown.

JUDGMENT.—This is an appeal from the judgment and sentence of the second Presidency Magistrate of Calcutta, who has convicted the appellants, Mati Lal Chandra and Promotha Lal Chandra, of transporting exciseable articles from Chandernagore to Calcutta under section 46, Act V of 1909, and of being in possession of exciseable articles knowing the same to have been unlawfully imported under section 52 of the same Act read with section 55 of the Act and sentenced them both under section 57 to a fine of Rs. 1,000 each or in default one month's rigorous imprisonment.

The facts are as follows:—There is a manufactory of drugs known as the Indian Pharmacy Co., situate in French territory at Chandernagore within the compound of the Distillery of the French Government. This factory is ostensibly owned by a lady, named Giribala Dassi, widow of the gentleman who originally started the business.

The accused persons are her nephews and the first is a Pleader at Hughly, the second a clerk in the office of the Director of Commercial Intelligence in Calcutta. Their family house is at Chandernagore, but they seem to habitually reside in Calcutta. For the purposes of this case, we may take it on the evidence, though the appellants disputed this, that these gentlemen both have an active interest in the management of the Chandernagore business. On the 29th August 1911, the accused No. 2 received an order from Messrs. B. K. Paul, large wholesale and retail druggists in Calcutta, for three cases of tinctures consisting of 25 one pound bottles of each of (1) Tincture of Cinchona, (2) Tincture of Cardamom, (3) Spirits of Nitric Ether, (4) Tincture of Ginger. This order is Exhibit B in the case and is of some importance. It is headed "Indian Pharmacy"; it is on a printed Invoice slip of B. K. Paul & Co., and it says "Please supply" the tinctures already mentioned and is signed B. K. Paul & Co., admittedly by one Haridhan Nag, P. W. No. 2, who is Manager and Superintendent of the godown and signs for Messrs. B. K. Pal.

On the 2nd September, a Saturday, one Tarini Charan Mukerjee, alleged by the prosecution to be the Sircar of the Indian Pharmacy, conveyed the three cases from Chandernagore to Howrah where they were consigned to him and took them thence in a carriage to Messrs. B. K. Paul's godown at 16, China Bazar Lane, and delivered them to the Manager. The same evening a letter was received from the 2nd accused, Exhibit 2, which is also of great importance and runs as follows:—

EMPEROR *v.* MOTI LAL CHANDER.

"Re your order of 29th August 1911. The medicines of the above order have been despatched under your instructions. Please order them to be opened and counted." Then follows an interpolation "in presence of our agent" in smaller writing and different ink but we have no reason to doubt it is in the same handwriting, *viz.*, that of P. L. Chandra.

The letter goes on: "The order of the 29th ultimo will be attached to the Bill when it will be presented to you afterwards, as is the custom with you and elsewhere. But it is impossible for us to attach it with our invoice as it has never been the practice with you or anywhere. Hope you will do what is needful." From this, it would appear that some message, oral or written, had been sent by Messrs. B. K. Paul to the 2nd accused.

On the 5th September, the two accused came to B. K. Paul's shop as they say to discuss prices for a contract for which they were tendering as Messrs. B. K. Pal expected to get a large order from the Government of the U. P. or the Punjab. The correspondence seems to show it was connected with Oudh but this is immaterial. An Excise Officer saw them enter the shop and leave again for the godown at China Bazar. He informed Mr. Wilson, the Excise Officer, who had long been on the look out for these Chandernagore medicine sellers and he went to the godown and says that he found them sitting at a table with price lists, one of which is Exhibit 1, before them, and the three boxes of medicines, two closed and one open. The letter Exhibit 2 and the *challan* Exhibit 3 and other documents, Exhibits 4 and 5, were found on the table. He made a search-list Exhibit 6 and seized all the articles. Upon this evidence, the accused have been acquitted of importing exciseable articles but convicted of transporting and possessing the three cases of medicines in question.

The points raised in the appeal by the defence are: (1) That these tinctures are not exciseable articles. (2) That the accused are not proprietors of the Indian Pharmacy nor its agents. (3) That T. C. Mookerjee is not their Sircar but the agent of Messrs. B. K. Paul or at least became so as soon as the goods were delivered to him for conveyance to them under a completed contract of sale. (4) That the possession proved in this case at the time of seizure is the possession of B. K. Paul & Co., and not the possession of the accused. (5) That to prove transport, you must prove direct connection of the accused with the act of transport.

The first point gives rise to a question of law which is of extreme difficulty and importance but in the view we take, it is not necessary to the decision of this appeal. In Act VII of 1878 (B. C.), exciseable articles are defined as including spirituous and fermented liquors and intoxicating drugs as defined by this Act.

Fermented liquor includes malt liquor of all kinds, *tari*, fresh or fermented, *pachwai*, diluted or undiluted, and any other intoxicating liquor which the Local Government may from time to time declare to be included in this definition.

Spirituous liquor includes any spirituous liquor imported into India or manufactured in India by any process of distillation.

Now, in the case of *Gonesh Chundra Sikdar* v. *Queen-Empress* (1), Macpherson and Banerjee, JJ., held that "spirituous liquor" in section 53 of the Act is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. The case would be different if alcohol was manufactured separately for the purpose of being used in the preparation of a medicine.

They point out that the term "spirituous liquor" is not defined in the Act. What is given as the definition of the term is, strictly speaking, no definition at all. It merely says "spirituous liquor includes, etc.," as above. But we observe that the medicinal preparation there under consideration was manufactured from *gur* or treacle mixed with other ingredients used for medicinal purposes. The Judges say the case would have been different if the accused had been found manufacturing alcohol or spirits separately for the purpose of being used in the preparation of a medicine. But what was found to have been manufactured in that case by the processes of fermentation and distillation is not alcohol or spirit separately, but the compound substance, the medicine, at once.

(1) 24 C. 157.

Again, in an unreported case, the judgment in which is filed with the record before us. Criminal Revision No. 180 of 1892, O'Kinealy and Ameer Ali, JJ., held that spirits of wine sold by a chemist for medicinal purposes was not liable under the Excise Act. They rely on section 66 of that Act and then they say that rectified spirits of wine is a drug largely used in making up other drugs, and if a chemist sells it *bona fide* as a medical drug and as a medical drug only, he is not liable. In the case before us, the articles are tinctures prescribed by the British Pharmacopœia and there is no doubt as to their being *bona fide* medicinal preparations. Now, in the new Excise Act, B. C., Act V of 1909, a definition of liquor has been given and "exciseable article" has been defined as any liquor or intoxicating drug as defined by or under this Act. We have nothing to do with intoxicating drugs and have only to see what the definition of liquor is and that definition runs as follows: Liquor means intoxicating liquor, and includes spirits of wine, spirit, wine, *tari*, *pachwai*, beer, all liquid consisting of or containing alcohol and any substance which the Local Government may, by notification, declare to be liquor for the purposes of this Act.

It will be observed that the only defining words in this clause are "Liquor means intoxicating liquor" and the rest of the clause is open to the observations made by the Judges in *Gonesh Chandra Sikdar's* case (1). That the clause covers spirits of wine which is in itself, apart from its medicinal use, a liquor which can be drunk as an intoxicating liquor, there can be no doubt and the decision in the unreported case we referred to above has, therefore, been clearly overruled. But that *Gonesh Chandra Sikdar's* case (1) is no longer good law is not so clear. To be an exciseable article liquor must be intoxicating liquor and the enumeration of all the liquids that follow does not make them liquor unless they are intoxicating. Now, none of these drugs before us could conceivably be used as an intoxicating liquor. The poisonous drugs they contain would kill a man long before he had taken a sufficient quantity of alcohol to intoxicate him and we can hardly think that the Legislature can have intended to penalize the use of a beneficent drug like Sweet Spirits of Nitre, which has saved the lives of thousands of children and is the basis of all the most efficient fever mixtures in this country, where malaria is the greatest scourge. The real object of this prosecution is to prevent smuggling of drugs prepared in French territory with French spirits in Bond into British territory. This can be effected under the customs law; it is idle to urge that the Government cannot afford to keep up a customs station if necessary on the French frontier.

As a matter of fact, it would be wholly unnecessary inasmuch as there is a Customs establishment at Hughly and the Station Master at Chandernagore, which station is in British territory, could be empowered to detain all articles exported from French territory, just as local Post Masters are empowered in respect of the parcel post, and have them examined, if suspected to contain articles liable to duty. It so happens that the customs duty on drugs containing alcohol is exactly the same as that levied on exciseable articles. The matter being *res integra*, we should be inclined to hold that the meaning of the Legislature in amending the Act was to prevent chemists and vendors of drugs selling intoxicating liquors or otherwise dealing with them as medicinal preparations.

It, in effect, says you shall not sell brandy or gin or other intoxicating spirits because they are included in the British Pharmacopœia under the name of Spiritus Vini Gallici or Spiritus Juniperi, etc., nor shall you by merely mixing a little cinnamon or other harmless medicament with spirits palm off an exciseable article as a *bona fide* medicine, and as one instance you shall not sell that exceedingly dangerous intoxicant, rectified spirits of wine, as a medicine without a license, or transport it without a permit.

The argument that unfermented *tari* is not an intoxicating liquor does not help the prosecution inasmuch as that was also an exciseable article under the old Act, and as it is impossible to say when it may become intoxicating by a natural process of fermentation over which the owner has no control, the Legislature has very rightly declared it to be an intoxicating liquor from the first, as it is undoubt-

edly a potentially intoxicating liquor in its nature.

A rather curious argument which was adduced by the prosecution may be glanced at here since it may be re-produced in other cases unless disposed of once for all.

This is that "Juice drawn from any cocoanut" is mentioned and the astounding argument is put forward that this refers to the milk of the cocoanut itself whereas it is obviously to be read with the word "tree" the words being any cocoanut, palmyra, date or other kind of palm tree, and means the juice of the palm tree of whatever species and not its fruit.

A much stronger argument is derivable from the fact that "denatured spirit" is treated as an exciseable article and is subject to duty under the Act. "Denatured" means effectually and permanently rendered unfit for human consumption. But it may be that "denatured spirit" is only exciseable by virtue of the notification which makes it liquor. It certainly is not intoxicating liquor and would not be exciseable but for the special notification. Had it been necessary for the decision of this appeal to come to a finding whether all drugs, *bona fide* prepared in accordance with the British or other recognized pharmacopœias, were exciseable merely because alcohol is used in their preparation, we should have felt it our duty to refer the question to a Full Bench in this form:—"Does the change in the law enacted in Act V, B. C. of 1909, make the decision in *Gonesh Chandra Sikdar* v. *Queen-Empress* (1) no longer sound law?"

The argument that the notifications of the Board treat all spirits used in the preparation of drugs as exciseable articles has no force.

If the law is as we have above indicated, those notifications would be *ultra vires* if they said that the spirit found in the prepared drugs rendered the drugs themselves exciseable. But they are careful to say nothing of the kind.

In the notification under section 4, a new clause (*h*), dated 6th January 1911, says that perfumed spirits and spirits used in drugs, medicines or chemicals, whether manufactured in India or imported from foreign countries, shall be taxed (if liable to taxation) as foreign and not as country liquor.

This cannot affect the question though it may indicate that the Board of Revenue takes a different view of the law to what we do. That this is so is patent from a letter on the record from Personal Assistant to the Excise Commissioner pointing out, in answer to a question from the Indian Pharmacy, that all their tinctures are liable to excise duty when imported into British India unless they can prove that the spirit used is foreign liquor and has paid the full duty imposed thereon by the Indian Tariff Act or the Bengal Excise Act. But this is rather discounted by another letter from the same gentleman to the Collector of Hughly in which he says that the Ipecacuanha Wine and Tincture of Bryonia, manufactured by Moti Lal Chandra of Chandernagore, are proved by analysis to be of a strength of 100·38, 54 or 61·46 U. P. and 6·40 U. P. respectively and that they are, therefore, spirits and not medicines.

This seems to admit that if they were *bona fide* medicines, as the articles in this case admittedly are, they would not be liable.

Then, there is the notification under section 19 imposing certain rates of duty upon spirits used in drugs, medicines, etc., which is Rs. 7-13 per proof gallon. This does not either affect the question. The spirits are undoubtedly exciseable but the finished drugs are apparently, in the view we have expressed, not so. About 3 annas 6 pies would have to be laboriously collected on each bottle of tincture after analysis and the duty would be impossible to collect. The procedure adopted in the firm of Messrs. David Waldie, who have a manufactory of drugs similar to the French one in British territory at Serampore, has been described to us at our request by the learned Counsel, Mr. P. L. Roy, for the Crown. We must here express our full appreciation of the very able and exhaustive way in which he dealt with the legal difficulties that arise in this case and the great help he gave us in elucidating them. It appears that the spirits used by them go up in bond so that no customs duty is paid, but Messrs. Waldie, by arrangement with Government, pay excise duties on the finished tinctures on a declaration which Government accepts that so much spirit goes to each gallon of tincture. This arrangement is, no doubt, convenient with a large firm having a permanent location at a British Excise head-

quarter but it does not show that the finished drugs are exciseable articles. It only shows that by special engagement, Messrs. Waldie & Co. pay the duties on the spirits used after the drugs issue from their factory and not before as they are liable to do. Obviously, this could not be done in the case of a small retail trade or of small imports from foreign territory made at odd times.

In the latter case, the Customs must intervene and this brings us to the contention which Counsel for the Crown necessarily had to make that the decision of the learned second Presidency Magistrate was erroneous when he held that the accused could not be convicted of importing. The learned Magistrate bases his contention, quite rightly in our opinion, on the wording of section 9, sub-section (2). It is argued that the words "was liable on imporation to duty" import the condition that the duty has been paid. But as the Magistrate points out, there is a clear distinction between imports and articles exported or transported. The customs are supposed to look after imports of non-exciseable articles and articles which are subject both to customs and excise.

If such articles escape the Customs, they can be dealt with by the Excise Authorities either in transport or when an attempt is made to export them, but the excise duty on imports does not apply to articles that are liable to a similar duty in the customs. In other words, two import duties cannot be charged and it is not the business of the Excise to inquire whether customs have been paid until transport begins and the Inland Revenue is affected.

It is perfectly clear that these articles ought to have been dealt with by the Customs Authorities but because this was not done, the accused are not thereby rendered liable to punishment under the Excise Act. As regards the exemptions notified under section 90 of the Act, it is clear that the Board intended to exempt only such articles as had paid duty under section 10 and wished to take powers to tax the spirit contained in tinctures which had not already paid duty. There is no doubt that such spirit can be taxed in transport or export but that does not make the drugs exciseable articles. Supposing the alcohol had been destroyed or masked by some chemical process in making the drug, it is clear from the wording of all the notifications that it is separated spirit and not the combined drug that is exciseable. If, as we are inclined to hold, these drugs are not exciseable articles, the Customs are the only authority that can deal with them. But assuming for the purposes of this case that they are exciseable articles, we have now to see whether the present accused can be said to have transported them and whether at the time of their seizure at 16, China Bazar Lane, they were in the possession of the accused. We think both these questions must be answered in the negative.

Section 46 says "if any person transports" and section 55, which is the section relied on to make the owner or person interested liable by implication, only applies to manufacture, sale or possession. It does not apply to import, transport, or export. It is section 56 which makes the holder of a license, permit or pass liable for the misconduct of his servant or agent in matters of import, transport or export and it is not contended that the accused are the holders of licenses, permits or passes. The persons actually engaged in the transport are the Manager, Siddeshwar, who ordered it and the Barahmin, Tarini Charan Mookerjee, who carried it out. It is faintly suggested that accused No. 2 might be charged with abetment of transport inasmuch as he took the order for the supply of the goods. But, to begin with, that is not what he is charged with, nor does the act of taking an order for foreign goods constitute an abetment of their transport though it might be an abetment of their import.

We do not think that the evidence is at all sufficient to make out that this Tarini Charan Mookerjee was a servant in the employ of the Indian Pharmacy, though he may have been a person acting on behalf of Siddeshwar, the Manager, and of B. K. Paul & Co. as a kind of go-between in this illicit trade.

It is in evidence that this Tarini Charan Mookerjee only personally conveyed goods to B. K. Paul & Co., though he countersigned the consignment notes addressed to other firms.

Now, the consignor being in French territory and not coming to the station himself to forward the goods, it is the practice of the Railway not to accept his signature on the consignment bill unless it is counter-signed

by some person who knows him. The counter-signature of his own servant would obviously be of very little value to the Railway Company and it must, therefore, be held that the Railway authorities regarded him as an independent witness not in the sole employ of the Indian Pharmacy. It is clear that B. K. Paul & Co. alone derived benefit from this importation without duty from French territory. They had been carrying it on for some years and their managers must be regarded as accomplices. We cannot, therefore, place any reliance on their unsupported statements that T. C. Mookerjee was the Sircar of the Indian Pharmacy, which, they aver, they learnt from the accused themselves. The evidence of the Deputy Inspector of Excise, Hem Chander Banerjee, who was employed to watch accused No. 2 and saw him in a number of Chemists' shops canvassing his wares, is clear that he does not remember any other shop than B. K. Paul's that was supplied through T. C. Mookerjee. For the same reason, we cannot accept their evidence that delivery had not been taken of the goods which form the subject-matter of this case, and that the price of this consignment was still under discussion and a dispute still going on as to the presentation of the bill. The evidence is half-hearted and inconsistent and it is perfectly clear from the admissions made that the discussion of prices that Mr. Wilson found going on, was with regard to the proposed tender for a large order by an up-country Government and that accused said they could execute it at a lower rate than that quoted by other firms, or in their own price lists if a large quantity was ordered.

Their price lists had been with B. K. Paul & Co., for years and there is no evidence that they had ever been disputed. They had ordered the goods, and accepted them and were in possession both in law and fact. The mere presence of an agent of the seller to see that the goods are in order when opened does not keep the sale uncompleted. It is a common practice for wine merchants to indemnify their customers for bottles broken in transit but that does not prevent the property passing to the consignee when delivery has been taken. We find on the evidence that the accused were not in possession, either actual or potential, of the incriminating articles.

That being so, the convictions and sentences must be set aside and the fines, if paid, must be refunded.

Accused acquitted.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 52 OF 1912.

April 13, 1912.

Present:—Mr. Justice Chevis.

SAMANDA—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *ss.* 110, 439—*Bad livelihood, security for—Proof.*

The following circumstances are not sufficient to place a person on security under section 110 of Act V of 1898, especially where these circumstances are shown to have occurred about a year after dismissal of that person's complaint of bribe-taking against two Police Sub-Inspectors of the *Ilaqa* in which he lives:—

(1) Two successful searches of his house.

(2) His having been seen in the company of some suspected persons none of whom has ever been convicted of theft.

(3) Allegations of some *Safedposhes* and *Lambardars* to the effect that people of their villages know him to be a *badmash*, while no one has ever suspected him in a theft case.

Petition for revision, under section, 439 of the Criminal Procedure Code, of the order of the District Magistrate, Ferozepore, dated 20th October 1911.

Mr. *Nihal Chand*, for the Petitioner.

JUDGMENT.—The petitioner, Samanda, has been ordered by the District Magistrate to find two sureties for Rs. 500 for good behaviour for three years, or to undergo three years' simple imprisonment.

The Sub-Inspector speaks of two cases, one a case in which one Sardara was the person named as suspected, but in which the petitioner's house was searched (this was in July 1911), and the other in which one Gahna was suspected and it was said that Gahna had been seen with petitioner one day before the offence, and it was also said that Ghana's brother, Dhera, lived with petitioner, (this is a recent case).

Some *Lambardars* and *Safedposhes* depose that petitioner's house has been twice searched. One says he has seen Sardara and Dehra

in company with petitioner. The *Lambardars* also say that the people of their villages know petitioner to be a *badmash*.

It is to be noted that in May 1910, a charge brought by Samanda and another against two Sub-Inspectors of receiving bribes was dismissed by the District Magistrate.

The present evidence is, in my opinion, quite insufficient to warant security being demanded. No complainant seems ever to have named the petitioner as suspected. Though his house has been twice searched by the Police since the above charge of bribe taking was dismissed, nothing of a suspicious character seems to have been found. He is alleged to have been seen in company with Sardara and Dhera, but it is not shown that either of these persons has ever been convicted. Several of the prosecution witnesses seem to have very little personal knowledge of the petitioner; *e. g.*, Gharib Khan says he knows petitioner by sight. If the Police search a man's house, whenever a theft occurs, no doubt uncharitable people will come to the opinion that the man is a bad character, but something more is wanted than a couple of unsuccessful searches and vague allegations of bad livelihood.

I accept this application and set aside the order of the District Magistrate and cancel the security.

Petition accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 453 OF 1911.

December 19, 1911.

Present:—Mr. Piggott, J. C.

HARI PADO MOZAMDAR, THROUGH DEPUTY COMMISSIONER, RAE BARELI—APPLICANT

versus

LACHMI NARAIN MARWARI—OPPTSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—High Court, jurisdiction of—Extension of the period of sanction to prosecute—District Magistrate wishing to take cognizance of offence committed within his jurisdiction can move for extension of period of six months.

A High Court has jurisdiction to extend the period of six months for which a sanction granted by a Subordinate Court, under section 195 of the Code of Criminal Procedure, may remain in force, even though such extension is granted after the period of six months has expired.

Kali Kinkar Sett v. *Dinobandhu Nundy*, 32 C. 379, 9 C. W. N. 321; 2 Cr. L. J. 106, dissented from.

In re Muthukudam Pillai, 26 M. 190; *Karuppana Servagaran* v. *Sinna Gounden*, 26 M. 480, followed.

Where sanction to prosecute under section 195, Criminal Procedure Code, for an offence against public justice is granted to a private person and the District Magistrate, within whose jurisdiction the offence has been committed, desires to take cognizance of the offence, the latter can move the Court to extend the prescribed period of six months.

Upon a complaint being filed on the strength of the sanction as it stands, it will be for the prosecution to satisfy the Court that the sanction is not being taken advantage of by the District Magistrate against the wish or without the authority of the person in whose favour it was originally granted.

Appeal against the order of the Munsif, Rae Bareli, dated 14th November 1911.

The *Government Pleader*, for the Applicant.

Messrs. *St. George Jackson*, *Ali Ausat*, *Muhammad Afzal*, and *Shahab-ud-din*, for the Opposite Party.

JUDGMENT.—This application raises two distinct points. The first is whether the time for which a sanction granted, under section 195 of the Code of Criminal Procedure, can remain in force can be extended by order of the High Court, such order being passed after the period of six months, referred to in section 195, clause 6 of the said Code, has expired. In the case of *Kali Kinkar Sett* v. *Dinobandhu Nundy* (1), three Judges of the Calcutta High Court expressed the opinion that the time cannot be extended when it has expired. The point was not essential to the determination of the case then before the Court; the Honourable Judges do not discuss it at any length and give no reason for their view beyond expressing the opinion that when the time has expired, there is nothing to extend. In the present case, the order of sanction was passed on the 22nd of December 1910. On May 10th, 1911, while that order was still in force, this Court passed a formal order staying all proceedings under the said sanction. The application in revision, in the course of which this stay-order was passed, was not disposed of until August 17th, 1911, by which time the period of six months reckoned from the 22nd of December 1910 had expired. There has been no unreasonable delay in bringing this matter before this Court;

(1) 32 C. 379; 9 C. W. N. 321; 2 Cr. L. J. 106.

what the complainant did was to move the Court, which originally granted the sanction, to extend the time or to give him a fresh sanction, and this he did by an application presented on the 5th of September 1911.

That application was eventually dismissed because the Court concerned was of opinion that under the provisions of section 195, clause 6, this Court alone had jurisdiction to pass any order which would have the effect of extending the period of six months for which a sanction once granted can remain in force. I think the view taken by the learned Munsif of Rae Bareli is substantially correct. I do not desire to pronounce any opinion as to whether it might not be lawful, under certain circumstances, for a Court to grant a fresh sanction to prosecute upon an application made by a different person, after a sanction granted in favour of the person, who first applied for the same, had been permitted to lapse. If, however, a subordinate Court were held competent at any time to grant a fresh sanction in favour of the very same person who had already received an order of sanction, which he had permitted to lapse by reason of his not availing himself of the same for a period of six months, it is obvious that the purpose of the proviso to section 195, clause 6 of the Code of Criminal Procedure, would be defeated. The object of that proviso is that a person, who has once obtained an order of sanction from a competent Court, must avail himself of the same within six months, unless he can obtain from the High Court, for good cause shown, an order extending the time. The Legislature has seen fit to reserve to the High Court alone the question of the propriety of granting such extension, and the learned Munsif was undoubtedly right in declining to pass any order which would have the effect of nullifying this reservation. With all respect to the learned Judges of the Calcutta High Court, I am of opinion that their decision proceeds upon too strict and technical an interpretation of the words "extend the time." I have before me an order of sanction, dated December 22nd, 1910, which would remain in force under the law up to the 22nd of June 1911. The Legislature has left it entirely to the power and discretion of this Court whether or not the period for which this order of sanction remains in force shall be extended beyond the second of these dates. It has nowhere limited the power of the High Court by saying that such order of extension must necessarily be passed before the period of six months has expired. In this particular case, the period prescribed by law expired at a time when no action could have been taken under the sanction by reason of this Court's stay-order of May 10th, 1911. In passing that stay-order, this Court virtually assumed responsibility for seeing that no consequences prejudicial to the interests of justice resulted from the same. In finally disposing of the application for revision on August 17th, 1911, the learned Judicial Commissioner expressly found that it was very desirable that Lachmi Narain, the opposite party in this case, should be placed on his trial under section 209 of the Indian Penal Code.

The circumstances of this case are peculiar, and I am satisfied that the long delay, which has taken place before the institution of the prosecution, which this Court considered to be very desirable, has been due to the proceedings taken by Lachmi Narain himself to contest and impede the action of the Courts at every possible stage. Authority against the ruling of the Calcutta High Court is to be found in the two Madras cases from which that Court expressly dissented, namely, *In re Muthukudam Pillai* (2) and *Karuppana Servagaran* v. *Sinna Gounden* (3). I am content to follow those rulings and to hold that it is within the jurisdiction of a High Court to pass an order extending the period of six months, for which a sanction, granted by a subordinate Court under section 195 of the Code of Criminal Procedure, may remain in force, even though such order be passed after the period of six months has expired.

The other point raised before me is that the present application is not one presented by or on behalf of the person in whose favour the order of sanction, dated December 22nd, 1910, was passed. As I have already remarked, the circumstances of this case are peculiar. The offence alleged is that of fraudulently or dishonestly making a false claim in a Court of justice under section 209 of the Indian Penal Code. The claim in question was a suit brought by a resident of the Rae Bareli District against a resident of Calcutta. After this suit had

(2) 26 M. 190.
(3) 26 M. 480.

been withdrawn, an application for sanction to prosecute was duly made by the defendant against whom the suit had been brought. It is clear, however, that the matter came at an early stage under the notice of the District Magistrate of Rae Bareli, who saw reason to believe that an offence against public justice had been committed within his jurisdiction and that he ought to interest himself in the prosecution of the said offence. At certain stages in the proceedings, the original applicant for sanction was represented by the Government Pleader of the Rae Bareli District, who was also acting under instructions given him by the Deputy Commissioner of the District in his capacity of District Magistrate. At the hearing of the application for revision, which was disposed of by this Court's order of August 17th, 1911, the learned Government Pleader for Oudh appeared to oppose the application under instructions from the District Magistrate, and did not even think it worth his while to place on the record the power-of-attorney, which he held on behalf of Hari Pado Mozamdar, though I am informed and am satisfied that he in fact held such a power-of-attorney. The application, made to the Court of first instance on September the 5th, 1911, was presented on behalf of Hari Pado Mozamdar by Babu Janki Prasad, Government Pleader, on the strength of the power-of-attorney with which he was furnished at the time the original application for sanction was filed, though the said Government Pleader was also acting under instructions from the District Magistrrte. I think it probable that some difficulties might have been avoided if the District Magistrate had seen fit to apply in his official capacity for a fresh sanction in his own favour, or to move the Court concerned to take action under section 476 of the Code of Criminal Procedure. Nevertheless, as the case now stands, I am not satisfied that the matter is not properly before me, or that I am bound further to delay these proceedings upon purely technical grounds. The position is this:—The District Magistrate of Rae Bareli desires to take cognizance of an offence against public justice which he sees reason to believe has been committed within his jurisdiction. He is debarred from doing so by reason of the first clause of section 195 of the Code of Criminal Procedure. He knows that a sanction to prosecute which would remove this bar has been granted by a competent Court, but that this sanction is no longer valid unless an order extending the prescribed period of six months can be obtained from this Court. I think that he is not outside his jursdiction in moving this Court to extend that period, whether it be said that he does so in his official capacity, or that he is acting on behalf of the original applicant for sanction. Upon a complaint being filed on the strength of the sanction as it stands, I agree with the learned Judges, who decided the case of *Jogendra Nath Mukerjee* v. *Sarat Chandra Banerjee* (4), that it will be for the prosecution to satisfy the Court that this sanction is not being taken advantage of by the District Magistrate against the wish or without the authority of Hari Pado Mozamdar in whose favour it was originally granted. This is a possible difficulty which might perhaps have been avoided if the District Magistrate had adopted one of the other courses which I have suggested; but as the matter now stands before me, I can only accept or reject the application made for extension of the time allowed in respect of the original sanction of December 22nd, 1910. For the reasons given, I hold that I have authority to extend that period, and that I have jurisdiction to do so on the application as it now stands before me. A reasonable period to allow would, in my opinion, be a period of six months from the 17th of August 1911, the date on which Lachmi Narain's application in revision was dismissed by this Court. I accordingly order, under section 195, clause 6, Code of Criminal Procedure, that the time allowed for the institution of a prosecution under the order of December 22nd, 1910, be, and it is hereby, extended to the 17th of February 1912.

(4) 32 C. 351; 2 Cr. L. 7. J. 78; 9 C. W. N. 2777.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 220 OF 1911.

January 23, 1912.

Present:—Mr. Drake Brock-man, J. C.

BIRDHICHAND—APPLICANT

versus

LAKHMICHAND—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 256, 257—Warrant case—Practice—Prosecution witnesses re-called for cross-examination—Case postponed to suit convenience of Court—Accused not liable for expenses of witness—Accused when to be called on to enter on his defence.

Where an accused person seeks to exercise the right given by section 256, Criminal Procedure Code, of re-calling prosecution witnesses for cross-examination, he cannot legally be required to deposit the expenses likely to be incurred by the witnesses who attend for such cross-examination.

Iswar Chunder v. *Kali Kumar*, 4 C. W. N. 351 and *Amin Chand* v. *King-Emperor*, 12 P. R. 1907 Cr.; 32 P. W. R. 1907 Cr.: 6 Cr.L.J. 339; 45 P.L.R. 1908, followed.

Where, in order to suit the convenience of the Court or for reasons connected with the discharge of public business, the witnesses for the prosecution are allowed to leave before a charge is framed or the right conferred by section 256 exercised, they must be required to attend again and ordinarily any expenses which may be allowed them on this score should be paid by Government in warrant cases.

In warrant-cases, the hearing should be continued from day to day until the prosecution witnesses have been cross-examined by the accused; and the witnesses should not be discharged until the Court has ascertained whether their cross-examination after the charge is desired.

An accused person should not be called on to enter on his defence before he has cross-examined the witnesses for the prosecution who are in attendance.

Revision against the order passed by the Magistrate, 1st Class, Nagpur, dated the 21st September 1911.

Dr. *H. S. Gour*, for the Applicants.

Mr. *G. V. Deshmukh*, for the Non-Applicant.

JUDGMENT.—The case, out of which this application arises, has already been before this Court which, on the 28th November last, refused to transfer it from the Court of Khan Sahib Elijah Jacob: see Miscellaneous Petition No. 27 of 1911.

The present applicants were prosecuted on a complaint for defamation, an offence punishable with imprisonment for two years. By reason of the definition of "warrant-case" in section 4 (*w*), Criminal Procedure Code, their trial is governed by Chapter XXI of the Code. The examination-in-chief of the complainant's witnesses concluded on the 15th August 1911. The Counsel for the defence then desired to cross-examine those witnesses, but the Magistrate considered it doubtful whether permission to do so should be granted at that stage and adjourned the hearing to consider the point. At the next hearing, the Counsel did not appear at the beginning of the day, and one of the accused briefly cross-examined one witness only. The Magistrate declined to wait for the Counsel, so the cross-examination ceased, the accused were examined and all were charged with having defamed the complainant. The accused were next asked if they wished to cross examine any witnesses for the prosecution and replied in the affirmative. Their Counsel then appeared and partly cross-examined one witness. The hearing was then adjourned to the 19th September, the Magistrate having been sent for by the Deputy Commissioner. On the 19th September, the parties asked for a day's time as a compromise was in contemplation. The next day, though the witnesses for both sides were in attendance, the Magistrate announced his inability to take up the case on any day in September and fixed the 30th October for the next hearing, directing also that all witnesses in attendance should be bound over to attend on that day. On the 20th September, the Magistrate further ordered orally that the accused should pay diet-money to the complainant's witnesses required for cross-examination; they paid in Rs. 76-15-0 accordingly, but, on the following day, put in an application protesting that such payment could not legally be demanded of them. The Magistrate then repeated his order and put it in writing.

The accused having moved this Court to set this order aside as unwarranted by law, the District Magistrate was called upon to show cause. He has now reported that the Magistrate acted under the mistaken impression that section 257 (2), Criminal Procedure Code, applied, whereas the section really applicable is 256.

The Magistrate's mistake appears to have been the outcome of two others, one committed by himself and the other by the accused. The former consisted in his calling on the accused to enter on their defence before they had cross-examined the witnesses for the prosecution who were in attendance. The latter appears in paragraph

2 of the application whereby the accused moved the Magistrate to recall his order of the 20th September; in that application, which is signed by a Pleader, the desired cross-examination was described as authorized by section 257, Criminal Procedure Code.

It seems to me clear that the Magistrate could not make section 257 applicable by his own illegal action in calling prematurely upon the accused to enter on their defence. There is nothing in section 256 of the Code corresponding to sub-section (2) of section 257, and it is to be observed that the latter provision covers only those cases in which summons for procuring the attendance of a witness is needed: should the witness be in Court, the obvious and proper course is to cross-examine him at once. In the present case, the Magistrate had before him the witnesses to be cross-examined, and his sole reason for postponing the process was that he had revenue cases which called more urgently for disposal. Assuming this postponement to have been justifiable on public grounds, it was, in any view of the law, unreasonable to make the accused pay for it. As authorities for the proposition that where an accused seeks to exercise the right of cross-examination conferred by section 256, Criminal Procedure Code, he cannot legally be required to deposit the expenses likely to be incurred by the witnesses, who will attend for cross-examination, I may refer to *Iswar Chunder* v. *Kali Kumar* (1) and *Amin Chand* v. *King-Emperor* (2). As explained in the latter case, the procedure contemplated by the Criminal Precedure Code for warrant-cases is that the prosecution witnesses should be examined in chief, the accused examined, the charge framed and the prosecution witnesses cross-examined at one hearing continued, if necessary, from day to day, and the said witnesses should not be discharged until the Court has ascertained whether their cross-examination after the charge will be desired. I would also refer to section 254 of the Code which makes it clear that a charge may be framed before all the evidence available for the prosecution has been recorded. Where in order to suit the convenience of the Court or for reasons connected with the discharge of other public business, the witnesses for the prosecution are allowed to leave before the charge has been framed or the right conferred by section 256 exercised, they must be required to attend again and ordinarily any expenses which may be allowed them on this score should be paid by Government. There is nothing in Chapter XXI of the Code which enables the Magistrate to demand even from a complainant the expenses to be incurred by his witnesses, though such a power is conferred by section 244 (3) where the case under trial is a summons-case.

The order complained of is illegal and is hereby set aside. The sum improperly realised from the applicants (accused) will be refunded to them by the Government.

Order set aside.

(1) 4 C. W. N. 351.

(2) 12 P. R. 1907 Cr.; 32 P. W. R. 1907 Cr.; 6 Cr. L. J. 339; 45 P. L. R. 1908.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 200 OF 1912.

April 20, 1912.

Present:—Mr. Justice Robertson.

MANI RAM—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 411—Criminal Procedure Code (Act V of 1898), s. 439—Stolen property—Defective identification—Interference in revision—Irrelevency of statement of person not examined in Court.

Where a stolen article is of ordinary make and there is nothing peculiar in it, the uncorroborated evidence of the complainant of ordinary position as to its identification is not sufficient for finding that it does not belong to the accused, specially where it has been equally contradicted by a witness on the other side.

Even a unanimous finding of fact by the lower Courts, without due regard to the evidence on the record, is liable to be set aside on revision under section 439, Criminal Procedure Code, 1898.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of Sessions Judge, Hissar Division, dated the 6th January 1912, affirming that of the Magistrate, 1st Class, Rohtak, dated the 9th November 1911, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—The weak spot in this case is the absence of any identification of any stolen property in the possession of Mani Ram.

The articles said to have been so found are a toe ring and an *arsi* or glass. The learned Sessions Judge in his judgment says: "Nothing was found with Hardwari, but out of the jewellery found in possession of Mani Ram, the complainant identified a toe ring and an *arsi* glass as his own. As to the other things, he referred them to his wife. His wife did not identify other things but she also was sure about the foot toe ring and the glass. The question is whether the statement of the *Patwari* and his wife are true and whether there was anything peculiar in these two things for identification. I have not the least doubt about the *Patwari's* statement being true. He could easily make the same statement about other things but he did not do so.

"As to the identification, the make of the ring is of a special artistic nature.

"The *Patwari's* wife being from Lucknow, the ring was of the fashion there and of the make not common in this part of the country; she could at once, therefore, identify the ring."

To my astonishment, I found that complainant's wife had not been called and that there was no evidence of hers upon the record. Yet the Sessions Judge dealt with the case as if the wife had made a statement in Court! This is, indeed, strange.

There remains nothing except the identification by Kanshi Ram of the toe ring and the *arsi*. The *arsi* appears to have been quite incapable of identification and as to the toe ring, said to be of Lucknow make, the wife of Kanshi Ram was not called to identify it though the Sessions Judge writes as if she had been and the ring is claimed as his by one Hazari.

It is quite impossible to maintain a conviction upon such very flimsy evidence as the *uncorroborated* evidence as to identification of Kanhsi Ram. I note also in regard to the claim by Hazari that the first Court said "Hazari was not produced." He was, however, produced and swears to the ring being his. It is impossible, under these circumstances, to support the conviction.

I set aside the conviction and sentence and acquit the accused and direct that he be discharged from bail forthwith.

Conviction set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 411 OF 1911.

February 21, 1912.

Present:—Mr. Piggott, J. C., and Mr. Lindsay A. J. C.

RAGHUNANDAN AND OTHERS—ACCUSED

versus

EMPEROR—COMPLAINANT.

Animal, wild, when it can be property of pursuer—Unlawful assembly, member of, lying unconscious from the outset, not charged with offence committed by others during his unconscious state—Penal Code (Act XLV of 1860), ss. 148, 149, 304.

In order to render an animal *feræ naturæ* the property of any person, there must be a complete capture, the result of which is to reduce the animal completely into possession. Mere pursuit, short of capture, will not do, and so long as it is possible for the animal to escape, it cann tobe said that there is such a reduction into possession as makes the animal the property of the pursuer. The mere fact of the accused's dog overtaking an animal and pulling it down, does not preclude the possibility of escape so as to make the animal his property.

Where it was found that *A.*, a member of an unlawful assembly, was felled to the ground at the outset and was left lying unconscious on the spot where the fight started, while the remaining members of *A.'s* party pursued the persons, one of whom had knocked *A.* down, and having overtaken them committed the offence of culpable homicide:—

Held, that *A.*, who was lying unconscious, could not be considered a member of the unlawful assembly at the time the offence of culpable homicide was committed and was, therefore, not liable to conviction on this charge.

Appeal against the order of the Sessions Judge, Hardoi, dated 17th November 1911.

Mr. *St. G Jackson*, for the Appellants.

The *Government Pleader*, for the Crown.

ORDER.—The five appellants in this case have been convicted in the Sessions Court at Hardoi of offences under sections 148 and 304/149 of the Indian Penal Code and sentenced to long periods of imprisonment. The case is a difficult one and involves several points which, for the reasons I am about to state, render it desirable that the appeal be heard by a Bench of two Judges. As stated by the learned Judge in his judgment, there appears to be no doubt that a great deal of the prosecution evidence put forward against the accused was absolutely false. The facts as found by the learned Judge appear to be as follows:—

The five accused are residents of the village of Rohilia; and it is that, on the morning of the 21st August, they were

chasing a wild deer with a dog. The deer was eventually pulled down in a field belonging to the neighbouring village of Badruddinpur, where it was despatched with *lathis* by some of the Badruddinpur men, who were working on the spot at the time. After killing the animal, it would seem that the Badruddinpur people attempted to carry off the carcass when the accused appeared upon the scene. An altercation ensued, the Rohilia men claiming that the animal belonged to them, while the Badruddinpur people wanted it for themselves. In the course of this altercation, the accused appellant, Ganga Singh, is said to have aimed a blow with his *lathi* at one of the Badruddinpur men—a man named Bija Pasi. The witnesses say that Bija warded off the blow. The next thing that happened was that Ganga Singh was felled to the ground by one of the Badruddinpur party. After he dropped, one of the accused, Pima Singh, is said to have knocked down with his *lathi* a Badruddinpur man, named Kunwar Dhobi. Both Kunwar and Bija died as the result of injuries received in this encounter. The case for the prosecution was not that Bija was wounded out in the fields where the altercation first arose. It was said that sometime after when Bija had returned to his house, a party of Rohilia men, including the accused and others, went into Bija's house in the village of Badruddinpur and hammered him to death. This story has been rejected as absolutely untrue by the learned Judge, and, in my opinion, rightly, for it is altogether inconsistent with what was observed by the medical officer who conducted the *post mortem* examination and who found only one mark of injury on Bija's head which would account for the fact of his death. So far as Kunwar Dhobi's case is concerned too, it would appear that he also bore only one mark of injury on the head—an injury which proved fatal. It may also be noted that the accused Ganga Singh was examined several days after the date of the occurrrence by the Civil Surgeon. He was then found to be still in a dazed condition and to be suffering from paralysis of the tongue. I gather from the judgment that the learned Judge was of opinion that both Bija and Kunwar received their injuries on the spot. He has convicted the five accused under section 304, read with section 149, of the Indian Penal Code, and also under section 143. I presume the charge under section 304, covers the causing of the death of both men, namely, Bija and Kunwar, though this is not expressly stated in the judgment. Mr. Jackson, who has argued the case very ably on behalf of the appellants, raises a plea of self-defence, and contends that, as the accused were acting in the protection of their property, they committed no offence. According to him, the carcass of this wild deer had become the property of the Rohilia men, who were entitled to defend it as against the theft attempted to be committed by the Badruddinpur people in carrying it off. He pleads that the animal, though *feræ naturæ*, had been reduced into possession of the accused, and was consequently property which was capable of being the subject of theft. This is a question of some nicety, though I may say I am disposed to think that the learned Judge's opinion is correct, and that the fact that the accused's dog had pulled the animal down did not constitute such a reduction into possession as made the animal the property of the accused. This is one point which I think might well be considered by the Bench. Another point of law which seems to me to deserve consideration arises in connection with the conviction of Ganga Singh under section 304 of the Indian Penal Code. The point was not raised by Mr. Jackson himself, but it struck me rather forcibly while the case was at hearing. It seems to me fairly clear that before either of the deceased men had been actually struck, Ganga Singh had been felled to the ground and was unconscious. No doubt some of the prosecution witnesses represented Ganga Singh as having got up after he fell and as having pursued Bija into the village of Badruddinpur. This story, however, is to my mind quite incredible; and, in view of the condition of Ganga Singh when he was examined five days later by the Civil Surgeon, it seems to me practically certain that Ganga Singh must have been lying unconscious on the ground after he received the blow on the skull. Turning now to section 149 of the Indian Penal Code, we find that it lays down that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly.....every person who, *at the time of the committtng of*

that offence, is a member of the same assembly is guilty of that offence. Can it be said that, in the circumstances just stated, namely, that Ganga Singh was at the time, when Bija and Kunwar or either of them was struck, lying on the ground in a helpless state, he (Ganga Singh) was, at the time when the offence under section 304 was committed, a member of the unlawful assembly? A further point may arise in this way, namely, that if it be held that Ganga Singh was not at the time in question a member of the unlawful assembly, can it be said that there was, at that particular time, any unlawful assembly at all, inasmuch as, so far as the evidence appears, the number of the persons who were originally members of it had been reduced to four? For these reasons, I certify that this case should be laid before a Bench of two Judges for decision.

JUDGMENT.—The facts of this case have been set out in the order, dated the 29th January 1912, by which this appeal was referred for decision to a Bench of two Judges. It is not necessary, therefore, to recapitulate them. We have had the whole case argued before us by Mr. Jackson who appears for the appellants and by the Government Pleader who appears on behalf of the Crown.

The first point, with which we have to deal, is a plea of self-defence which was raised on behalf of the appellants. The form in which this plea is raised is this, namely, that as it has been found by the lower Court that the deer, which the accused appellants were pursuing, had been pulled down by their dog, it had for this reason become their property so as to entitle them to act in self-defence against any attempt made by the people of Badruddinpur to remove it. After hearing the arguments on both sides, we are satisfied that this plea cannot be sustained. In order to make out a case of self-defence in favour of the appellants, it would be necessary to establish in the first place that the deer which had been pulled down by their dog had become their property. As is stated in the referring order, the animal was one *ferae naturae*; and we think that, in a case of this kind, the true rule is that in order to render such an animal the property of any person, there must be a complete capture, the result of which is to reduce the animal completely into possession. Mere pursuit, short of capture, will not do, and so long as it is possible for the animal to escape, it cannot be said that there is such a reduction into possession as makes the animal the property of the pursuer. We think that, on the evidence, there can be no doubt that in this case there was no such complete capture made by the accused appellants. No doubt, their dog had overtaken the animal and succeeded in pulling it down, but that fact by itself did not preclude the possibility of escape, and we are satisfied that the animal really became the property of the Badruddinpur people, who are proved to have despatched it with their *lathis*. We hold, therefore, that the plea of self-defence cannot succeed.

The next point which we have to consider is the propriety of the conviction of the appellant, Ganga Singh, under section 304, read with section 149 of the Indian Penal Code. We have come to the conclusion that the conviction under these sections cannot stand. There is overwhelming evidence to show that Ganga Singh was felled to the ground immediately after the beginning of the riot; and we are satisfied that after he received the blow on the skull, he was quite incapable of any further action. We take it that what really happened was this. The appellants and the other Rohilia people who were with them came up, and observing that the animal, which they were pursuing, had been seized by the Badruddinpur people, who were preparing to take it away, resolved to rescue the carcass of the animal by force. There was thus undoubtedly an unlawful assembly, the common object of which was to take away the carcass from the Badruddinpur people, whose property it had become. In pursuance of that unlawful object, Ganga Singh struck out at Bija Pasi. Bija Pasi warded off the blow and immediately felled Ganga Singh to the ground with his *lathi*. After this we have no doubt as to what took place. The Rohilia people, having seen one of their number laid out for dead on the ground, resolved to take vengeance upon the people of Badruddinpur and with that object, they pursued these people to their village. Kunwar Dhobi was struck down in the course of this pursuit; and we think that the truth is that Bija was overtaken just after he had got inside the village and was knocked down there. We have no doubt

whatever that Ganga Singh was quite incapable of taking any part in the pursuit of the Baddruddinpur people. On the contrary, we think it is proved, beyond any question, that Ganga Singh was left lying unconscious on the spot where the row started. In order to establish the guilt of Ganga Singh under section 304 read with section 149, it would be necessary to show that, at the time the offence of culpable homicide was committed, Ganga Singh was a member of the unlawful assembly. We do not think it can, by any process of reasoning, be said that a man who was lying unconscious on the ground could be a member of an unlawful assembly engaged in the pursuit of persons one of whose number had knocked Ganga Singh down. We hold, therefore, that at the time the offence of culpable homicide was committed with respect to the two deceased men, Bija and Kunwar, Ganga Singh was not a member of the unlawful assembly and is, therefore, not liable to conviction on this charge.

As regards the other accused-appellants, we agree with the finding of the Court below that Jhamma, Pima, Raghunandan and Umrai were all present when the riot began and were also members of the unlawful assembly at the time when Kunwar and Bija were struck down. So far as Jhamma and Pima are concerned, it is admitted that they were present. As regards Umrai and Raghunandan, they are named by nearly all the prosecution witnesses as having come up with the Rohilia men just before the raid began. It is pointed out on behalf of the appellant, Raghunandan, that one of the witnesses, namely, Dwarka (P. W. No. 1) has stated that Raghunandan stood some 10 or 15 paces apart and did not use his *lathi*. This statement, however, was made with reference to what took place at the very beginning of the riot. It may be that Raghunandan was not willing to join with the other members of his party in an attempt to rescue the carcass of the deer by force. But we have no doubt whatever that as soon as Ganga Singh had been felled to the ground, Raghunandan joined in with the others when they started off to take vengeance upon the Badruddinpur people for what happened to Ganga Singh. We think it is proved that Raghunandan and Umrai both took part in the pursuit of the Badruddinpur people to their village in the course of which Kunwar and Bija came by the injuries which caused their death. It has, no doubt, been held by the Sessions Judge that the statements of all these prosecution witnesses are anything but true in their entirety. There can be no doubt that they deliberately laid themselves out to concoct the false story regarding the manner in which Bija Pasi came to be killed. At the same time, we are not prepared to reject their evidence altogether, and two of them at least have, as found by the learned Sessions Judge, given a description of the affair which, on the face of it, must be accepted as substantially correct. It is only natural to suppose that these people from Rohilia would proceed to retaliate in return for the injury caused to Ganga Singh, whom they believed to be dead at the time. So far as Jhamma, Pima and Umrai are concerned, we are of opinion that their conviction must be maintained. Their appeals are dismissed. For the reasons already given, we acquit Ganga Singh of the charge under sections 304 and 149 of the Indian Penal Code; we maintain his conviction and sentence under section 148. As for Raghunandan, we give him the benefit of the statement made by Dwarka (P. W. No. 1) and hold that he was not a member of an unlawful assembly at the time when the riot began. We acquit him of the charge under section 148, but we hold that he is proved to be guilty of the offence under sections 304 and 149, and we confirm his conviction and sentence under those sections.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 10-B OF 1911.

March 16, 1912

Present:—Mr. Stanyon, A. J. C.

JAIRAM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 367, 423—What an appellate judgment should contain.

The provisions of section 367, Criminal Procedure Code, are mandatory and it is no ground for violating these imperative provisions that no serious inconvenience, harm or injustice has resulted from such violation.

JAIRAM *v.* EMPEROR.

No judgment of a Court, other than a High Court, which purports to dispose of an appeal under section 423, Criminal Procedure Code, is a legal judgment unless it contains at least,—

(1) the point or points for determination raised by the memorandum of appeal;

(2) the decision thereon; and

(3) the reasons for the decision.

Therefore, the following judgment of an Appellate Court was held to be no judgment in law:

"There appears no sufficient reason to doubt the evidence for the prosecution. The sentence is not too heavy. The appeal is dismissed."

Revision against the order of the District Magistrate, Amraoti, dated the 26th January 1912, confirming the conviction and sentence passed by the Tahsildar and Magistrate, Second Class, Morsi, dated the 3rd January 1912.

Mr. *F. W. Dillon*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—In this case, the accused was convicted by a Magistrate of the Second Class, and sentenced to rigorous imprisonment for four months and to pay a fine of Rs. 50 or, in default, undergo a further term of rigorous imprisonment for 1½ months. The conviction was under section 324, Indian Penal Code, the offence found being that of causing simple hurt with a pen-knife.

Against this conviction and sentence, the accused appealed to the Court of the District Magistrate, and, on the 11th January 1912, the appeal was admitted for hearing, and the accused enlarged on bail by a District Magistrate of ripe experience and particular knowledge of the people of Berar. On the the 26th January 1912, the appeal came before a very junior officer, temporarily acting as District Magistrate, pending the arrival of the permanent successor of the District Magistrate who had admitted the appeal. He allowed the complainant to be represented by Counsel, as well as the appellant, and disposed of the appeal the same day as follows:—

"ORDER IN APPEAL.

"The alleged use of a pen-knife by Jairam is surprising, but is easily explained by the fact that he was angry and excited. There appears no sufficient reason to doubt the evidence for the prosecution. The sentence is not too heavy. The appeal is dismissed."

The application for revision now before me is mainly based on the contention that the above order is no judgment in law, and that, consequently, the disposal of the appeal was either illegal, or so irregular as to occasion a failure of justice. On behalf of the Crown, it was urged that the appeal has been legally disposed of, since the District Magistrate concurred with the first Court: and, further, that, if the order of the Appellate Court was an irregular judgment, or no judgment at all, section 537, Code of Criminal Procedure, 1898, as applied to Berar, saves the proceedings which ended with the order dismissing the appeal.

It seems expedient to examine the question and state, chiefly for the future guidance of the Courts below, the views of this Court thereupon. Section 367 lays down in the clearest terms what the judgment of a Criminal Court must contain, namely—

(1) the point or points for decision;

(2) the decision thereon; and

(3) the reasons for the decision.

I have no doubt that these provisions are mandatory, and that these three elements are intended to constitute the substance, as distinguished from mere form, of every legal judgment passed by any Criminal Court exercising original jurisdiction. Then section 424 of the same Code is in these terms:—

"The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court."

These provisions of the law do not import any distrust in the Criminal Courts other than the High Court. They are designed to produce uniformity in procedure, and to ensure that the judgments of the subordinate Criminal Courts shall contain such matter as may tend to promote public confidence in their decisions, and safeguard them against the possible suggestion that cases are disposed of without proper consideration. I have not the least doubt in my own mind that the learned Magistrate, who disposed of the appeal in this case, read up the record carefully, and gave proper weight to the arguments advanced before him. But, can it be said that the accused in this case, and the generel body of the community to which he belongs, are assisted to such confidence by the terms of the order which the Magistrate gave in place of the formal judgment required by law? If unsuccessful appeals were habitually disposed of, after admission to hearing, by such orders,

would that tend to promote such public confidence in our subordinate Appellate Tribunals as the due administration of criminal justice demands? I think not. Moreover, whatever may be the policy of the Legislature, there is the law; and it affords no ground for its violation that a particular digression from its imperative provisions has resulted in no serious inconvenience, harm or injustice.

I have been much pressed by the learned Standing Counsel with the decisions in *Queen-Empress* v. *Pandeh Bhat* (1) and *Rohimuddi* v. *Queen-Empress* (2). The first of these, coming as it does from a Full Bench of the Allahabad Court headed by so capable a Chief Justice as Sir John Edge, is an authority against which I venture to advance my own humble opinion with extreme diffidence. Nevertheless, that opinion is one of honest dissent, and I am bound to follow it. With the utmost deference, I make bold to assert that the Allahabad decision does not appear to be a sound exposition of the law. The learned Chief Justice, who delivered judgment on behalf of the Court, wrote thus:—

"It is difficult to lay down any rule with precision as to what judgment of an Appellate Court complies, and what judgment does not comply, with the requirements of the Code of Criminal Procedure. * * *. We are not dealing here with the case of a judgment of a Court of first instance, * * * *. In our opinion, if the Sessions Judge had simply said in his judgment:—'I dismiss this appeal'—that would not have been a judgment * * * * *.

"A judgment must contain something more than that. It must contain something to justify the order dealing with the appeal. One way to arrive at a conclusion as to what the Legislature contemplated, when enacting sections 367 and 424 of the Code, is to take a case, for example, which might occur * * *. A Magistrate has written a judgment * * *. The judgment shows that the Magistrate had before his mind what were the ingredients in law of the offence of which he convicted the accused. It shows that he had considered the evidence; that he had come to definite conclusions on that evidence; that he had given reasons for those conclusions, and that acting on those conclusions, he had found the man before him guilty of a particular offence. The case comes in appeal before a Court of Session. The Sessions Judge, after a most careful consideration, agrees with every word which the Magistrate has written and can add nothing to what appears in the Magistrate's judgment. What is he to do? * * *. It appears to us that the most reasonable course * * * * would be for the Sessions Judge in such a case to write such a judgment as the following:—'I have considered the evidence in this case and I agree with the Magistrate in his conclusions and in the reasons given for them, and, in my opinion, the sentence which he passed was a proper sentence.' It appears to us that such a judgment would be in compliance with the law and not in violation of the law. One must trust to the honour of Sessions Judges, and trust that they would not make such statements in their judgments unless they were true, in the same way as one must trust to the honour of a Sessions Judge and believe that he would not dismiss a criminal appeal unless he were satisfied that the appellant had been properly convicted of the offence and properly sentenced."

With great respect, it seems to me that there is a fallacy underlying the above reasoning, and I hope that no Court of Criminal Appellate jurisdiction subordinate to this Court will ever take the form set out in the above quotation as a model for its judgment in any case. The fallacy appears to me to lie in the assumption that, in a criminal appeal, the matter before the Appellate Court is precisely, and only, the matter which was before the first Court. This is obviously not the case. The first Court had to try the accused for the offence charged, and both parties are entitled to a judgment which shows, *upon the face of it*, that the 'case'—in which term I include the allegations, evidence and arguments—of both parties have been judicially considered and weighed one against the other prior to arrival at a decision. The Appellate Court has to try, not the accused, but the appeal. In every appeal at least two points are raised which can only be raised for decision in the Appellate Court, namely, (1) Is any objection raised in the memoradum of appeal a valid

(1) 19 A. 506.
(2) 20 C. 353.

objection; and, if not, (2) Is there any other ground, apparent on the record, for interference in appeal? In the irreducible minimum approved by Edge, C. J., and his learned colleagues, there is no mention of a single point raised by the appellant, nor any direct decision thereon, still less is there any reasoning on the merits of any objection contained in the memorandum of appeal. In the absence of these elements, it seems to me that by such a judgment there would have been no decision of the appeal, *on its merits*, in the manner required for a due compliance with the terms of sections 464—*cum*—367 of the 1882 Code in force when the Allahabad decision was pronounced—sections that have been repeated in the 1898 Code now current. If decisions that do not comply with these sections are, nevertheless, to be accepted as valid because Judges can be trusted to act honourably, then there is no need for any judgment, properly so called, or for anything but a dispositive order, unsupported by reasons, in any case. But the Legislature has not seen fit to adopt this view. On the contrary, it appears to regard two rules as cardinal points in ensuring public confidence in the tribunals of justice, namely:—

(1) that the Judges should understand, and the parties before them should have assurance that they do understand, what questions are submitted for their decisions, and
(2) that the Judges should lay open to criticism the reasons which impel them to their conclusions.

Therefore, the Law of Procedure applies in all cases, the first, and, in all but the most summary and unimportant cases, both of the above rules to the judgments of the Courts, excepting only, in the particular case before us, the High Court.

No person convicted by a Court which makes in its judgment no mention of his defence, and of its reasons for rejecting that defence, would be satisfied with the fairness of his trial and the impartiality of his Judge. Nor would such judgment commend itself as proper and trustworthy to the general body of the community. In what better light can we expect the appellant or the public to regard an appellate judgment which does not expressly refer to, or give reasons for, non-acceptance of the several objections urged against the conclusions of the first Court? It is upon those objections that the appellant seeks decision in the Appellate Court, and the law gives him the right to have such decision once the appeal has passed the barrier of section 421 of the Criminal Procedure Code.

The Calcutta case above cited was little more than a condonation of irregularity in a particular case. As an authority on what a judgment in decision of a criminal appeal should contain, it can be disregarded in view of the very strong chain of decisions emanating from the same authority with which it appears to conflict. I need only refer to *Kamruddin* v. *Sonatun Mandal* (3), *In the matter of the petition of Ram Das Maghi* (4), *Farkan* v. *Somsher Mahomed* (5), *Girish Myte* v. *Queen-Empress* (6), *Ekcowri Mukerjee* v. *Emperor* (7) and *Jamait Mullick* v. *Emperor* (8). To the same effect are the decisions in *In re Shivappa* (9) and *Hakim Singh* v. *The Empress* (10).

After giving the matter my best consideration, I am of opinion that no judgment of a Court, other than a High Court, which purports to dispose of an appeal under section 423 of the Criminal Procedure Code, 1893, is a legal judgment unless it contains at least—

(1) the point or points for determination raised by the memorandum of appeal;
(2) the decisions thereon; and
(3) the reasons for the decision.

Therefore, there has so far been no legal decision of the appeal in this case, and whatever other course it is open to me to pursue, I have no doubt that I have the power to remand the case for re-trial of the appeal and its disposal by a legal judgment and this is the course I have decided to adopt. The case is one calling for careful scrutiny, because there is no doubt that while the accused had a motive for hostility towards the complainant, the latter had an equally strong motive for making a false charge. The trial was somewhat superficially

(3) 11 C. 449.
(4) 13 C. 110.
(5) 22 C. 241.
(6) 23 C. 420.
(7) 32 C. 178.
(8) 35 C. 138; 12 C. W. N. 134; 6 Cr. L. J. 427.
(9) 15 B. 11.
(10) 31 P. R. 1884 Cr.

conducted in the first Court, and that made appellate scrutiny all the more necessary. One example will suffice. The wounds inflicted on the complainant present the very remarkable feature of all being on one limb, and all except one or two scratches on the hand were on the left upper arm just below the shoulder—apparently where they could easily have been self-inflicted with a knife held in the right hand. On the other hand, the chances against all the wounds being inflicted in such juxtaposition in the course of a struggle in which several persons were engaged in hustling one another—witness the injuries received by complainant's father Appaji (W. P. No. 4)—appear to be considerable. It is also remarkable that none of the wounds is a stab, and most of them are cuts only skin deep. A searching examination of the medical witness on this point might have helped to clear the difficulty. The only answer elicited from him on the point is absolutely worthless. Again, the complainant seems to have said that he called for help when struck with the knife, and then the witnesses came from the neighbourhood; while the witnesses appear to say that the wounding began after they got there. These are matters not to be lightly passed over in a case of this kind.

I, therefore, set aside the order of the District Magistrate dismissing the appeal, and direct that he do re-hear the appeal and dispose of it according to law. Pending further orders by the District Magistrate, the accused will remain on the bail already furnished.

Appeal dismissed.

S. N. DAR, B. A., LL. B.,
Vakil High Court

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 1153 OF 1911.
February 13, 1912.
Present:—Mr. Justice Shah Din.
JALAL-UD DIN—CONVICT—PETITIONER
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Forgery—Evidence—Handwriting expert—Expert evidence alone insufficient for conviction—Evidence of expert how far reliable—Penal Code (Act XLV of 1860), ss. 467, 477—Evidence Act (I of 1872), ss. 45, 47.

It is very unsafe, as a general rule, to base a conviction simply upon the opinion of an expert.

Panchu Mondal v. *Emperor*, 1 C. L. J. 385; 2 Cr. L. J. 311, *Seri Kant* v. *Emperor*, 2 A. L. J. 444; 2 Cr. L. J. 353, followed.

The evidence of a person supposed to be acquainted with the handwriting of another is not admissible under section 47, Indian Evidence Act of 1872, if he does not state facts which, according to the explanation to the section, would make his opinion relevant. Similarly, the evidence of a witness who is not positive as to identity of handwriting is of no value.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Lahore, dated the 7th August 1911, confirming that of the Additional District Magistrate, Lahore, dated the 3rd July 1911, convicting the petitioner.

Messrs. *Jalal Din*, *Brij Lal* and *Nabi Bakhsh*, for the Petitioner.

JUDGMENT.—In this case, the petitioner Jalal Din, who was Head Establishment Clerk in the District Carriage Superintendent's Office, Lahore, from 26th August 1910 to 3rd November 1910, has been convicted in the alternative under section 467 or 477, Indian Penal Code, in respect of two settlement Bills No. 523 (Exhibit P. 24) and No. 532 (Exhibit P. 5) for Rs. 17-3-0 and Rs. 30-3-0 respectively, and he has been sentenced to four years' rigorous imprisonment, including three months' solitary confinement, on each count, the sentences to run concurrently.

The petitioner has denied throughout that the bills in question were prepared by him but the Magistrate and the Sessions Judge have acted, relying on the evidence of B. Ganesh Dass, (P. W. No. 1) Head Clerk of the District Carriage Superintendent's Office, Lahore, Hira Singh (P. W. No. 9), Assistant Establishment Clerk in the same office, and Mr. Hardless, junior, an expert in handwriting, that the whole of Exhibit P. 5 and a portion of Exhibit P. 24. which is encircled by a red line, are in the petitioner's handwriting; and he has accordingly been convicted of the above mentioned offences in the alternative in respect of each document. I have carefully gone through the evidence of above-mentioned three witnesses, who are relied on by the prosecution, and I must say that, in my opinion, their evidence is not

sufficient to establish the petitioner's offence beyond reasonable doubt. B. Ganesh Dass and Hira Singh are supposed to be acquainted with the handwriting of the petitioner and their evidence has been treated as relevant under section 47 of the Evidence Act in order to prove that both the bills, Exhibit P. 5 and Exhibit P. 24, are in his handwriting. As regards B. Ganesh Dass, on referring to his evidence, I find that he does not state any of the facts, which according to the explanation to section 47 aforesaid, would make his opinion as to the petitioner's handwriting relevant. He does not state expressly that he has seen the petitioner write or that he has received documents purporting to be written by the petitioner in answer to documents written by himself or under his authority addressed to the petitioner, or that in the ordinary course of business documents purporting to be written by the petitioner have been habitually submitted to him. His evidence is not, therefore, of much value. Apart from this, it is noteworthy that whereas this witness says that Exhibit P. 6, which was also the subject-matter of this prosecution, bears the initials of the petitioner, the Magistrate has held this is not proved and has acquitted the petitioner in respect of that Exhibit. The evidence of B. Ganesh Dass does not, therefore, carry much weight.

Hira Singh (P. W. No. 9), no doubt, tries to support the prosecution, but his statement is not very positive, though from what he says as to having constantly seen the petitioner write, his evidence is relevant under section 47 of the Evidence Act. For instance, he says "Exhibit P. 24 is written *like* the hand of Jalal Din. I *suspect it* of being his, also the initials, on P. 5, the handwriting and initials *seem* to be his, but I am *doubtful* about the handwriting. (Exhibits P. 22 and P. 23) I think the hand and initials may be his." Evidence of this description is not of much value and is far from sufficient even taken in conjunction with expert evidence for connecting the petitioner.

The expert, Mr. Hardless, gives *prima facie* strong reasons for his opinion that Exhibit P. 5 and part of Exhibit P. 24 are in the handwriting of the petitioner, but he can express no opinion as to whether the initials on Exhibits P. 24 and P. 6 are or are not in the same hand. The Magistrate and the Sessions Judge admit that it may not b quite safe to convict an accused person on expert evidence as to handwriting, but they say in this case the opinion of the expert is supported by the evidence of two other witnesses which is relevant under section 47 of the Evidence Act. As I have shown above, that evidence is of no value at all, and, therefore, the conviction must stand or fall according as the evidence of the expert, as corroborated by other evidence, is considered sufficient or otherwise for proving the guilt of the petitioner.

In Calcutta case, *Panchu Mondal* v. *Emperor* (1), it was laid down by a Division Bench that the evidence of an expert as to identity of thumb marks should be approached with considerable care and caution, especially where much depends upon such evidence. That ruling would apply with equal force to a case of this kind. In another case, *Srikant* v. *Emperor* (2), the Allahabad High Court held that to base a conviction upon the opinion of an expert in handwriting is, as a general rule, very unsafe. In that case, the expert whose opinion was not considered sufficient for conviction was one Hardless, very probably the same gentleman, who has been examined in this case, and I am unable to hold in this case that his opinion ought to be considered as sufficient for petitioner's conviction. The following passage, which occurs in the judgment of the learned Judge of the Allahabad High Court, is significant:—

"As regards the evidence of the expert, the learned Counsel put before us, with great labour and pains and remarkable ingenuity, twenty-five different points of similarity, which he claimed could be found in Exhibit A., Exhibits B., E., Exhibit W. 3, and Exhibit 4, and all of which he pressed upon us as points to be found in the handwriting admitted to be that of the accused. His argument was that the concurrence of so many points of similarity between the Exhibits abovementioned and the handwriting of the accused had a cumulative force, which made any other inference than this impossible. * * * * * * We gave full attention to what the witness Hardless considered a very strong piece of evidence, *viz.*, that the writing on the forgery was what he called

(1) 1 C. L. J. 385; 2 Cr. L. J. 311.
(2) 2 A. L. J. 444; 2 Cr. L. J. 353.

"a heavy hand' and the writing in the 'O' series was a light hand." (This is a series of documents, which is admitted to be in the handwriting of Gopal Dass).

"This is too uncertain to act upon. It may well be that some person, whose handwriting was ordinarily light, would carefully suppress that evidence of identity when he came to forge a document. * * * The real difficulty in this case is that the prosecution, although they made every attempt to establish that the writing of the forged Exhibits is * * * like that of Srikant, have made no real attempt to show that Srikant is the only man in the bank who could have written the forged Exhibits. Having regard to our experience, which is that persons of similar education and employment and also employed together have a strong tendency to assimilate their handwritings, we feel that this is a serious *lacuna* in the case for the prosecution and that we have no alternative but to allow this appeal."

The reasoning employed in the above passage applies with equal force to the present case, and I hold that the evidence of the expert is insufficient for the conviction of the petitioner.

I, accordingly, accept the revision and, setting aside the conviction and sentence of the petitioner, acquit him.

Revision allowed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION NO. 191-B OF 1911.

August 10, 1911.

Present:—Mr. Justice Twomey.

PO HLAING—APPLICANT

versus

BA E—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—False complaint made to Police—Subsequent inquiry and discharge of accused by a Magistrate.

Though, as a rule, no sanction is required to prosecute for making a false charge to the Police, yet where, after the rejection of a complaint by the Police as false, the complainant complains to a Magistrate, who, after full inquiry, discharges the accused, the latter cannot prosecute the complainant merely for the false charge made to the Police but must obtain the Magistrate's sanction before prosecuting.

Puti Ram Ruidas v. *Muhammad Kasem*, 3 C. W. N. 33, distinguished.

Petition for revision of the order of the First Class Head-quarters Magistrate, Maubin, who considered it unnecessary that sanction should be obtained for the prosecution of the applicant for an offence under section 211, Indian Penal Code.

Mr. *Kyaw Din*, for the Appellant.

Mr. *Dawson*, for the Respondent.

ORDER.—Maung Po Hlaing of Ledaunggan, Pegu District, complained to the Maubin Police that he found a pony he had lost in the possession of Maung Ba E, a Pleader of Maubin and the Police accordingly took cognizance of an offence of theft against Ba E. It was then ascertained that Ba E had bought the pony openly from another man who called himself Po Hlaing. The District Superintendent of Police rejected the case as false and the District Magistrate agreed in this opinion.

Before the Police investigation at Maubin was finished, the complainant, Po Hlaing, had left Maubin and on 14th July 1910, preferred the complaint of receiving stolen property, an offence under section 411, Indian Penal Code, against Ba E in the Dabein Sub-Divisional Magistrate's Court. Ba E was summoned to Dabein but the Sub-Divisional Magistrate discharged him believing his statement that he bought the pony publicly. The Sub-Divisional Magistrate expressed no opinion as to Po Hlaing's *bona fides* in preferring the complaint.

Meanwhile, on 17th September 1912, Ba E had filed a complaint against Po Hlaing under sections 211 and 384, Indian Penal Code, in the Maubin Head-quarters Magistrate's Court. Evidence was recorded and Po Hlaing was eventually charged under section 211, Indian Penal Code. It was not till after the charge was framed that objection was taken to the trying Magistrate's proceedings on the ground that the prosecution required the sanction of the Sub-Divisional Magistrate, Dabein, under section 195, Criminal Procedure Code. The Head-quarters Magistrate, Maubin, held that such sanction was unnecessary because (1) the prosecution of Ba E at Dabein ended before the prosecution of Po Hlaing at Maubin began and (2) because the District Superintendent of Police and the District Magistrate, Maubin, concurred in ordering the prosecution of Po

Hlaing under section 211, Indian Penal Code. The first is no reason at all and the second is not a good one.

It is idle to contend that the prosecution of Po Hlaing under section 211, Indian Penal Code, was merely in respect of a false charge made to the Maubin Police. The Dabein Magistrate took cognizance after the Police investigation at Maubin.

The offence complained of had, therefore, become "an offence in relation to a proceeding in Court" and section 195 (*b*) of the Code of Criminal Procedure applied to it. The fact that Po Hlaing had previously made a similar complaint to the Police of another District is immaterial.

I put the following case to the learned Counsel for the respondent. A woman *X*, lays a charge of rape against *A*. at the Police station. The Police after investigation reject the charge as false and order it to be struck off. Subsequently, *X*. complains to the Magistrate who after full inquiry discharges the accused. If *A*. could then prosecute *X*. without first obtaining the Magistrate's sanction, the provisions of section 195, Criminal Procedure Code, would be rendered *nugatory* to a great extent. It is clear, I think, that *A*. would have to obtain the Magistrate's sanction and could not prosecute *X*. merely for the false charge he had brought to the police. The present case is not essentially distinguishable from the hypothetical case which I have supposed.

It would, no doubt, have been different if the prosecution under section 211 had already commenced before Po Hlaing complained to the Dabein Magistrate. The Dabein proceedings would not in that case affect the power of the Maubin Magistrate to finish trying the offence of which he had already taken cognizance. This is clear from the ruling in *Puti Ram Ruidas* v. *Muhammad Kasem* (1), cited by the learned Counsel for the respondent. But that ruling is no authority for the view that sanction is unnecessary when the prosecution under section 211 is instituted after the Magisterial proceedings (as in the present case).

I think that the sanction of the Dabein Sub-Divisional Magistrate or of the District Magistrate, Pegu, was necessary for Po Hlaing's prosecution under section 211, Indian Penal Code.

But, seeing that the objection was not raised till a very late stage of prosecution, I think that Ba E should now be given an opportunity of obtaining the requisite sanction.

I direct the prosecution of Po Hlaing shall be stayed for six weeks or until such earlier date as the requisite sanction may be obtained by the respondent, Ba E, from the Sub-Divisional Magistrate, Dabein, or the District Magistrate, Pegu. If sanction is obtained, the trial of Po Hlaing should proceed from the point where it left off, the previous proceedings holding good.

(1) 3 C. W. N. 33

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 130 OF 1912.

April 1, 1912.

Present:—Mr. Justice Karamat Husain.

Saiyid FAIYAZ ALI—APPLICANT

versus

Saiyid EWAZ ALI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *ss.* 107, 145—*Jurisdiction.*

There is nothing either in section 107 or in section 145 of the Criminal Procedure Code, which would warrant the conclusions that proceedings taken under the former section, would preclude a Magistrate from proceeding under the latter.

Criminal revision from an order of the Magistrate, First Class, of Muzaffarnagar.

Mr. *R. Alston* (with him Mr. *Satya Chandra Mukerji*), for the Applicant.

Mr. *W. Wallach* (with him Mr. *Ishaq Khan*), for the Opposite Party.

JUDGMENT.—Ewaz Ali and his son, Faiyaz Ali, have been quarrelling for sometime. Proceedings were started under section 107 of the Code of Criminal Procedure and both parties were bound down to keep the peace. That order was passed on February 14th, 1912. Afterwards an order was passed under section 144 of the Code of Criminal Procedure, prohibiting Ewaz Ali from collecting rents of the property in dispute. Faiyaz Ali also instituted a civil suit in respect of the property in dispute, for a declaration that he is in possession of the property and that he is entitled to it. The

Police, however, reported that a dispute likely to cause a breach of the peace existed, concerning the property in question. On this, the Magistrate, on the 17th of February 1901, declared Ewaz Ali to be in possession of it until he was evicted in due course of law and prohibited all disturbance of such possession until such eviction. Faiyaz Ali comes in revision to this Court and the main point taken is, that inasmuch as Faiyaz Ali was bound down to keep the peace under section 107 of the Criminal Procedure Code, the Magistrate had no jurisdiction to proceed under section 145 of that Code. I am not concerned with the merits of the case, with the fact that the proceedings taken under section 145 were proper or improper, I am only concerned with the question of jurisdiction, and I do not find anything either in section 107 or in section 145 to come to the conclusion that the proceedings taken under the former of the two sections, preclude a Magistrate from proceeding under the latter. I, therefore, reject the application.

Application rejected.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 5 OF 1912.

March 9, 1912.

Present:—Mr. Justice Kensington.

JIT SINGH—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Contempt of Court—Penal Code (Act XLV of 1860), s. 228—Criminal Procedure Code (Act V of 1898), ss. 480 to 484.

A coarse expression used by a litigant but not addressed to the Court can scarcely be treated as an intentional insult to the Court or an interruption of its proceedings, under section 228, Indian Penal Code, even if the expression was actually overheard by the presiding officer.

Litigants are bound to conduct themselves in an orderly manner, but too much notice should not be taken of a sudden lapse, during a moment of excitement, into language which is unfortunately too common among the lower class of rustics and is not meant to be taken seriously. Where a litigant is detained and adopts a submissive attitude when brought before the Court later after the excitement has worn off, a due admonition or a petty fine at the most is sufficient for preservation of order.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Montgomery, dated 27th October 1911, confirming that of the Magistrate, 2nd class, at Depalpur, District Montgomery, dated 9th October 1911, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—This is an application for revision in respect of the petitioner's conviction and sentence of Rs. 50 fine for contempt of Court. It may be taken that the petitioner used a highly improper expression within the precincts of the Court, but for the reasons given by my learned colleague when directing notice to issue, the case appears to be one in which discharge of the offender with a warning would have sufficiently met the requirements of sections 480—484, Criminal Procedure Code.

The coarse expression used by the petitioner was not addressed to the Court but to his adversary, and can hardly be treated as an intentional insult to the Court or interruption of the proceedings, even if it was actually overheard by the presiding officer, which appears doubtful.

Litigants are bound to conduct themselves in an orderly manner, but too much notice should not be taken of the sudden lapse, during a moment of excitement, into language which is unfortunately too common among the lower class of rustics and is not meant to be taken seriously. The petitioner was detained and adopted a submissive attitude when brought before the Court later after the excitement had worn off, and due admonition was sufficient for the preservation of order. At the most, a petty fine would have meant the necessities of the case.

The revision is allowed. Petitioner's fine of Rs. 50 is set aside and will be refunded if paid.

Revision allowed.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 52 OF 1912.
April 26, 1912.
Present:—Mr. Justice Hartnoll.
SUBRAMONIAN CHETTY—APPLICANT
versus
EMPEROR—RESPONDENT.

Police Act (V of 1861), ss. 25, 26—Criminal Procedure Code (Act V of 1898), ss. 87, 88—Priority of claim—Seizure of absconder's property by Government—Attachment of property under Civil Court decree before attachment and proclamation by Government.

The Police seized certain property belonging to two absconding accused under section 25 of the Police Act. The property, however, was not declared to be at the disposal of Government under section 88 of the Criminal Procedure Code until 19th February 1912. Prior to that, *i.e.*, on 5th October 1911, the applicant sought to attach the said property in execution of his decree against the said accused. The Magistrate of the District refused to hand over the property in obedience to the order of the attachment of the Civil Court:

Held, that, as the Government had established no right to the property on 5th October 1911, and as the applicant had at the time established a right to have the right, title and interest of the judgment-debtors (the absconders) in it sold by the Civil Court, the order of the District Magistrate refusing to hand over the property to the Civil Court for disposal was wrong.

ORDER.—From the papers before me, it appears that the house of one Tin Ngan was searched on August 29, 1911, and a large quantity of opium found. In connection with the finding of this opium, Tin Ngan and one Sit Hpaw absconded and certain property, said to belong to them, was seized by the Police. On September 2, 1911, V. M. R. P. Subormonian Chetty instituted a suit in the Sub-Divisional Court, Bassein, against Thon Bon and Chim to recover Rs. 1,000 due on a promissory-note. These persons seem to be the same as Tin Ngan and Sit Hpaw. Subramonian obtained his decree on September 27. On September 2nd, he applied for an attachment before judgment on ThonBon's and Chim's property saying that the Police had taken chargeof this property as ownerless property and might confiscate the same as ownerless property. An *ad interim* attachment was ordered to issue. The attachment referred to certain moveable property. On the back of the attachment order, the District Magistrate noted:—"This property is at present in the custody of the Police in a criminal case. It may have to be confiscated to Goverment later on. The house is not to be opened on any account. If the Chetty has any claims, they may be considered when the Government claims have all been fully satisfied." Subsequently, an order of attachment was issued on the District Magistrate and the District Superintendent of Police on September 9th, under Order XXI, rule 52 of the Civil Procedure Code. On the back of this order of attachment is a note by the District Magistrate to the District Superintendent of Police as follows:—"None of this property is to be touched until the Government claim is first satisfied." On October 4th, Subramonian Chetty applied for proclamation and sale of the attached property. The Sub-Divisional Judge refused to take action until the matter had been settled by the District Magistrate or between the District Magistrate and Subramonian. The latter laid an appeal against this order before the Divisional Court. This appeal is still pending. On November 23rd, Subramonian filed an application before the Sessions Judge setting forth the facts and asking that the District Magistrate be asked not to obstruct the process of the Sub-Divisional Judge's Court and to act in accordance with the provisions of the Civil Procedure Code. On September 25th, proceedings were taken before the second Additional Magistrate, Bassein, to record evidence under section 512 of the Criminal Procedure Code and to take action under sections 87 and 88 of the same Code. No action was taken under sections 87 and 88 until December 4, when proclamation and warrants of attachment were ordered to be issued. The warrants of attachment were not returned until January 8th, when it was stated that the properties had been seized by the Police, and were in their custody and that the bailiff had a list of them. Sufficient time was not allowed in the first proclamation, and so a fresh one was ordered to issue on January 16. It was, on February 19th, declared to have been duly published on January 17th, and on that date, the properties attached were declared to be at the disposal of Government. The learned Sessions Judge has reported the matter for the orders of this Court. Notice was issued, on Subramonian and the District Magistrate, of the day fixed for hearing the matter. Subramonian appeared by Counsel, but the District Magistrate entered no appearance.

I should also add that on October 5th, Subramonian made an application to the District Magistrate setting out the facts and *inter alia* mentioning the attachment by the Sub-Divisional Court and saying as follows:—"That petitioner was informed by the Sub-Divisional Judge that your honour objected to the attachment and sale of the goods and, therefore, refused to proclaim the said attached goods to be sold in execution of the decree obtained by petitioner against the said Thon Bon and Chim. Your honour knows that no offence was committed by the said absconders with reference to the said goods, and the Police only took charge of them and reported the matter to you because the owners were absent." The relief asked was that the District Magistrate might be good enough to withdraw his objection and obstruction to the attachment and sale of the goods, or that if he still claims, on behalf of Government, to have interest in the property superior to that of the applicant, he would agree to the sale of the goods pending the decision by a proper tribunal as to the respective rights of Government and applicant to the money. The order passed by the District Magistrate was that he could not accede to the request as the claims of Government must be safeguarded.

The first point seems to be whether the Court can interfere in revision on the Criminal side as it has been asked to do. The application of October 5th before the District Magistrate and the order passed thereon seem to me to constitute a proceeding within the meaning of sections 435 and 439 of the Criminal Procedure Code, and I am of opinion, therefore, that the Court can interfere in revision. The seizure of the property of the absconders would appear to come under the provisions of section 25 of the Police Act. It has already been detained by the orders of the District Magistrate, though no proclamation has been issued under section 26. At the time of the attachment and application for sale, no action had been taken under the provisions of sections 87 and 88 of the Criminal Procedure Code, and so no rights had accrued to Government under the provisions of section 88 (7). On the other hand, Subramonian had, when he applied for sale of the goods, established a right to have the right, title, and interest of the judgment-debtors, or the absconders, in them sold by the Civil Court. I think that this is such a claim as is contemplated by section 26 of the Police Act. As Government had established no right to them on October 5th, I think that the order passed by the District Magistrate on that date is incorrect. It may be argued that subsequent to that date, that is, February 19, Government has established its right to them, which establishment should be allowed to override Subramonian's claim. But, in my opinion, to allow this would be unfair and inequitable, for, if the goods had been sold in October by process of the Civil Court and the proceeds drawn out by Subramonian, there would have been nothing in December to attach under section 88. As Government had no right to the goods on October 5th, and as on that date Subramonian had established a certain right over them, I am of opinion that the order of the District Magistrate then passed was wrong, and that the order to be passed now should be the order that should have been passed then. I accordingly set aside the order of the District Magistrate of October 5th, and direct that, on the application of the Sub-Divisional Court, he do hand over the goods attached by that Court to that Court for disposal.

Order set aside.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 685 OF 1911.

March 14, 1912.

Present:—Mr. Shaw, J. C.

NGA SAN MYIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 360, 476—Order under section 476, when to be made—Deposition of witnesses how to be read and corrected—Evidence Act (I of 1872), s. 80—Statement not read over and corrected, whether admissible.

An order under section 476, Criminal Procedure Code, should be made at, or soon after, the conclusion of the judicial proceedings referred to in the section.

It is the duty of a Judge or Magistrate to read or to have read over to witnesses their recorded deposi-

tions with a view to correct any errors which may require correction not only in his own presence and hearing but also in the presence of the accused and of his Pleader, so that the latter may have an opportunity of checking their correctness

A statement not read over and corrected as aforesaid is not taken in accordance with law and, therefore, is not admissible in evidence against the person making it.

Mr. *San Wa*, for the Applicant.

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—The applicant was a witness for the defence in a Criminal Regular Case before the District Magistrate. He was examined on the 29th August 1911 and the District Magistrate pronounced judgment in the case on the same day On the 18th of September following, the District Magistrate made an order under section 476, Criminal Procedure Code, directing the applicant to be arrested and sent before a Subordinate Magistrate on a charge of giving false evidence under section 193, Indian Penal Code. Those proceedings are now stayed pending the result of this application.

It is contended that the Magistrate's order under section 476 was bad and ought to be set aside for two reasons; *first*, because it was made twenty days after the conclusion of the case in which the alleged false evidence was given, and *secondly*, because the applicant's deposition was not read over to him in the presence of the accused or his Advocate, or even in the presence of the Magistrate as required by section 360, Criminal Procedure Code, and was, therefore, inadmissible as evidence of the alleged false statement.

The subject of interference by the High Court in revision with an order passed under section 476, Criminal Procedure Code, and the circumstances, under which such interference is proper, were explained in *Nga Paw U* v. *King-Emperor* (1).

On the first point raised by the applicant, there has been some conflict of opinion. It is sufficient to refer to the Full Bench case of *Begu Singh* v. *Emperor* (2), where it was held that an order under section 476, Criminal Procedure Code, should be made at, or soon after, the conclusion of the judicial proceeding referred to in the section. I do not think it necessary to go further into the question here, because I find that on the 1st of September, the District Magistrate ordered some "preliminary inquiry" to be made by the Police with a view to proceedings under section 476, and the order in question was made after the receipt of the Police report. Although I do not think that section 476 contemplates a Police investigation, it cannot be said, in the foregoing circumstances, that the Magistrate only thought of proceeding against applicant under the section after 20 days.

On the second point, the application is supported by an affidavit to the effect that the deposition was read over to the applicant by the Bench Clerk in the verandah of the Court House and not in the presence of the Magistrate or the accused or his Advocate And the Government Prosecutor, who has been heard in support of the order, admits that, according to information received from the Magistrate, the affidavit is correct adding, however, that applicant and the Clerk were in view of the accused and his Advocate. He further admits that what section 360, Criminal Procedure Code, evidently requires is that the deposition should be read over in the hearing of the accused or his Advocate.

The practice followed in recording the applicant's deposition, has been the subject of several High Court decisions, *e.g.*, *Kamachinathan Chetty* v. *King Emperor* (3); *Mohendra Nath Misser* v. *Emperor* (4); *Jyotish Chandra Mukerji* v. *Emperor* (5). In all these cases, it meets with condemnation. Manifestly, it is a gross infraction of the plain provisions of section 360, Criminal Procedure Code. It is the business of the Judge or Magistrate in Burma to record the statement of the witness, and it is, therefore, his business to correct any errors which may require correction. He cannot do this efficiently unless the deposition is read over in his presence and hearing. The section further requires that this shall be done in presence of the accused or his Pleader obviously with the view that the accused or his Pleader may have the opportunity of checking the correctness of the deposition. The reading

(1) U. B. R. 1907-09, I, Cr. Pro. 1; 6 Cr. L. J. 25.

(2) 11 C. W. N. 568; 34 C. 551; 5 C. L. J. 508; 5 Cr. L. J. 398; 2 M. L. T. 298 (F. B.).

(3) 28 M. 308; 2 Cr. L. J. 756.

(4) 12 C. W. N. 845; 8 Cr. L. J. 116.

(5) 36 C. 955, 14 C. W. N. 82; 4 Ind. Cas. 416; 10 Cr. L. J. 581.

over of the deposition is as important as the recording of it, and it is not permissible to hand over the business to a Clerk to carry out in a verandah or elsewhere while the Judge or Magistrate proceeds to examine another witness or do something else. Even if the verandah or other place were within hearing, the attention of the presiding officer and the accused and the Advocate would be enagaged on the business then before the Court, and they would not be in a position to notice what was read over or what corrections were made.

There is a further special reason why the practice in question cannot be allowed, namely, that section 91 of the Evidence Act, makes the record of a witness's statement the only evidence of that statement, and under section 80 of the same Act, it is admissible only if it was taken in accordance with law. It is from this point of view that the illegality of the practice arises in the present case.

In directing the applicant's prosecution on the basis of a deposition recorded in the manner described, the District Magistrate clearly exercised an improper discretion.

The order passed under section 476 is set aside.

Order set aside.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL NO. 598 OF 1911.
December 19, 1911.
Present:—Mr. Justice Harington and
Mr. Justice Brett.
LALAN MALLIK AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Approver—Evidence—Corroboration—Confession to private person—Evidence Act (I of 1872), s. 133.

On the night of the 6th-7th of December, a large gang of dacoits made an attack on the house of *B.* Before they could effect their purpose, the neighbours came up and the dacoits were driven off. One of them, *L.*, was, however, captured. He made a confession on the spot to a private person giving the names of some of the dacoits. As a result of the confession, some dacoits were captured. *J.* was captured on February 18 and he afterwards turned informer. *L.* had made a long detailed confession giving an account of the dacoity to a first class Magistrate on December 9, but subsequently on April 20, he retracted the confession:

Held, that, in all cases depending on the evidence of an informer, the degree of support that the evidence required must depend on the amount of the credit in each particular case to be attached to the informer, that the confession of *L.* was ample evidence to corroborate the approver, and that the convictions of the dacoits were legal.

Appeal against the order of the Sessions Judge of Faridpur, dated 19th June 1911.

Babu *Gour Chandra Pal*, for the Appellants.

Mr. *A. Caspersz*, for the Crown.

JUDGMENT.

HARINGTON, J.—In this case, the nine appellants have been convicted under sections 395 and 396 of the Indian Penal Code, and have been sentenced to ten years' transportation each. The Assessors agreed that Lallan and Sajani were guilty, but, while acquitting the remaining seven prisoners, they expressed the opinion that the deposition of the approver was true, but were doubtful as to whether he had given the names of the dacoits correctly. They also expressed an opinion that Lallan was caught red-handed, and that the confession which he made on the spot was made to a private person and was not obtained by force.

The learned Vakil, who appears for the appellants, has taken us at very great length through the evidence of upwards of fifty witnesses who were heard in the course of the case. His object in doing so is not clear because it is conceded by the learned Vakil that it has been established, without any shadow of doubt, that the occurrence took place, and that the only question is whether the evidence of the approver has been sufficiently corroborated to make it safe to uphold the conviction.

The facts that were accepted by the Judge and the Assessors are that, on the night of the 6th-7th of December last year, a large gang of dacoits made an attack on Bistoo's house at Mirgi. Bistoo and another man were sleeping in a varandah. They were assaulted and the dacoits endeavoured with an axe to break into the house. Before they could effect their purpose, the neighbours came up and there was a fight and the dacoits were driven off; but they were not driven off until they had used a gun which was carried by one of them. Bistoo and several other persons received gun-shot wounds, a man named

Mahadeo being so severely injured that he died of the effects a short time afterwards. One of the dacoits, a man named Lallan, fell into a hole near the bank of a *khal* as he was running away and was captured by one Ahmed and two other persons and brought back to Bistoo's godown. There he gave the names of certain other members of the party of the dacoits. While he was doing this, a *chowkidar* was sent away to lay the first information. As a result of the information received from Lallan, efforts were made to arrest the persons whose names he had given; but, they were not to be found in their villages. Not till the 16th of December, was Biswanath arrested, then on the 18th, Gour Charan was brought by his father and Ganga Charan was caught, on the 29th Pocha Mandal was captured, on January 3rd Sajani, on January 25th, Reajuddi, on February 7th Bepin, on February 18th, Jagadish, who afterwards turned informer, and, in the early part of March, the last prisoner Nabadwip was taken into custody.

A great deal of the evidence which was read dealt with the events that took place when the attack was made in Bistoo's house, but no single one of the dacoits was identified during the attack because they had taken the precaution of arranging their *pugris* so as to conceal their faces and it was on the capture of Lallan that it was possible to ascertain the names. With regard to Lallan, it should be noticed that he appears to have disclosed no defence at all until April 20th, 1911, when before a first class Magistrate, he stated that he went to a fair and that he was seized by persons he did not know on his way back. He had already made to that same gentleman, on December 9th, 1910, a long detailed confession giving an account of the dacoity. I entirely disbelieve the story about his return from the *mela*. If there was any truth in it, it would have been stated at once, and Lallan would not have taken time from December to April to think out the story. I have no doubt it was an invention concocted as soon as he regretted having made the confession which he did as to his proceedings in the dacoity. This confession is ample evidence to corroborate the approver and his conviction must be affirmed.

Another of the appellants, Sajani, has made a confession which has been accepted by the Assessors and it is ample evidence to corroborate Jagadish's evidence against him. The law as to an accomplice's evidence is clearly and explicitly laid down in section 133 of the Evidence Act, which provides that an accomplice shall be a competent witness against an accused person and that a conviction shall not be illegal merely because the evidence of the accomplice is uncorroborated. In the present case, therefore, to justify the appellants in asking us to set aside the conviction, they must show not only that there is no corroboration but that the Judge, taking all the evidence together, was wrong in acting on it. Now, the informer Jagadish was arrested on the 18th of February. He made his statement on the 20th. It is a very long and detailed statement and is one which it is extremely unlikely that he would be able to invent. When Jagadish went into the witness box, he narrated his story in a way which commended itself to those who heard him giving the evidence. He gave the names of no fewer than 19 persons, some Hindus and some Muhammadans. They were inhabitants of different villages and although Reajuddi, Pocha Mandal and Bepin suggest that there was enmity between themselves and Jagadish, there appears to be no evidence to support the suggestion nor does there appear to be any reason whatever for Jagadish's desiring to implicate any one of the particular persons whose names he had given. He described how the eight people, amongst whom were Sajani and Lallan, assembled in his *bari* and how they went on to Budhai Mandal's *gulli*, where 11 other persons were waiting, amongst whom were the other seven out of the nine appellants. He described their progress to Mirgi, mentioned their sitting down at a place for smoking and cutting a bamboo from a bamboo hedge, and the fact that they passed persons on the road with whom words were exchanged, and gave details of the attack on the house and his movements after the failure of the attack in detail, which bears on its face the impress of a true story. He said that he got a warning from Mofizuddin after the dacoity that Lallan had been captured and that he had given the names. Lallan's statement as to the persons, who took part in the dacoity, made in the godown gives the

names of all the appellants excepting Pocha Namasudra and Ganga Charan,—but the former's name is given in his statement made to the Magistrate. It has been argued by learned Vakil for the appellants that Lallan did not give the names when he was brought back to Bistoo's godown, but that his statement is the result of a later consultation between the Police officers. The only ground on which the suggestion is founded is that there is a discrepancy between the *daffadar* and the the *chowkidar* as to the event of the evening. The *chowkidar* says that he was sent away to lay the first information while the witness Buzlur was writing down the information as to the names of the dacoits which he was obtaining from Lallan. The *daffadar* says that when he arrived, he saw Lallan in custody of the *chowkidar* in Bistoo's godown, and that he [at that time heard that a statement of Lallan's had been written down. Now, would that discrepancy justify the inference that the alleged statement by Lallan is a concoction? It is quite possible that the *daffadar* may have made a mistake as to the presence of the *chowkidar* when he arrived, but that the names were given directly after the dacoity by the captured dacoit is, I think, clear from the fact that when the *chowkidar* laid the first information, he mentioned the fact that the captured dacoit had given the names of those who had come to commit the dacoity. Now, this *chowkidar* clearly started very shortly after the occurrence, and it is quite impossible to suppose that at that time there was a conspiracy between the Inspectors, who had not yet arrived on the scene of the occurrence, to make out a false list and say that Lallan had given it; and, moreover, though Lallan denied, on April 20th, that he had made any statement to Buzlur Munshi, yet he had made on January 9th to a Magistrate a confession implicating, with one exception, the same people whose names he is said to have given to Buzlur. To my mind, the theory that the names might have been concocted by the Inspectors and made up afterwards entirely breaks down because from the first information which was laid long before the Inspectors came, it appears that Lallan did mention who the dacoits were. It has been contended that his statement is inadmissible on the ground that he was in the custody of the Police when it was made: but I do not think that was the case. He had been captured by private persons and was in their charge in Bistoo's godown. I am inclined to think the argument for the Crown that the *chowkidar* was not allowed to know what names were given, so that there should be no ground for saying Lallan was in his custody when he made his statemant, is well founded. We have, therefore, the circumstance that directly after the occurrence, the names of the dacoits were given by a man who was engaged with the party, and that those names and the statement made by Lallan with respect to the occurrence agree with the evidence subsequently given by the informer. Sajani's statement, also made on the 5th of January, while implicating himself, gives not only the names given by Lallan but those of Pocha Mandal and Ganga Charan as well; though there is authority for saying that confessions subsequently withdrawn are not evidence against any one except the persons who made them, yet they can be taken into consideration by the Court under section 30 of the Evidence Act; and it is impossible to disregard the fact that, immediately after the occurrence, the names of all the appellants except Ganga Charan were given, and a story was told which agrees with the evidence of the accomplice. Then of the two confessions made before the Magistrate, that of Lallan implicates all the appellants except Ganga Charan, and that of Sajani all the appellants, and there is no evidence of any circumstance which would induce both Sajani and the informer to falsely accuse Ganga Charan. Besides these circumstances, there is evidence that 5 out of the 19 persons named, namely, the appellants Lallan, Reajuddi and Sajani with two other persons who are not before the Court, were seen together by Subdar Hossain just before the dacoity; and another witness, Kadem Sikdar, also saw 7 out of the 19, whose names have been given, sitting close together just before dark on the day of the dacoity and out of these seven, Reajuddi, Bepin, Lalan and Sajani are amongst the appellants on the record. No reason was alleged at first as to why either Lallan or Jagadish or Sajani should give the names of these particular individuals, for there was no evidence that there was any quarrel or ill-feeling between them. It is only late in the proceedings that there is a suggestion

that they are named because of an ill-feeling against the Namasudras. There is a striking circumstance that Jagadish says that he got a letter from Mozuffudin stating that Lallan had been captured, and he had given the names of the dacoits. It was, therefore, known to one member of the gang at least that the names of the dacoits had been given. It is to be observed that it is not stated that the name of this or that particular person was given by Lallan, but merely that he gave the names of the persons who took part in the dacoity, and then there is a very significant fact that all the persons whose names were given at once disappeared from their houses. I think myself that all these circumstances sufficiently support the evidence which Jagadish has given. In all cases depending on the evidence of an informer, the degree of support that the evidence requires must depend on the amount of credit in each particular case to be attached to the informer. I have pointed out circumstances in this case which lead me to think that the story that the informer is telling is a true one and that view is strengthened by the impression that was obviously made on the assessors by the informer when he told his story. Then, on the case generally, there has been no attempt to strengthen it by exaggeration or by procuring the false witnesses. It would have been quite easy, I have no doubt, to get persons to come and give evidence as to seeing the members of the gang together or it might have been possible to adduce false evidence of identification in the village at the time of the attack and to improperly strengthen the case by methods which are not unknown in this country. There seems to me in this case to have been a studious avoidance of anything which savours of bolstering up the case. I have no doubt that the evidence given is perfectly true, and that the appellants before the Court were a dangerous body of robbers.

With respect to the sentences, although the attack on the house failed and the dacoits were unable to appropriate any property, yet, nevertheless, the offence is a very serious one because fire-arms were carried by one, at least, of the robbers, and those fire-arms there was no hesitation in using. Several persons have been wounded, more or less seriously, and one man has been murdered. Under these circumstances, I am quite unable to say that the Judge exercised his discretion wrongly in passing the sentences he did. The result is that the appeal is dismissed, and the convictions and sentences are affirmed.

BRETT, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 351-A OF 1911.

February 5, 1912.

Present:—Mr. Justice Twomey.

EMPEROR—PROSECUTOR

versus

KYA SONE—ACCUSED.

Penal Code (Act XLV of 1860), s. 214—Illegal gratification—Offer of money to forest subordinate for not proceeding with a compoundable offence—Burma Forest Act (Burma Act IV of 1902), s. 62.

A. had a license under the Burma Forest Act for one saw-pit but worked two saw-pits. *B.*, a forester, discovered this breach of the rules and told *A.* that he would be prosecuted. Whereupon *A.* offered him Rs. 5 not to proceed with the case.

The offence of working more saw-pits than were covered by the license was compoundable under the Forest Act:

Held, (1) that the offer of Rs. 5 to *B.* did not amount to an offence under section 214 of the Penal Code;

(2) that the fact that *B.* was not authorized to compound the offence, did not make any difference.

JUDGMENT.—The accused had a license under the Burma Forest Act for one saw-pit but worked two saw-pits. A forester discovered this breach of the Forest Rules and told the accused that he would be prosecuted for it. The accused thereupon offered Rs. 5 to the forester as consideration for not proceeding further with the case. For this, the accussd has been fined Rs. 50 under the Indian Penal Code section 214 (last paragraph) by the 2nd Class Township Magistrate, Hlaingbwe.

The Township Magistrate and the District Magistrate (who examined the case in revision) overlooked the explanation to section 214 and the provisions of section 62, Burma Forest Act. The forest offence committed by the accused was compoundable under the latter section, and the offering of the sum of Rs. 5 was, therefore, not an offence under section 214 of the Indian Penal Code.

EMPEROR *v.* GANGA.

It is true that the subordinate to whom the offer was made was not empowered to compound the offence. But that makes no difference. Instead of instituting a prosecution, he should have returned the money and informed the accused as to what forest officers are empowered to compound forest offences.

No one appears in support of the conviction, though the District Magistrate was asked to give notice to the Conservator of Forests in order that the Government Advocate might be instructed to appear in support of the conviction and sentence, if that course was considered necessary.

The conviction and sentence are set aside. The fine will be refnnded.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 140 OF 1912.

April 13, 1912.

Present:—Sir George Knox, KT., Judge.

EMPEROR—APPLICANT

versus

GANGA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 177—*Offence committed at a place in British India—Subsequent transfer to an Independent State—Jurisdiction of Court of the place—Territorial jurisdiction of State.*

A. committed an offence within the local limits of the Sessions Court at Mirzapur. Subsequent to the commission of the offence, the place where the offence had been committed was transferred to the Native State of Benares. *A.* was a British Indian subject and never ceased to be so. Since the commission of the crime, he resided in British territory:

Held, that the Sessions Court of Mirzapur had jurisdiction to try the offence.

Mahabir v. *King-Emperor*, 11 Ind. Cas. 585; 8 A. L. J. 630; 12 Cr. L. J. 401; 33 A. 578 and *King-Emperor* v. *Ram Naresh Singh*, 13 Ind. Cas. 921: 9 A. L.J. 51; 34 A. 118; 13 Cr.L.J. 169, relied upon.

The judicial power of every Independent State extends to the punishment of all offences against the Municipal laws of the State by whomsoever committed within the territory, also to the punishment of all such offences by its subjects wheresoever committed.

The jurisdiction of the *Mofussil* Courts depends upon the offence having been committed within their local limits.

Hursee Mahapatro v. *Dinobundo*, 7 C. 523; 9 C. L. R. 93, relied upon.

Criminal revision by the Local Government against an order of the Sessions Judge of Mirzapur.

Mr. *A. E. Ryves* (Government Advocate) for the Crown.

JUDGMENT.—The attention of the Court has been called by the learned Government Advocate to the case of *King-Emperor* v. *Ganga*, charged with an offence under section 392, read with section 75 of the Indian Penal Code.

The offence is said to have been committed on the 18th of March 1910. Two men have already been convicted as having been concerned in the offence. Ganga was said at the time to have absconded and the case proceeded without his appearance in Court.

So far as I can learn from the papers which have accompanied the record, he was arrested within the Bengal Presidency as being a person without any ostensible means of livelihold. He found his way to prison at Mymensingh. From this prison he was sent for, it does not appear by what authority, and produced before the Joint Magistrate of Mirzapur. The Joint Magistrate inquired into the case falling under section 392 of the Indian Penal Code. The inquiry began on the 6th of November 1911, and ended in the committal to the Court of Session for trial on the 4th of December 1911.

The Sessions Judge of Mirzapur, holding that the Joint Magistrate had no jurisdiction to inquire into the case, and that his Court had no jurisdiction to try the case, directed that Ganga be returned to the custody of the District Magistrate and treated for the purpose of this charge as a prisoner of the Benares State in custody in British territory. It is with this order that the learned Government Advocate asks this Court to interfere.

The attention of the learned Judge was directed to the case of *Mahabir* v. *Emperor* (1), also to the case of *Emperor* v. *Naresh Singh* (2) and lastly, to the case of *Emperor* v. *Lachmi* (3).

In all these cases, this Court held that the British Court had jurisdiction to try the

(1) 8 A. L. J 630; 11 Ind. Cas. 585; 12 Cr. L. J. 401; 33 A. 578.

(2) 9 A. L. J. 51; 13 Ind. Cas. 921; 34 A. 118; 13 Cr. L. J. 169.

(3) Reference No. 338 of 1911, made by the Sessions Judge of Mirzapur, to this Court.

several cases concerned. The learned Judge, however, considered that those cases could be distinguished from the present on the ground that the cases above cited related to persons who had been committed to the Court of Session before the 1st of April 1911, the date on which certain *parganas* of the District of Mirzapur were constituted a State and granted to the Raja of Benares. He doubts their force as precedents in the present case when the accused was not arrested until the 8th of October 1911, and the case was not instituted against him until the same date. Section 177 of the Code of Criminal Procedure of 1898 enacts that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdictin it was committed. The sections which follow, 178-189, do not take the present case out of section 177. At the time when the offence was committed by Ganga, it was an offence committed "within the local limits" of the jurisdiction of the Magistrate of the District of Mirzapur; and, as a necessary result upon the arrest, the case would, in the ordinary course, have been committed to the Court of Sessions as Mirzapur. It matters little to what place the offender betakes himself after he has committed the crime. To take an ordinary instance, an accused commits an offence within the jurisdiction of the District Magistrate of Mirzapur, he absconds, remains in hiding for a year or more, passes through several districts in the course of his flight and is eventually arrested for that offence within the district, say, of the 24-Pergunnahs. Upon his arrest, he is, as a matter of course, upon proper request made, transferred to the Court of Mirzapur, his case investigated there, and if it is committed to the Court of Session that Court proceeds to try and pronounce judgment in the case. No question can arise as to jurisdiction.

In the present case, the offence was an offence against British Indian law committed by Ganga at a time when he was a British Indian subject at a place which, at the time when the crime was committed, was within the local jurisdiction of the Mirzapur Courts. It has never been said that Ganga has at any time since he committed the crime ceased to be a British Indian subject. So far as the record goes, he has apparently since the crime resided in British territory up to the time he was produced before the Courts of Mirzapur. The mere accident that from the 1st of April 1911, the spot where he committed the crime has ceased to be British territory, appears to me quite irrelevant.

Wheaton in his Elements of International Law says:—The judicial power of every Independent State extends to the punishment of all offences against the Municipal laws of the State by whomsoever committed within the territory, also to the punishment of all such offences by its subjects wheresoever committed (Edition 1866, p. 179). To the same effect is Phillimore's International Law, 3rd Edition, Vol. I, p. 216. According to Mr. Mayne in his Criminal Law, 3rd Edition page 956, "the jurisdiction of the *Mofussil* Courts depends upon the offence having been committed within their local limits." See *Hursee Mahapatro* v. *Dinobundo* (4).

To hold otherwise would lead, it seems to me, to endless complications and might result in very serious miscarriages of justice.

So far as the present case is concerned, the jurisdiction of the Mirzapur Courts, which may be said to have commenced with the commission of the offence, has neither been suspended nor unbroken.

I, therefore, set aside the order of the learned Sessions Judge of Mirzapur, and direct him to try at an early date the prisoner Ganga, who has been committed to him for the offence for which he was committed.

Order set aside.

(4) 7 C. 523; 9 C. L. R. 93.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 694 OF 1911.

March 21, 1912.

Present:—Mr. Shaw, J. C.

MI NGWE—APPLICANT

versus

MI CHIT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), ss. 182, 211—False

charge of theft made to Police—Complaint against informant under sections 182 *and* 211, *Indian Penal Code —No sanction necessary for proceeding under section* 211, *Indian Penal Code—Duty of Magistrate--Same facts constituting offences under more than one section—Proceeding to be with respect to the more serious offence.*

Where a given set of facts constitutes an offence under more than one section of the Indian Penal Code, proceedings should be taken with respect to the more serious offence.

The offence of making a false charge of theft in an information laid at a Police station falls not only under section 182 but also under section 211, Indian Penal Code, and as sanction is not necessary in order to proceed against the informant under the latter section, a Magistrate should proceed under that section when the complaint is under both sections, *viz.*, under sections 182 and 211, Indian Penal Code.

A person who makes a false charge on more than one occasion is responsible for his act on each occasion.

Mr. *S. Mukerjee*, for the Applicant.

Mr. *J. C. Chatterjee*, for the Respondent.

JUDGMENT.—It is admitted before me that respondent, Mi Chit, on the 24th June last, laid information at the Police station, charging applicant, Mi Ngwe, with theft of her jewellery. On the 30th July, the Police reported that the information was false.

On the 3rd August, the applicant made a complaint to the Senior Magistrate, praying that process might issue against respondent on charges under sections 182 and 211, Indian Penal Code, with respect to the information. The Senior Magistrate transferred this complaint to the Additional Magistrate for disposal.

On the 10th August, respondent made a complaint to the Senior Magistrate identical with her previous information to the Police. The Senior Magistrate transferred this complaint also to the Additional Magistrate for disposal. The Additional Magistrate postponed proceedings on the applicant's complaint and inquired into the respondent's complaint. In the end, on the 25th September, he discharged the applicant and classified the case as false, and reported that as he had come to this conclusion, he thought it unfair to the respondent that he should inquire into the applicant's complaint.

The District Magistrate held that either a complaint from the Police Authorities or their sanction was necessary to a prosecution under section 182, Indian Penal Code, and, therefore, the Magistrate could not proceed unless the applicant applied for and obtained the necessary sanction. The Additional Magistrate thereupon discharged the respondent.

Applicant comes here in revision on the ground that no sanction was required to a prosecution under section 211, Indian Penal Code, with respect to the information which respondent laid at the Police station on the 24th June. It is only necessary to read section 195, Criminal Procedure Code, to see that this objection must be sustained. But there have been several rulings to this effect of which the following may be mentioned:—*Government of Bengal* v. *Gokool Chunder Chowdhry*, (1) *Puti Ram Ruidas* v. *Mahomed Kasem* (2) and *Empress* v. *Jugat Chander Mozumdar* (3).

Intentionally making a false charge of theft against some one in an information laid at a Police station, no doubt, comes within section 182, but it does more. It also comes within section 211 and is, therefore, a very much more serious case than the cases given in the illustrations to section 182, in which the information does not amount to an offence under section 211. The ordinary rule is that where a given set of facts constitutes an offence under more than one section of the Indian Penal Code, proceedings should be with respect to the more serious offence.

Hence, in the present case, it was for the Additional Magistrate, on receiving applicant's complaint, to proceed on the more serious charge, that is, on the charge falling under section 211, and, as no sanction was necessary to such proceedings, the respondent was improperly discharged.

The learned Advocate for the respondent before me has attempted to argue that as the respondent repeated her information in her complaint to the Magistrate of the 10th August, the alleged false charge should be considered to have been one made to a Magistrate and, therefore, to require sanction under section 195 (1) (*b*). But I am of opinion that this contention is not sustainable. A man may make a false charge on more than one occasion, and, if he does so, he is responsible for what he did on each occasion.

Under section 437, Criminal Procedure Code, I direct that the District Magistrate by himself, or by some Subordinate Magis-

(1) 24 W. R. 41 Cr.
(2) 3 C. W. N. 33.
(3) 3 C. W. N. 491.

trate, make further inquiry into the complaint of the applicant on which the respondent was discharged.

The Additional Magistrate's report of the 25th September was a proper one to make, and the District Magistrate should not direct the Additional Magistrate to make the further inquiry now ordered.

LOWER BURMA CHIEF COURT.

FULL BENCH.

CRIMINAL REVISION PETITION No. 318-B OF 1911.

November 21, 1911.

Present:—Sir Charles Fox, KT., Chief Judge,
Mr. Justice Hartnoll and
Mr. Justice Twomey.

EMPEROR—PETITIONER

versus

SHEIKH AHMED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—False charge made to the Police at a Police station—Penal Code (Act XLV of 1860), s. 211.

No judicial sanction is required in order to prosecute a person for laying a false charge at a Police station. There is no necessity in such a case to hold a preliminary Magisterial inquiry.

Mr. *Higinbotham*, Assistant Government Advocate, for the Crown.

ORDER OF REFERENCE TO A FULL BENCH.

Sheikh Ahmed laid information at a Police station charging one Kader Gunny with theft of a goat. The Police after inquiry classed the case as false and submitted it to the District Magistrate for sanction to prosecute under section 211. The District Magistrate wrote on the report "Sanctioned." This sanction is bad in law as it does not comply with the provisions of section 195 (4). Again notice, though not legally essential, is generally proper. The petitioner only asks that that sanction should be revoked.

So far as the prosecution for laying a false information to the Police is concerned, no sanction is necessary and there is no sufficient ground for interfering with those proceedings at all. Moreover, the setting aside of the sanction granted by the District Magistrate would not affect the proceedings now pending.

The District Magistrate's sanction is dated the 9th August 1911. On the 15th June 1911 petitioner filed a complaint before the Sub-Divisional Magistrate. This was dismissed on the 17th June after complainant was examined and the Police papers read.

There is a considerable body of authority that before an order to prosecute for a false charge is made, the person, who made the original charge, should be offered an opportunity of supporting it or abandoning it. The facts in *Queen-Empress* v. *Sham Lall* (1) and in *Jogendra Nath Mookerjee* v. *King Emperor* (2) are very similar to those of the present case. See also *Emperor* v. *Tula* (3) and the cases cited therein. I do not think there is any justification for a hard and fast rule such as these authorities lay down. There are cases no doubt when Magistrates granting sanction should be guided by the principle underlying these decisions but this should not, I venture to think, be the invariable rule.

I agree with the opinions expressed by the learned Judges in *Jogendra Nath Mookerjee's* case (2). There is no authority of this Court on the point.

In view of this body of the authority, I refer to a Full Bench the following question:—

Is it legally essential that a person, who has laid an information to the Police, which, after inquiry, is held to be false and who has then filed a complaint before the Magistrate, which is also dismissed under section 203 as false, be given an opportunity of proving his complaint to the Magistrate by producing evidence, before he can be prosecuted under section 211 of the Indian Penal Code in respect of his information to the Police?

JUDGMENT.

TWOMEY, J.—The following reference has been made by Mr. Justice Robinson sitting as a Court of Criminal Revision.

"Is it legally essential that a person, who has laid an information to the Police, which, after inquiry, is held to be false and who

(1) 14 C. 707.

(2) 33 C. 1; 10 C. W. N. 158; 2 C. L. J. 228; 2 Cr. L. J. 615.

(3) 29 A. 587; A. W. N. (1907) 195; 4 A. L. J. 471; 6 Cr. L. J. 42.

has then filed a complaint before the Magistrate, which is also dismissed under section 203 as false, be given an opportunity of proving his complaint to the Magistrate by producing evidence, before he can be prosecuted under section 211 of the Indian Penal Code in respect of his information to the Police?"

Sheikh Ahmed made a charge of theft at the Police station against Kader Gunny. The Police investigated the charge with the result that the case was not sent up for trial and was classified as false by the Magistrate having jurisdiction (as required by the Local Government's Police Department Circular No. 15 of 1908). Meanwhile, Sheikh Ahmed had petitioned the Sub-Divisional Magistrate representing that the Police were not dealing properly with his information and that he was afraid the Sub-Inspector "might spoil the case" and the Sub-Divisional Magistrate had thereupon examined the Police papers and, treating the petition to him as a complaint of an offence, had dismissed it under section 203 of the Code of the Criminal Procedure on 17th June 1911. It seems doubtful whether Sheikh Ahmed intended his petition to be treated as a complaint. It mentions no accused and does not ask for process to issue. He probably desired only that the Magistrate should interfere in the conduct of the Police investigation. Subsequently on the 9th August, the District Superintendent of Police applied to the District Magistrate to sanction the prosecution of the informant, Sheikh Ahmed, under section 211 of the Indian Penal Code, for bringing a false charge of theft and the District Magistrate wrote the word "sanctioned" on the application. No sanction is necessary for a prosecution under section 211 in respect of a false charge made to the Police. The District Magistrate's order sanctioning the prosecution had no judicial effect.

Sheikh Ahmed applied to the Sessions Judge to revoke the sanction under section 195 (6) of the Code of the Criminal Procedure. The learned Sessions Judge remarked that the District Magistrate's order was not a sanction under section 195 and that no sanction is necessary when the alleged false charge has been made to the Police. But in view of certain rulings of Indian High Courts, he was doubtful whether "in a case of this kind", the complainant is entitled to have Magisterial inquiry held into his complaint before he can be prosecuted under section 211. He, therefore, referred the question to the Chief Court for orders under section 438 of the Code of Criminal Procedure and Mr. Justice Robinson then made the reference now under consideration.

In the Indian cases which have been cited, the alleged offence under section 211 was committed in or in relation to a proceeding in Court. Section 195 of the Code of Criminal Procedure, therefore, rendered sanction necessary in those cases and the Courts were at liberty to consider the question whether a Magisterial inquiry into the truth of the charge is a necessary preliminary to such sanction.

But in the present case, the prosecution is for laying a false charge at a Police station and as no judicial sanction is required for such a prosecution, the question stated in the order of reference does not properly arise. It is clear that no preliminary Magisterial inquiry is necessary as a preliminary to a prosecution for a false charge to the Police.

The learned Sessions Judge expressed the opinion that the subsequent complaint to the Magistrate made no difference, and did not refer for orders the question whether a prosecution for a false charge to the Police will lie when the false charge has afterwards been repeated in a complaint to a Magistrate. This question is not raised in the order of reference and we are not called upon to decide it.

The papers may be returned to Mr. Justice Robinson with a copy of this order.

HARTNOLL, J.—In my opinion, an answer to the reference is not necessary to the decision of the case and consequently one cannot be given. The facts have been set out by my learned colleague, Mr. Justice Twomey. If sanction is necessary under section 195 (*b*) of the Code of Criminal Procedure, none exists as such can only be given by the Sub-Divisional Magistrate or the Court to which the Sub-Divisional Magistrate is subordinate which, under section 195 (7), is the Sessions Court since the Sub-Divisional Magistrate possesses first class powers and so the proceedings would be bad on that account.

If, on the other hand, such sanction is not necessary, the question equally does not arise.

FOX, C. J.—I also think that the question

referred does not really arise in the case and that, consequently, it should not be answered.

There has been a ruling of this Court *viz.*, *Maung Po Hlaing* v. *Maung Ba E* (4), which bears on some of the remarks of the learned Sessions Judge.

(4) 5 Bur.L.T. 111; 15 Ind. Cas. 981; 13 Cr.L.J. 565.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 795 OF 1912.

July 11, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Imam.

SHASHI BHUSHAN GUPTA CHOWDHURY AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Bengal Local Self-Government Act (III B. C. of 1885), *s.* 76—*Channel—Property of private person—How can be brought under District Board.*

A District Board can only bring a private channel under its control and administration by making an agreement with the person in whom the property in any channel is vested, under section 76 of the Bengal Local Self-Government Act.

Where a District Board had a certain private channel entered on its books and had spent some money on its up-keep:

Held, that, this was not sufficient to bring the channel under the control and administration of the District Board, and that the persons erecting weirs and fishing in it, with the permission of the owners, committed no offence against the District Board's bye-laws.

Rule against the District Magistrate of Noakhali to show cause why the conviction of the petitioners for having obstructed a channel should not be set aside on the ground that there is nothing to show that the channel in question is in the control and under the administration of the District Board.

Babus *D. L. Kastgir* and *Probodh Kumar Das*, for the Petitioners.

JUDGMENT.—This Rule was issued on the District Magistrate of Noakhali to show cause why the conviction of the petitioners for having obstructed a channel should not be set aside on the ground that there is nothing to show that the channel in question is in the control and under the administration of the District Board.

No one appears to show cause; but the District Magistrate has submitted a statement by the trying Magistrate in which it is pointed out that there is on the record the evidence of the Overseer to the effect that the District Board has the channel on its books and has spent some money on its up-keep. We doubt whether that is sufficient to bring the channel, which is admittedly the private property of the petitioners-landlords, under the control and administration of the District Board for the purposes of the Bengal Local Self-Government Act of 1885.

Under section 76 of that Act, a District Board may agree with the person in whom the property in any channel is vested to take over the property therein, and after such agreement may declare, by notice in writing put up therein or near thereto, that such channel has been transferred to the District Board. Thereupon the property in the channel becomes vested in the District Board and it has in future to be repaired and maintained out of the District Fund. In this way only, so far as we can see, can a private channel be brought under the control and administration of a District Board under the Act.

Now, there is nothing on the record before us to show that there has been any such arrangement between the owners of this channel and the District Board, and it seems to us that, in these circumstances, it is scarcely possible to maintain that the petitioners have by erecting weirs and fishing in the channel with the permission of the owners committed an offence against the District Board bye-laws.

The Rule must, therefore, be made absolute and the fines, if paid, will be refunded.

Rule made absolute.

LOWER BURMA CHIEF COURT.

FULL BENCH.

CRIMINAL REVISION PETITION No. 26-B OF 1912.

May 13, 1912.

Present:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, Mr. Justice Parlett and Mr. Justice Young.

GURUDEEN TAILY—APPLICANT

versus

S. MUTTU SERVAI—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859)—*Jurisdiction after the expiration of term of contract or completion of work—Preamble—Object of the Act to punish workmen who receive advances and then break their contracts to work.*

GURUDEEN TAILY *v.* MUTTU SERVAI.

In a case under the Workman's Breach of Contract Act, where either the work has been completed or the term of the contract has expired, a Magistrate has jurisdiction to entertain a complaint under section 1 and to order re-payment of the advance under section 2 of that Act.

In re Anusoori Sanyasi, 28 M. 37; 2 Cr. L. J. 149, dissented from.

One object of the Act may have been to provide against workmen a speedy remedy for employers who have made advances on account of work; but the main object was, as the preamble shows, to provide for the punishment of workmen who have taken advances and have fraudulently broken their contracts to work.

The impossibility of a master being able to exercise the option of demanding an order from a Magistrate ordering a workman to perform the work, does not affect his right to ask for an order for the re-payment of the advance and subsequently for an order for the workman's punishment by imprisonment if he fails to comply with the order.

Mr. *Halker*, for the Applicant.

Mr. *K. B. Banurji*, for the Respondent.

ORDER OF REFERENCE TO A FULL BENCH.

On 4th October 1911, complaint was made that Gurudeen Tely had, on 5th October 1908, received an advance of Rs. 200 on a contract signed by him to work as a mill cooly and bring fifty other coolies to work for complainant from 1st January to 31st December 1909; that he absconded and neither worked nor supplied coolies, and that complainant was unaware of his whereabouts till shortly before the complaint was laid.

Respondent admitted signing the contract and also admitted its terms, save that he said he received only Rs. 150 and undertook to supply only twenty coolies; but he alleged that he worked for three months and thereby cleared off the amount of his advance.

The Magistrate found for the complainant on the facts and ordered the respondent to return Rs. 200 to the complainant within seven days.

Respondent applies for revision of this order on the grounds (1) that he is only a contractor and the Act is not applicable to him, and (2) that as the term of the contract had expired and the work had been performed before the complaint was made, the Magistrate had no jurisdiction under the Act.

The first ground is untenable. Even if respondent were merely a supervisor of other coolies, he might still be a workman or labourer within the meaning of the Act, see *Maung Tun* v. *Fazil Kadre* (1). But the contract clearly stipulates, and the respondent himself admitted, that he was to work with his own hands.

In support of the second ground, the case *In re Anusoori Sanyasi* (2) is quoted. It was there held that section 2 of the Act only applies when the work is uncompleted when the complaint is made. If the work has been completed when the complaint is made, the Magistrate has no jurisdiction. In the course of the various judgments delivered, the following remarks occur:—

"An employer by doing the work himself or employing a third party to do it loses his right to proceed under the section."

* * * * *

"The plain object of the Act is to provide a speedy remedy when the work is not done."

* * * * *

"The section pre-supposes that at the time the defaulter is brought before the Magistrate, the complainant has an option either to demand back the advance, or to get an order to have the work completed. But if the work has been already completed, complainant cannot ask for an order to have it completed. He has, therefore, no option, and the condition pre-supposed by section 2 does not exist and the remedy by the Act cannot be applied."

I find that this ruling has not always been followed. Thus, in *Queen Empress* v. *Juno* (3), the report of which is not available but which is quoted at page 10 of Jagtiani's Workman's Breach of Contract Act, 1905 edition, where a Magistrate refused to entertain a complaint on the sole ground that the complainant had got the work done through other agency before filing the complaint, it was held that it is only where the employer has allowed the workmen, with whom he originally contracted, to complete the work, even after the time agreed upon has expired, that no prosecution will lie against them under Act XIII of 1859.

In *Narsing Prosad Singh* v. *King-Emperor* (4), of the two learned Judges composing the Bench, one held that "the remedies under section 2, Act XIII of 1859, are interlocked and interdependent, and if one has lapsed,

(1) U. B. R. 1904-1905, I; 1 Cr. L. J. 551.

(2) 28 M. 37; 2 Cr. L. J. 149 (F. B.).

(3) Sind Sadar Court Cr. Rule No. 53, dated 28th October 1904.

(4) 12 C. W. N. 869; 8 Cr. L. J. 134; 7 C. L. J. 312; 35 C. 1028.

the other has lapsed also," the other held a different view, and, in the course of his judgment, says as follows:—

"I cannot see why the expiration of the term of the contract should deprive the complainant of his right to exercise his option of asking for the recovery of the money he advanced. The option between the two remedies is that of the complainant and not that of the person complained against and the fact that one remedy would be infructuous, does not seem to me to deprive him of the other. I consider that the complainant's right to recover the money he has advanced continues till it is re-paid to him, subject to the effect of the Limitation Act of which there is no question here." He expressly dissented from the ruling in *Khoda Buksh* v. *Motilal Johori* (5) that the term of the contract having expired, the contract cannot be specifically enforced and the money recovered under the Act before a Magistrate, but the Bench being divided in opinion, that ruling was followed. It has also been dissented from by this Court in *V. N. Ramasawmi Pillai* v. *A. Amanadar* (6), where the complaint was made, though the respondent did not appear before the Magistrate before the term of the contract expired. To this extent, therefore, the Madras ruling is inapplicable to this Province. In the present case, however, the complaint was not made till long after the term of the contract had expired, and if the Madras and the earlier Calcutta cases be followed, the Magistrate had no jurisdiction to entertain the complaint. Those rulings are based upon the principle quoted above that "the remedies under section 2 are interlocked, and if one has lapsed, the other has lapsed also," and this appears to have been inferred from the fact that section 2 gives the complainant an option between two remedies. It is argued that the Act applies only so long as this option is capable of being exercised: inasmuch as section 2, where alone the option is mentioned, refers to a stage of the proceedings when the workman has already been brought before the Magistrate, the logical conclusion is that unless at the time the defaulter is brought before the Magistrate the option still exists, the remedy by the Act cannot be applied. This Court has already decided against this sweeping conclusion where the complaint has been made, but the respondent has not appeared, before the expiry of the term of the contract. I am doubtful whether in other cases, too, it is sound. Supposing that the contract is for repairs to a house, and that before the defaulter can be brought before the Magistrate, the house is burnt down: I find nothing in the Act to indicate that this deprives the unfortunate employer of the benefit of a summary order under section 2 to re-pay the advance. Nor can I see that where the work is of an urgent nature, such as, *e.g.*, repairs to a roof in the rainy season, the employer, if he wishes to proceed under the Act, is bound to leave the repairs undone until he can trace and produce before the Magistrate a rogue who has swindled him; nor that if he gets the repairs done by somebody else, he thereby deprives himself of the right of laying a complaint under the Act and asking for an order for re-payment of his advance.

Reading section 2 as a whole and together with the rest of the Act, I think the words "at the option of the complainant" in section 2 are inserted for the purpose of making it incumbent on the Magistrate in cases, where it is possible to order either a refund of the advance or performance of the work, to comply with the wish of the complainant in the matter. But for these words, the matter would rest with the Magistrate's discretion; their insertion merely takes away that discretion. I doubt whether their insertion was intended to imply that in cases where, for any reason, it is not feasible to order the completion of the work, the complainant loses his right to proceed under the section to obtain an order for the re payment of the advance.

The objects of the Act are clear from the preamble, namely, to prevent loss and inconvenience sustained by employers from fraudulent breaches of contract on the part of workmen who have received advances; to supplement, by a summary remedy, the employers' wholly insufficient remedy by suit for damages, and to punish persons guilty of such breach of contract. To place on section 2 the narrow construction contended for, would, I consider, largely defeat these objects and render the Act in many cases nugatory for the purpose of protecting and assisting those persons whom it was intended to protect and assist.

(5) 11 C. W. N. 247; 5 Cr. L. J. 66.
(6) 4 L. B. R. 270; 8 Cr. L. J. 470.

As, however, there is in applicant's favour a decision of a Full Bench of the Madras High Court, under section 11 of the Lower Burma Courts Act, VI of 1900, I refer for the decision of a Bench or of a Full Bench, as the Chief Judge may direct, the question:—

"In a case where either the work has been completed or the term of the contract has expired, has a Magistrate jurisdiction to entertain a complaint under section 1, and to order re-payment of the advance under section 2 of the Workman's Breach of Contract Act?"

OPINION OF THE FULL BENCH.

Fox, C. J.—In my opinion, the answer to the question referred should be in the affirmative. With due respect to the opinions of the learned Judges of the Madras High Court in the case of *Anusoori Sanyasi, In re* (2), quoted in the reference order, it appears to me that they have read into the Act a provision which is certainly not expressed in it, and which does not appear by necessary implication to be involved in anything expressed.

One object of the Act may have been to provide a speedy remedy for employers against workmen who have taken advances from them on account of work, but the main object was, as the preamble shows, to provide for the punishment of workmen who have taken advances and have fraudulently broken their contracts to work.

The impossibility of the master being able to exercise the option of demanding an order from the Magistrate ordering the workman to perform the work, does not appear to me to affect his right to ask for an order for the workman's punishment by imprisonment if he fails to comply with the order.

HARTNOLL, J.—I concur.

ROBINSON, J.—I concur.

PARLETT, J.—I concur.

YOUNG, J.—I concur.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 752 OF 1912.

July 4, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Imam.

JOGABANDHU SHAHA AND ANOTHER—FIRST PARTY—PETITIONERS

versus

RAJ KUMAR ROY CHOWDHURY AND OTHERS—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Decree of Civil Court not inter partes—Possession under such decree—Jurisdiction of Magistrate to declare opposite party's possession.

Where the first party was put in possession of disputed property under a decree of a Civil Court, which was not one against the second party: *Held*, that a Magistrate had jurisdiction, in a proceeding under section 145 of the Criminal Procedure Code, to declare the possession of the second party.

Rule against the order of the Assistant Magistrate of Chandpur, dated May 14th, 1912.

FACTS.—This was a proceeding under section 145 of the Criminal Procedure Code. Both parties filed written statements. The second party stated that the land in dispute was given to them by a Civil Court decree in 1910 and the first party obtained an *ex parte* decree for the same just before the institution of these proceedings against a third party, and when the peon was giving possession to the 1st party and a few huts were being erected, the second party protested and no further acts of possession took place. These facts were admitted by both sides.

The learned Assistant Magistrate after stating the facts proceeded as follows in his judgment:—

"The question seems rather difficult to decide. The effect of decrees against third parties has been the subject of conflicting decision." [*Gordon Sims* v. *Johurry Lal* (1); *Kristo Alhadini Dasi* v. *Radha Syam Panday* (2); *Bloomfield* v. *Gangadhar Kundu* (3).]

"On considerations of equity, I think the second party, who were in possession from 1910 till the institution of these proceedings, who were not even aware of the *ex parte* decree dispossessing them, not being made a party to those proceedings, should be maintained in possession till a proper decree has been obtained against them.

(1) 5 C. W. N. 563,
(2) 7 C. W. N. 118.
(3) 4 C. L. J. 562; 4 Cr. L. J. 503.

ALLAM SINGH *v.* BRINDABAN.

"I accordingly make an order in their favour."

The first party moved the High Court against this order and obtained this Rule.

Babu *Kritanta Kumar Bose*, for the Petitioners.

Babu *Atulya Charan Bose* and *Bipin Chandra Bose*, for the Opposite Party.

JUDGMENT.—In this case a Rule was issued on the opposite party to show cause why an order under section 145, Criminal Procedure Code, made in their favour should not be set aside on the ground that the petitioners had been put in possession of the property under a decree of a Civil Court.

As, however, the decree in question was not a decree against the opposite party, there is, in our opinion, no ground for interference. The Rule was in fact issued under the misapprehension that the decree of the Civil Court was binding on the opposite party.

The Rule is discharged.

Rule discharged.

LOWER BURMA CHIEF COURT.

CRIMINAL MISCELLANEOUS APPLICATION NO. 8 OF 1912.

March 14, 1912.

Present:—Mr. Justice Parlett.

Sardar ALLAM SINGH—APPLICANT

versus

BRINDABAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Adjournment—Accused—Proper place for.

Though section 526 (8) only makes it obligatory to postpone a case when notification is made to the Court before commencement of the hearing, yet when it appears that a *bona fide* application for transfer is about to be made, it would usually be well for the Magistrate, at any stage, to grant a reasonable time to enable it to be made.

Dock is the accommodation provided in Courts for persons accused of criminal offences and it is entirely an act of indulgence on the part of a Court to allow an accused person to remain outside it.

Application for transfer of Criminal Trial No. 25 of 1912, in the Court of the 1st Additional Magistrate of Letpadan to a competent Court in Rangoon.

Mr. *Banurjee*, for the Applicant.

JUDGMENT.—The following is briefly the history of this case. On 9th August 1910, complainant gave accused a promissory note for Rs. 4,000, for which he says the consideration was the agreement, Exhibit A, signed by accused, waiving all further claims against complainant. Accused denies having signed it.

On the 20th November 1911, accused's prosecution was ordered under the Stamp Act for executing this document when insufficiently stamped. The prosecution was stayed provisionally on 5th December, and definitely on 4th January 1912, as accused announced his intention of suing for cancellation of the document. On 16th and 20th December 1911, accused filed suits against complainant in Mandalay and Sagaing, respectively. On 18th January 1912, complainant instituted the present case against accused for cheating in respect of the pro-note for Rs. 4,000. On 26th January, complainant, accused and both their Pleaders were present in the Additional Magistrate's Court, but as the summonses on the witnesses had not returned, it was impossible to proceed, and the case was adjourned till 16th February. On 13th February, complainant sued the accused in Tharrawaddy to establish the validity of the document, Exhibit A. On 15th February, accused swore an affidavit before a Magistrate in Rangoon, and on 16th, his Pleader presented it in the District Magistrate's Court, Tharrawady, with a petition purporting to lie under section 435, Criminal Procedure Code, praying for the proceedings before the Additional Magistrate to be stayed. The grounds alleged in the affidavit were that the suits in Upper Burma were fixed for the 27th and 30th of April, and that in Tharrawady for the 4th March, that one of the issues in both the Upper Burma suits, and the sole issue in the other suits was whether accused executed the document Exhibit A, which is also the subject-matter of the criminal case in the Additional Magistrate's Court. On 17th February, the District Magistrate passed order fixing the case for hearing on 29th February and calling for the Magistrate's proceedings but on 29th, the District Magistrate closed the case as the present application for transfer had been filed.

On 16th February, accused presented a petition to the Additional Magistrate asking him to stay proceedings pending the order of the District Magistrate. This was rejected on the ground that no sufficient cause was shown, that there had been delay in moving the

District Magistrate, and that the prosecution witnesses were all in attendance, and the complainant objected to a postponement. Nine witnesses and accused were then examined and the case adjourned till the next day. On 17th, accused presented his petitions, one to be allowed to file a copy of the affidavit put in the day before to the District Magistrate's Court, and one for a postponement to enable him to move the Chief Court to transfer the case. The Magistrate rejected and returned them both; the former on the ground that it had no bearing on the case before him and the latter on the ground that it was made too late. Accused was charged and ordered to file a list of witnesses by the 20th, the case being fixed for 27th. On 21st, this application was filed and the next day proceedings ordered to be stayed pending its hearing.

On 22nd, accused filed a list of witnesses, but as there was not time to summon them before 27th, summonses were postponed till after the cross-examination of the prosecution witnesses. Before 27th, this Court's order staying proceedings was received. The present petition and accompanying affidavit are extremely verbose and contain the following allegations:—

(1) That on accused asking for a postponement on 16th February, the Magistrate got angry, postponed all custody cases that were fixed for hearing on that day and proceeded with the case against accused;

(2) that later on the day when his Pleader appeared and wanted to file the copy of the affidavit presented to the District Magistrate's Court, the Magistrate flew into a passion and ordered accused to be placed in the dock;

(3) that on 17th, he returned both applications instead of filing them;

(4) and that he refused to stay proceedings while he applied for a transfer.

As regards the first point, it appears that there were no custody or other cases at all fixed for 16th February which, at the request of Pleaders on both sides, was reserved for the present case. This ground is false.

As regards the second, it appears that accused's Pleader exhibited some excitement and a tendency to interrupt the proceedings, and had to be called to order. The Magistrate says he and accused became boisterous and, therefore, the latter was placed in the dock. I may remark that the dock is the accommodation provided in Courts for persons accused of criminal offences, and it is entirely an act of indulgence on the part of the Court to allow an accused person to remain outside it. Under the circumstances, accused had no ground of complaint in being placed in the dock, nor any reasonable ground for fearing that he will not receive an impartial trial after being so placed.

As to the third ground, no doubt the Magistrate would have done well to file the petition and copy of affidavit, even if he considered they had no bearing in this case; and as regards the application for adjournment, he certainly ought to have done so. But I fail to see that the return of these petitions to accused could in any way lead him to presume he would not have a fair trial. It is not as if they were torn up and thrown in the waste paper basket. He was in no way bound to adjourn, pending order from the District Magistrate, and he gave good reason for not holding so. I may remark, however, that it is to be regretted that the District Magistrate, when fixing the date for hearing the application, did not stay proceedings pending the hearing. Had he done so, I fancy all this bother would have been saved.

As to the last ground, though it is true that section 526 (8) only makes it obligatory to postpone when notification is made to the Court before the commencement of the hearing, yet when it appears that a *bona fide* application for a transfer is about to be made, it would usually be well for the Magistrate, at any stage, to grant a reasonable time to enable it to be made. In the present instance, it does not appear that any adjournment was in fact necessary, inasmuch as the application for transfer was filed and the proceedings were stayed before the date originally fixed for the further hearing of the case. Under these circumstances, the Magistrate's refusal to fix a later date cannot have given rise to any reasonable apprehension in accused's mind.

There are other allegations against the Magistrate, as to his losing his temper, threatening to record that accused wished to produce no witnesses and to send him to jail. The whole petition appears, on the face of it, highly exaggerated. It contains at least two false statements of fact, (1) that on the 26th January, the case was postponed as complainant

was absent being sick, whereas the record shows he was present and that the absence of witnesses was the reason for postponement, and (2) as to postponing custody cases on 16th February, whereas none were fixed for that date. I entirely disbelieve the other allegations. I consider this application to be the culmination of a systematic attempt to throw obstacles in the way of prosecution and I accordingly dismiss it.

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 65 OF 1912.

April 10, 1912.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

ARUNACHELLA THEVAN AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 299—Verdict of Jury—Sessions case—Right of Jury to return special verdict—Power of Judge to require a verdict of guilty or not guilty.

The Code of Criminal Procedure does not permit the recording of what is known in English law as a '*special verdict*', *i. e.*, where the Jury state their findings on the facts themselves, leaving it to the Judge to apply the law to those facts and himself find the prisoner 'guilty' or 'not guilty.'

A Judge is not entitled to ask the Jury the reasons for their verdict. He is not entitled to put questions to them to show that the conclusions at which they arrived were not logical or consistent. Any ambiguity in the Jury's verdict is the only justification for any question by the Judge.

Emperor v. *Siranadu*, 30 M. 469; 17 M. L. J. 476; 6 Cr. L. J. 373, approved.

Queen-Empress v. *Joy Kristo Goswami*, 7 W. R. (Cr.) 22, distinguished.

Queen-Empress v. *Dadanna*, 15 B. 452; *Queen-Empress* v. *Madhavarao*, 19 B. 735, not followed.

Where the Jury give their findings only on the facts, leaving it to the Judge to apply the law to those facts, the Judge is empowered to require the Jury to return a verdict of "guilty" or not "guilty."

Appeal against the order of the Court of Session of Tinnevelly Division, in Case No. 104 of the Calendar for 1911.

Messrs. *T. Rangachariar* and *A. Subbarama Iyer*, for the Appellant.

Mr. *J. L. Rosario*, Public Prosecutor, for the Crown.

JUDGMENT.

SANKARAN NAIR, J.—The accused were charged with house-breaking by night and with dacoity. After the evidence on both sides was taken and the Public Prosecutor had replied, the Judge explained the law to the Jury and summed up the evidence, both of the prosecution and the defence, and he asked the Jury to give the verdict. What then happened may be described in his own words:—"Foreman: We find that the accused were present at the dacoity, but there is no evidence that they shared the common purpose of those engaged in the dacoity or were assisting in it."

"The Court informed the Jury that a verdict of guilty or not guilty of the offence charged must be returned, and added, 'The question for you, gentlemen, is whether you think that they were there in pursuance of the common purpose of those who were engaged in the dacoity and whether you think that they had that purpose in assisting in it.'"

After some consultation in the box by the Jury, the Court said:—"I shall direct you, gentlemen, that, on that finding, your verdict should be 'not guilty'."

"Jury expressed a desire to retire again for consultation and did so. After doing so, the Foremam said that their finding was guilty, as the very presence of the accused in the house at the time was sufficient to justify a finding that they were dacoits though there was no evidence of individual acts."

The Judge accepted the Jury's verdict and convicted the accused of the offences charged. The Judge states further in his judgment that after their first finding and, if they had returned a verdict in accordance with it, he should have felt it his duty to refer the case.

The Pleader for the accused in appeal contends that when the Foreman said that the accused were present at the dacoity, but that there was no evidence of a common purpose, the Judge was bound to have recorded a verdict of not guilty and acquitted the accused. According to the English Law, it is open to the Jury to deliver their opinion on the facts of the case, *i.e.*, a special verdict and to leave it to the Judge to draw the legal interence from the facts found. The Judge is bound to accept their opinion on the facts and record the verdict of not guilty if on the facts found they are not guilty in law. In the case before us, it is clear that, on the facts found by the Jury, the appellants are not guilty of the offences for which they are charged.

But it is contended by the Public Prosecutor that the Criminal Procedure Code recognises no distinction between a "general" verdict and "special" verdict and that the Jury are bound to deliver a verdict of guilty or not guilty. The question is one of difficulty and, after a full consideration of the question, I have finally come to the conclusion that the Public Prosecutor is right.

Under section 297 of the Criminal Procedure Code, at the close of the trial, the Judge has to sum up the evidence for the prosecution and the defence and to lay down the law by which the Jury are to be guided. He cannot divide the charge into two. He is not entitled to sum up the evidence, ask them to give their opinion on such evidence and apply the law to the facts found. This is also the English law, according to which, it is the privilege of the Jury to give a special verdict. After the summing up, "it is the duty of the Jury to decide which view of the facts is true and then to return the verdict which, according to such view, ought, according to the direction of the Judge, to be returned" (section 299 of the Code of Criminal Procedure). It will be noticed that this direction of the Judge, referred to in section 299, must be given when the evidence was summed up; and the verdict has to be returnd according to the direction which is given to the Jury before they had come to a decision upon the facts of the case. This section apparently does not entitle the Jury to decide the facts alone leaving it to the Judge to draw the legal inference therefrom and direct the verdict to be recorded in accordance with that inference.

The illustration to section 299 of the Code of Criminal Procedure supports this view. "When *A.* is tried for the murder of *B.*, the Judge has to explain to the Jury the distinction between murder and homicide and tell them under what view of the facts, *A.* ought to be convicted of murder or of culpable homicide, or ought to be acquitted. It is the duty of the Jury to decide which view of the facts is true and to give a verdict in accordance with the direction of the Judge." The section does not contemplate a case of special verdict.

It is true that the section does not lay down that it is not open to the Jury to give a special verdict. But our law of Criminal Procedure is very different from that which is prevalent in England. Where there is nothing to support such an inference in our Procedure Code, I do not think it is open to us to assume the existence of similar power in India.

The case reported as *Queen-Empress* v. *Joy Kisto Gossamy* (1) has no application. There the Sessions Judge refused to accept the verdict of the Jury on the first count acquitting the prisoner and required them to find the prisoner guilty on that count. He was obviously wrong.

In *Queen-Empress* v. *Hurry Prosad Gangooly* (2), the Jury informed the Judge that they believed the prosecution case that the accused were beaten, but did not believe the aggravating circumstances alleged by the prosecution. The Judge thereupon asked them whether the accused were guilty under section 330 of the Indian Penal Code and they returned an answer in the affirmative. The contention was that the Jury had given a special verdict which was tantamount to a verdict of not guilty in that case and the Judge should have simply recorded it. The High Court held that the Judge did not act illegally. The result of the case, therefore, if it has a bearing on the case before us, is against the appellant's contention. But there is an observation in the judgment in favour of the appellant to this effect :—

"The law does not prescribe any specific form in which the Jury are to return their finding, and we are of opinion that they are at liberty to deliver it in any form which they think fit."

The case of *Queen-Empress* v. *Dada Ana* (3) was the converse of the present case. There, after the delivery of the verdict of 'not guilty' by the Jury, the Sessions Judge put various questions to them to elicit their opinion on the various facts which arose in the case. There was a difference of opinion among the High Court Judges as to the legality of this course.

In my opinion, a Judge is not entitled to ask the Jury their reasons for their verdict. He is not entitled to put questions to them to show that the conclusions at which they arrived were not logical or consistent. Though he is entitled under certain circumstances to refer the case to the High Court for

(1) 7 W. R. 22 Cr.
(2) 14 W. R. 59 Cr.
(3) 15 B. 452.

decision, he cannot put any questions to the Jury to come to a conclusion upon the case himself. Any ambiguity in the verdict is the only justification for any question by the Judge. It is true that it may be of very great assistance to a Sessions Judge to know the reasons for the verdict of the Jury to make up his own mind whether it is necessary to differ from the Jury or not. But the Jurors would not generally be able to state their reasons very clearly and I, therefore, entirely agree with the decision of this Court on this point in *Emperor* v. *Siranadu* (4). In the course of the judgment in the Bombay case [*Queen-Empress* v. *Dada Ana* (3)], Mr. Justice Jardine apparently accepts the view that it is open, under the Criminal Procedure Code of India, for the Jury to return a special verdict and so far that case is in favour of the appellant. The other Judges give no opinion on the point. The decision in *Queen-Empress* v. *Madhavarao* (5) is directly in point and is in favour of the appellant. In that case, the prisoner was tried for rape. The Jury returned a verdict that the prisoner did the act with consent. The Judge, without desiring them to reconsider their verdict or giving them fresh directions, required them to say whether they found the accused guilty or not guitly. Thereupon the Jury returned verdict of 'guilty.' Jardine, J., to whose opinion I have already referred in *Queen-Empress* v. *Dada Ana*(3), sitting with Candy, J., held that the first verdict is "what is called a special verdict" and the Judge is bound to accept it. In none of these cases are the terms of section 299 of the Criminal Procedure Code referred to. No Madras case has been cited by the Pleaders. In England, it may be necessary to recognise the right of the Jury to return a special verdict to minimize the risk of error on their part in applying the law to the facts. The power which the Judges have in India to disagree with the Jury and refer the case to a superior Court does not exist in England. The findings of fact are not always sufficient and clear and the Judges in England have often found it difficult to apply the law to a series of facts found in a special verdict by the Jury. In India it is probable that the findings of fact would seldom be sufficient, and very often they will be wanting in precision and as the Code gives the power to the Judge to differ, it is certainly much more convenient that he should send the matter up to the High Court in a proper case rather than put questions to the Jury with reference to the various facts on which their findings may not be clear. Such examination may seriously interfere with the independence of the Jury. A general verdict of guilty or not guilty simply is less likely to be open to any criticism by such examination. If we recognise this right of the Jury to return a "special verdict", we shall have to recognise the right of the Judge to ask the Jury to reconsider their verdict—see *Reg.* v. *Meany* (6)—or to give them fresh directions, *Rex.* v. *Henry* (7). In the result, we may lose the benefit of trial by Jury without securing the benefit of trial by Judge. I am, therefore, of opinion that what is called a special verdict, where the Jury state their findings on the facts themselves, leaving it to the Judge to apply the law to those facts, is not allowed by the Criminal Procedure Code.

The procedure followed by the Judge is, therefore, right and, as there is no misdirection, the conviction must be affirmed and the appeal dismissed.

AYLING, J.—I agree.

Appeal dismissed.

(4) 30 M. 468; 17 M. L. J. 476; 6 Cr. L. J. 373.
(5) 19 B. 735.
(6) 9 Cox C. C. 231; L. and C. 213; 32 L. J. M. C. 24; 8 Jur. (N. S.) 1161; 7 L. T. 393; 11 W. R. 41.
(7) 28 T. L. R. 296.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 477 OF 1912.

July 18, 1912

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

EMPEROR—APPLICANT

versus

SHAMA CHARAN AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (8), 337 (4)—Complaint—Tender of pardon—Recording of reasons for the pardon—Penal Code (Act XLV of 1860), ss. 7, 20, 466—Plaint—Proceeding of a Court of Justice—Alteration of plaint after it has been filed.

In filing a complaint in a Criminal Court, it is not necessary that the complainant should name all the accused persons.

The recording of reasons by the inquiring Magis.

trate is not a condition precedent to the tender of pardon and its acceptance by the approver.

A plaint is a record or a proceeding of the Court of Justice in which it is filed. It is a document which once filed cannot be altered or amended without the special sanction of the Court.

Revision against an order of conviction by the Sessions Judge of Shahjahanpur.

Mr. *Ryves*, for the Crown.

Messrs. *Satya Chandra Mukerji* and *Gulzari Lal*, for the Accused.

JUDGMENT.—The appellants, Shama Charan and Jamna Sahai, have been convicted under section 466 and Shama Charan sentenced to one day's simple imprisonment and a fine of Rs. 500; Jamna Sahai was sentenced to one day's simple imprisonment and a fine of Rs. 100. Ram Lal was also tried at the same time and convicted and sentenced to one day's simple imprisonment and a fine of Rs. 3,000. Ram Lal has not appealed but Government has applied in revision for enhancement of sentence in the case of all three. Notice has duly issued to show cause why the sentence should not be enhanced and Mr. Satya Chandra Mukerji appeared to show cause on behalf of Shama Charan and Ram Lal, while Mr. Gulzari Lal appears to show cause on behalf of Jamna Sahai.

On another charge, all three persons were also convicted but the sentence was limited to one day's simple imprisonment in each case. Jamna Sahai and Shama Charan have appealed from that conviction. We do not think that it was unreasonable not to inflict substantial sentences in the second case because to some extent the matter was one transaction. Second offence was committed at one and the same time.

The offences, with which these several persons were charged in the two cases and some other cases which were instituted at the same time but which have not been proceeded with, were that of altering plaints which had been filed in the Court of the Subordinate Judge of Shahjahanpur and substituting certain pages in these plaints for pages which formed part of the plaint at the date that the suits were instituted. It was admitted that the plaints as originally drawn up were altered very considerably and it was also admitted that certain pages were, after the plaints had been originally drawn up, subsequently substituted. The prosecution alleged that these things were done after the suits were filed, while the accused alleged that the alterations and substitutions were made and done perfectly innocently before the plaints were filed.

We have considered the evidence and we have had the advantage of hearing the case for the accused most forcibly put by Mr. Satya Chandra Mukerji, but we have not the least hesitation in saying that we entirely concur with the finding of the learned Sessions Judge and the Assessors that the alterations and substitutions were made after the plaints were filed. In one of the cases, the alteration was no less an alteration than the addition of a party against whom the suit was clearly barred when the alteration was made. There cannot be the least doubt that the alteration and substitutions that were made, were made fraudulently.

In addition to addressing us on the merits, Mr. Satya Chandra Mukerji has raised a number of objections to the legality of the conviction. He says, in the first place, that there was no sanction or complaint entitling the Court to take cognizance of the offences, that is to say, that in one case, there was no sanction or complaint against two of the accused and in the other case against one of them. It is true that there was no sanction but there was, in our opinion, a complaint.

It is urged that because Jamna Sahai and Shama Charan were not specifically named in the complaint of Mr. Lyle, District Judge, that there was no complaint. Mr. Lyle in his order does not, it is true, name Jamna Sahai and Shama Charan, while he does name Ram Lal, but, in our opinion, it was not necessary that he should name these persons. "Complaint" is defined in section 4 (8) of the Code of Criminal Procedure as meaning:—"The allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence." In our opinion, Mr. Lyle's order was a complaint within the meaning of this definition, and he having made this complaint, the Court or Magistrate was entitled to take cognizance of the offence and to proceed against all persons who should appear before him as accused persons in connection with the

offence of which Mr. Lyle had made a complaint.

The next point urged on behalf of the accused was that the approver's evidence was not admissible. It appears that the pardon to the approver was tendered by Mr. Lane, a Magistrate of the 1st class. It is urged that Mr. Lane was not inquiring into the offence and that he did not record his reasons as provided by section 337 (4) of the Code of Criminal Procedure. In our opinion, Mr. Lane was inquiring into the offence. The case had been transferred to him for inquiry and he had issued summonses for the attendance of the witnesses and the accused. It is true that in his order, he did not record his reasons but it does not appear from the section that this recording of reasons by the Magistrate is a condition precedent to the tender of the pardon and its acceptance by the approver, and the pardon clearly could not be set aside on this ground. Furthermore, it is perfectly clear that the accused were in no way prejudiced by reason of the fact that Mr. Lane omitted to record his reasons.

It was then argued that the approver's evidence was not admissible because the altering of the plaint in the way already referred to was not an offence under section 466 of the Indian Penal Code, but that it was one under section 465 and that accordingly, it was not an offence triable exclusively by the Court of Sessions, and that, therefore, a pardon could not be given to the approvers. It was argued that a plaint was neither a record nor a proceeding of, or in, a Court of Justice, and reliance was placed on the definition of the words "Court of Justice" in section 20 of the Indian Penal Code. The definition is as follows:—"The words 'Court of Justice' denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially." Section 7 is as follows:—"Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation." In our opinion, it is impossible to contend that a plaint is not a record or a proceeding of the Court of Justice in which it is filed. It is part and parcel of the record of a suit and we think that it can clearly be said to belong to the particular Court of Justice in which it is filed, notwithstanding the definition of that expression in the Code. It is a document which once filed cannot be altered or amended without the special sanction of the Court.

We think, therefore, that all the objections taken to the admissibility of the approver's evidence fail. We accordingly dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 955 OF 1911.

November 21, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

SHYAMA CHARAN MAJUMDAR AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 225, 353—Rescue from lawful custody—Arrest on warrant with bail—No intimation that bail was allowed—Arrest, whether legal.

Where a warrant allowing bail is being executed by a constable, it is his bounden duty to state that bail would be taken. If the constable did not give the slightest intimation to the person arrested of the fact that bail had been allowed, the arrest would be illegal. The arrested person's people would be justified by the law of private defence, in rescuing him, by committing a common assault upon the constable.

Rule against the order of the Deputy Magistrate of Magurah, dated June 23, 1911, convicting the petitioners under sections 225B and 353 of the Penal Code and sentencing the petitioner No. 1 to six months' and the rest to one year's rigorous imprisonment each, which was confirmed by the Session Judge of Jessore on July 28, 1911.

Mr. *K. N. Chaudhuri* and *Babu Debendra Nath Bagchi*, for the Petitioners.

JUDGMENT.—We are of opinion that this Rule must be made absolute on the first three grounds taken together which practically amount to this, that a small bail was entered upon the warrant and that the constable did not give the slightest intimation to the arrested person of the fact that bail had been allowed. On the contrary, he appears to have said that it was no use rescuing the prisoner because the *darcga* was coming present.

ly. The warrant had been made over by the *daroga* for execution and it was the constable's bounden duty under the law to at once state that bail would be taken. Before actually making the arrest he should certainly have said, "Can you give the required bail?" We are of opinion that the arrest was illegal.

Now comes the question whether the accused persons were justified by the law of private defence in committing a common assault upon the constable. The medical evidence clearly shows that nothing but simple hurt was caused. The conviction under section 147 must clearly go, inasmuch as the accused was not in lawful custody. For the same reason, the conditions under sections 225 and 353 must go; and having regard to the medical evidence we cannot find that there was any offence committed by exceeding the right of private defence.

The Rule, therefore, must be made absolute and the petitioners discharged from their bail.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 649 OF 1911.

July 12, 1911.

Present:—Mr. Justice Caspersz and
Mr. Justice Sharfuddin.

UTTAM CHAND—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Excise Act (V, B. C. of 1909), ss. 46, 56—Master's liability for offence by servant—Removing ganja—*Acting on behalf of master, meaning of.*

A master is not criminally responsible for the wrongful act of a servant unless he can be shown to have expressly authorized it.

Sutter Ali Khan v. *Golam Hyder Khan*, 6 W. R. Cr. 60, relied upon.

Under section 56 of the Bengal Excise Act, the prosecution must show that the servant was not only in the employ of his master but also acted on his behalf in committing the offence. The expression "on behalf of" connotes some benefit to the person on whose behalf another person may act.

When a servant does anything within the scope of his employment for that purpose, his action will be binding on his master, and the master will be criminally liable for any wrongful act of the servant.

Rule against the order of the Deputy Magistrate of Arrah, dated April 29th, 1911, convicting the Petitioner under sections 46 and 56 of the Bengal Excise Act V, (B. C.) of 1909 and sentencing him to pay a fine of Rs. 200.

Mr. *Caspersz* and Babu *Surendra Kumar Bose*, for the Petitioners.

Mr. *Sultan Ahmad*, for the Crown.

JUDGMENT.—The petitioner, Uttam Chand, has an extensive business in excise shops of which he holds a considerable number in nine districts of this Province including a *ganja* shop at Koelwar in the District of Arrah. His Koelwar, servant Lakhi Chand, was convicted, under section 46 of the Bengal Excise Act (V of 1909), for being in possession of two and a-half seers of *ganja* which he was attempting to export from Arrah District to Bindhyachal. Lakhi Chand confessed his guilt.

The question, now, is whether the conviction of the petitioner, the master of Lakhi Chand, can be supported on the language of section 56 of the Act. The section is as follows:—"When any offence punishable under section 46 is committed by any person in the employ and acting on behalf of holder of a license granted under this Act, such holder shall also be punishable as if he himself had committed the offence unless he establishes that all due and reasonable precautions were exercised by him to prevent the commission of such offence."

In the opinion of the convicting Magistrate, the petitioner had so many servants and so much business to attend to that it was due to laxity of supervision on his part that his servant, Lakhi Chand, was able to leave his Koelwar shop and commence travelling to Bindhyachal with $2\frac{1}{2}$ seers of *ganja*.

The substantial grounds argued on this Rule are two in number. With regard to the fourth ground specified in the petition, there is no finding in the judgment of the convicting Magistrate, that the $2\frac{1}{2}$ seers of *ganja* belonged to the petitioner, that is, came from his Koelwar shop. The Magistrate says:—"It is extremely probable that he (Lakhi Chand) took the *ganja* from the Koelwar excise shop of the accused." That, however, is not a sufficient finding on which to implicate the master of Lakhi Chand. The other ground—the 3rd in the petition—is that Lakhi Chand was acting outside the scope of his employment and was not acting on behalf of the petitioner when he committed the offence under section 46 (*a*) of the Excise Act.

Section 46 enumerates various offences, and

we think that if a master is to be held liable for all the acts of his servants, his liability must extend to all parts of section 46. As we put it to the learned Deputy Legal Remembrancer, who appeared to show cause, "If his servant Lakhi Chand had cultivated *ganja* in the garden of his own private residence would the master be liable for that act?" The only possible answer to this question is in the negative.

The language of section 56 is very clear and does not in any way conflict with the general principle alluded to in *Suffer Ali Khan* v. *Golam Hyder Khan* (1), namely, that a master is not criminally responsible for the wrongful act of a servant unless he can be shown to have expressly authorised it. That case was one of mischief, but the principle is of extensive authority. Under section 56, the prosecution must show that Lakhi Chand was not only in the employ of the petitioner, but also acted on his behalf in removing the *ganja* from his shop. Lakhi Chand was presumably committing a criminal offence. His business was to remain at the Koelwar shop, and there to conduct sales for the petitioner; but when he travelled beyond the scope of that business, it is not possible to implicate the petitioner in his acts which were not done for the benefit of the petitioner but rather for Lakhi Chand's private purposes. The expression "on behalf of" connotes some benefit to the persons on whose behalf another person may act.

Various authorities have been cited to us on constructions of the Arms Act, the Opium Act, and the Bengal Motor Car and Cycle Act. We have examined them all but we have not derived such assistance from them as would warrant a detailed discussion. There is one case to which we may allude, namely, *Emperor* v. *Haji Shaik Mahomed Shustri* (2), which was cited to us by the learned Deputy Legal Remembrancer; but it does not carry his arguments any further than the principle we have already mentioned. No doubt, when a servant does anything within the scope of his employment for that purpose, his action will be binding on the master, and the master will be criminally liable for any wrongful act of the servant. In the particular case cited, which was under the Indian Emigration Act (XXI of 1883), the master was deemed to be so liable.

In these circumstances, we think the conviction cannot be supported. It is, therefore, set aside and the Rule made absolute. Any fine, paid or levied, will be refunded.

Rule made absolute.

(1) 6 W. R. Cr. 60.
(2) 32 B. 10; 9 Bom. L. R. 1059; 7 Cr. L. J. 238.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION NO. 1524 OF 1911.

January 17, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

NRISINGHA DEB CHATTERJEE AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Bail-bond—Prisoner committing suicide—Surety—Discharge.

When a person on bail commits suicide, the surety is discharged.

Rule against the order of the Magistrate of Maldah, dated August 19th, 1911, directing that the petitioners should forfeit Rs. 5 each in respect of their bail-bonds by which they had stood sureties for the appearance of one Satya Narain who was released pending the hearing of his appeal by the Sessions Judge of Rajshahi. The Sessions Judge of Rajshahi refused to revise the order on September 19th 1911.

Babu *Akhil Bandhu Guha*, for the Petitioners.

JUDGMENT.—This Rule must clearly be made absolute on the ground on which it was issued. It is absurd to contend that when a person on bail commits suicide the sureties are liable for default in his appearance. The proposition only needs to be stated to expose its fallacy. The order of the lower Court will be discharged and the money, if paid, will be refunded.

Rule made absolute.

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A notice to the Collector under clause (2) of section 87 of the Bengal Tenancy Act is not necessary to make an abandonment complete and effectual. The notice is important for the purpose of the suit which the tenant is allowed to bring under clause (3), but is not essential to complete the abandonment; and a landlord who has not given such notice is still at liberty to prove that an abandonment has in fact taken place. The question of abandonment or no abandonment is one of intention to be determined upon the facts of the particular case in which the question arises. KAMALA KANT CHAKI *v.* BEJOYA KANT LAHIRI **639**

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Before a conviction can be sustained on the evidence of an accomplice, there must be corroboration in material particulars by means of independent testimony.

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———————*Evidence — Evidence to explain decree.*

A decree described the lands dealt with as north of a line marked in the plan attached to the decree. A schedule attached to the decree but not referred to in it, however, described the field as Survey No. 265/1:

Held, that evidence was admissible to show that Survey No. 265/1 was not included in the land to the north of the line marked in the plan attached to the decree. GOVINDA VARIER *v.* PARU AMMA, (1912) 1 M. W. N. 401 **360**

———————*Evidence—Sale—Description of house and site—Oral evidence—Evidence Act (I of 1872), s. 92.*

Where a sale-deed purported to convey an upstair house standing on a certain site, which was also described and conveyed, and the vendor had no upstair house on that side but had one on the opposite side of the same street and no other in that town or elsewhere:

Held, that parol evidence was admissible to show that the house intended to be conveyed was the latter upstair house. ANNATHURI IYER *v.* RAMANUJA CHARIAR, (1912) 1 M. W. N. 402; 22 M. L. J. 411 **223**

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———*Document in possession of accused.*

For a document to amount to an admission, it is not necessary that it should have been written by the person against whom it is sought to be used. Mere possession of the document would not ordinarily go for much; but it is sufficient if it be proved that the document has been in his possession, and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy.

The rule would apply more strongly where the document was received or written by the person against whom it is sought to be used. LALIT CHANDRA *v.* EMPEROR, 39 C. 119; 13 CR. L. J. 433 **65**

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——————————*Possession of one co-heir in the absence of others—Whether adverse.*

A co-heir, in the absence of the other co-heirs, got possession of certain property left by a deceased Muhammadan:

Held, that the possession of such co-heir was not adverse to the others unless an adverse title was asserted. CHAND KHAN *v.* ALI KHAN **292**

Agra Tenancy Act (II of 1901), s. 4—*Rent, definition of—Suit for recovery of money equivalent of half the produce of fruit trees in a grove occupied by tenant—Revenue Court, jurisdiction of.*

The definition of the word "rent" contained in section 4 of the Agra Tenancy Act is wide enough to make a suit for the recovery of the cash equivalent of one-half the produce of fruit trees, in a grove occupied by tenant, maintainable as a suit for arrears of rent. MURAT PANDE *v.* KESHO DAS **27**

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The words "agricultural purposes" in section 4 (2) of the Agra Tenancy Act, 1901, must be construed in their ordinary sense; they refer to tilling and cultivation for purposes of raising crops. In their widest sense, the words may include grazing but it is impossible to hold that all land held for grazing purposes is land held for agricultural purposes.

A suit for ejectment of a tenant from pasture land, not held for agricultural purposes, is cognizable by the Civil Court and not by the Revenue Court. MOHIB ALI *v.* SURAT SINGH **743**

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——————— **ss. 95, 167**—*Rival claimants to occupancy-tenancy, dispute between—Jurisdiction of Civil Court.*

Civil Courts are not precluded, by reason of section 167, read with section 95 of the Agra Tenancy Act, 1901, from determining a dispute between rival claimants to an occupancy-tenancy. GANESH *v.* KUNDAN **33**

——————— **ss. 159, 160**—*Suit for arrears of revenue payable or paid by* lambardar—*Limitation.*

Section 159 of the Agra Tenancy Act contemplates a suit by a *lambardar* for arrears of revenue payable to the Government through the *lambardar* by a co-sharer, whether such revenue has actually been paid or not. The limitation for such a suit is three years from the date when the revenue became payable. Section 160 contemplates a case where arrears of revenue have actually been paid by one co-sharer for another, whether the co-sharer paying the revenue be a *lambardar* or not. The limitation under this section runs from the date of actual payment. RAM SINGH *v.* LALTA PRASAD, 9 A. L. J. 581 **733**

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——————— **s. 167**—*Suit for possession against usufructuary mortgagee — Ex-proprietary tenancy—Jurisdiction of Civil or Revenue Court.*

As the question whether a person lawfully in possession of land as a mortgagee must give up possession to his mortgagor when the latter becomes entitled to ex-proprietary rights in the land, *i.e.*, becomes ex-proprietary tenant of the land, is not a question reserved exclusively for the Revenue Courts, section 167 of the Agra Tenancy Act does not apply. GHISSA LAL *v.* RAM AUTAR LAL, 9 A. L. J. 547 **438**

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Section 199 of the Agra Tenancy Act, 1901, is confined to questions of title to land.

Where a Revenue Court does not act under section 199 (1) *(b)* of the Agra Tenancy Act, its decision does not operate as *res judicata*. TAUFIQUNNISSA *v.* TASKIN BANU **239**

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A co-sharer's possession cannot be considered to have become adverse unless and until he sets up his own title by some overt act. HUKAM KAUR *v.* BIHARI LAL, 73 P. W. R. 1912; 110 P. L. R. 1912 **192**

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An appeal was filed in March 1909. The sole appellant died on 4th October 1909, but no application to bring his representatives on the record was made till 27th May 1912. The only explanation of the extraordinary delay was that the appellant's representatives were ignorant of law. The appeal was admitted on 4th June 1910, long after the appellant's death but nothing more was done for over a year owing to omission to pay process-fee till 6th August 1911:

Held, that appeal had abated and that no special circumstances existed to justify any concession to the appellant's representatives.

Cross-objections filed by a respondent cannot be heard, where an appeal abates and there is no appellant on the record. KARAM CHAND *v.* LEHNA, 204 P. L. R. 1912 **708**

———— *Arbitration—Award—Order setting aside award for arbitrator's misconduct can be attacked in appeal against decree.*

When an appeal is finally preferred against a decree of a Court of first instance, which Court has, in the course of the suit, set aside an award of the arbitrators on the ground of misconduct, the order setting aside the award can be traversed in the appeal against the whole decree. JUMA *v.* MUBARAK KHAN, 106 P. W. R. 1912; 133 P. L. R. 1912 **62**

———— *Fruitless even if successful—Execution—Direction that properties, be sold in particular order—Appeal by judgment-debtor—Sale absolute—No appeal filed against order dismissing application to set aside sale—Whether appeal against first order competent.*

In execution of a decree, the Court directed that the properties of the judgment-debtor should be sold in a particular order. The judgment-debtor appealed from that order. Before the appeal was heard, the properties were sold and objections to the sale were rejected:

Held, that the appeal was incompetent and should be dismissed, because, even if it were successful, it would be fruitless, as the sale could not now be set aside. MOHESH CHANDRA SHAHA *v.* BRINDARANI CHOWDHURANI **529**

Appeal—contd.

———*Judgment—High Court's power—Appeal, second.*

The High Court will, in second appeal, satisfy itself only with regard to the lower Appellate Court having applied its mind to the evidence on record and pronounced its finding upon a consideration of the evidence. RANGACHARIAR, *In re*, (1912) 1 M. W. N. 175 **190**

———*Order directing application for assessment of mesne profits to be registered as execution case—Interlocutory order, not appealable.*

An order directing an application for assessment of mesne profits, to be registered as an execution case, is an interlocutory order and does not determine the rights of the parties. It is, therefore, not open to appeal. UPENDRA CHANDRA SINGH *v.* SAKHI CHAND, 16 C. L. J. 3 **573**

——— *against an order of remand—Order of remand carried out by first Court no bar to appeal—Civil Procedure Code (Act V of 1908), s. 105 (2), O. XLI, r. 23, O. XLIII, r. 1 (u).*

Where a suit has been remanded under Order XLI, rule 23 of the Code of Civil Procedure, the fact that before the appeal against the order of remand is filed, the order of remand has already been carried out by the first Court, is no bar to the hearing of the appeal. HUB LAL *v.* GANGA **191**

———*Practice—Time-barred appeal admitted in exercise of discretion before issue of process—Discharge of order of admission on respondent's objection—Limitation Act (IX of 1908), s. 5.*

An order admitting a time-barred appeal by exercise of the discretion given by section 5 of the Limitation Act, if made before issue of process to the respondent, is not conclusive on the respondent.

But such an order should not be discharged on objection by the respondent, unless upon grounds which have not already been considered before the order was made; especially when the respondent's objection to the order of admission comes before a Judge other than the Judge who, in the exercise of his discretion, made the order of admission. SAKU *v.* MAROTI, 8 N. L. R. 50 **562**

———*Present right of—Construction of Statute—Right* in esse *not affected by new Law—General Clauses Act (X of 1897), s. 6—Civil Procedure Code (Act V of 1908), s. 154, O. XLI, r. 23, O. XLIII, r. 1 (u)—Remand order—Appeal.*

The right of appeal in a pending action is not a matter of procedure and the repeal of a statute, which was in force at the time when the action was instituted and which regulated the course of appeal, does not affect the right of appeal acquired or enjoyed under that Statute unless the repealing Statute expressly or by necessary implication takes away that right.

The words "any present right of appeal" in section 154 of Act V of 1908, mean a right of appeal *in esse* and not *in passe*, *i.e.*, a right of appeal which had actually come into existence and was capable of being exercised by the aggrieved party at the commencement of the new Statute.

Where in a suit instituted before the coming into force of the new Civil Procedure Code, an order of remand is passed after the new Code has come into force, the right of appeal against the order is regulated by the new and not by the old Code. GANDA MAL *v.* PIRAN DITTA, 84 P. W. R. 1912; 156 P. L. R. 1912 **725**

Appeal—concld.

——— **Second.** *See* CIVIL PROCEDURE CODE, 1908, s. 100.

——— ——— ———Costs—Discretion **429**

———Decision of Assistant Judge in Land Acquision case **512**

———Finding based on document and on statement of witness—High Court—Document found not to support the conclusion—Remand **103**

———Objection as to defect in verification **583**

———Power of High Court **190**

———Question of law—Determination of legal right **857**

———*Application to set aside execution sale on ground of fraud—Difference between old and new Codes—Civil Procedure Code (Act XIV of 1882), s. 244—Civil Procedure Code (Act V of 1908), s. 104, sub-s. (2), s. 115, O. XXI, r. 90 and O. XLIII, cl. (j)—Sale held under old Code—Decision of lower Appellate Court under new Code—Whether second appeal lies—Revision—Limitation—Erroneous decision on point of limitation, no ground for interference in revision by High Court.*

Under the Civil Procednre Code of 1882, a sale in execution could be impeached for fraud under section 244 thereof, and, therefore, a second appeal lay. But under the present Code of 1908, fraud is put on the same footing as material irregularity by Order XXI, rule 90, and section 104, sub-section (2) read with Order XLIII, clause (*j*), makes it clear that there is now no second appeal in such a case.

A sale was held in execution under the old Code. The first application to set it aside on the ground of fraud was made and allowed by the first Court under the old Code. The order was set aside on appeal and the case remanded under the old Code. On remand, the application was dismissed by the first Court on June 12, 1909, that is, when the new Code had come into operation. There was an appeal and the original order was once more set aside and the case again remanded. A second appeal was preferred against the remand order:

Held, that this order having been made under the new Code, the appeal was incompetent.

An error in applying the law of limitation is not an error which can be corrected in revision; for it cannot be held that a Court, which has jurisdiction to decide a case, has acted without jurisdiction, or illegally, or with material irregularity in the exercise of its jurisdiction, where it makes a mistake in law through failure to appreciate the whole of the law on the subject. BENODE BEHARI BHADRA *v.* RAM SARUP CHAMAR, 16 C. W. N. 1015 **679**

———*Finding as to custom—Right to challenge.*

It is open to an appellant in second appeal to show that the evidence relied upon by the other side, even if believed and considered sufficient, does not, in law, amount to the proof of an alleged custom. SUBHADRA *v.* TRIBHUAN DAT **247**

———*Finding of fact—Finding based upon inadmissible evidence.*

A finding of fact may be challenged in second appeal, when, in coming to it, the lower Court has proceeded illegally in relying upon evidence which is irrelevant and inadmissible. TARINI CHARAN SARKAR *v.* FAKRANNISSA **459**

Appeal to Privy Council. *See* PRIVY COUNCIL APPEAL.

———— ———— ————*Stay of execution—Civil Procedure Code (Act V of* 1908), *Order XLV, r.* 13.

Where permission to appeal to Privy Council is granted execution should not generally be stayed unless the execution would so upset things that in the event of the appeal being successful, the *status quo ante* could not be restored or could be restored only with great difficulty. Execution of the decree should not be stayed on the mere allegatiou that tho applicant will suffer much loss. KHADAM HUSSAIN KHAN *v.* MURAD BIBI, 87 P. W. R. 1912 **187**

Appraisement **914**

Approver. *See* CRIMINAL PROCEDURE CODE, s. 337.

———— ———— ————*Evidence — Corroboration — Confession to private person—Evidence Act (I of* 1872), *s.* 133.

On the night of the 6th-7th of December, a large gang of dacoits made an attack on the house of *B.* Before they could effect their purpose, the neighbours came up and the dacoits were driven off. One of them, *L.*, was, however, captured. He made a confession on the spot to a private person giving the names of some of the dacoits. As a result of the confession, some dacoits were captured. *J.* was captured on February 18 and he afterwards turned informer. *L.* had made a long detailed confession giving an account of the dacoity to a first class Magistrate on December 9, but subsequently on April 20, he retracted the confession:

Held, that, in all cases depending on the evidence of an informer, the degree of support that the evidence required must depend on the amount of the credit in each particular case to be attached to the informer, that the confession of *L.* was ample evidence to corroborate the approver, and that the convictions of the dacoits were legal. LALAN MALLIK *v.* EMPEROR, 16 C. W. N. 669; 13 CR. L. J. 571 **987**

Arbitration. *See* CIVIL PROCEDURE CODE, SCH. II.

————Agreement to refer—Bar to suit **402**

———— Award, order modifying—Appeal **519**

————Award—Order setting aside award for arbitrator's misconduct can be attacked in appeal against decree **62**

————*Award—Valid award, effect of—Extinction of original cause of action—Bar to suit—Limitation—Setting aside award—Limitation Act (XV of* 1877), *Sch. II, Art.* 91—*Award when a nullity—Fraud or dishonesty—Omission to decide all matters—Award not enforced—Award when abrogated.*

A valid award ordinarily operates to merge and extinguish all claims embraced in the submission. After the award has been made, the submission and the award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original cause of action.

In order that a person, who was a party to a submission and award, may sue on the original cause of action, he must first have the award set aside, if the award is not a nullity but is only voidable at the instance of the party, and the suit to set aside the award must be brought within the period of three years under Article 91 of the Limitation Act.

Arbitration—contd.

Fraud or dishonesty on the part of arbitrator is not sufficient to vitiate his award as a nullity.

When an arbitrator has jurisdiction to make an award, fraud or dishonesty on his part does not deprive him of such jurisdiction; such conduct merely amounts to misconduct and may afford good cause for a competent Court to set aside the award.

Where a party has omitted to take steps to get an award set aside within the prescribed period of limitation, he cannot be allowed to object to the award on the ground of fraud or dishonesty of the arbitrator or his failure to decide all the matters in dispute.

An arbitrator is not bound to determine a matter not notified as a matter in difference or which is merely a collateral question, though it may be necessary to dispose of it with a view to deciding the main dispute.

In order to deprive an award of its binding effect, it is not enough that it was not enforced or that even both parties objected to it, but there must be positive evidence that both parties agreed that the former state of things should be restored. KHANCHAND *v.* KODUMAL, 5 S. L. R. 224 **819**

————*Award—Parties to pending suit making reference without intervention of Court—Submission and award invalid—Specific Relief Act (I of* 1877), *s.* 21—*Civil Procedure Code (Act XIV of* 1882), *ss.* 12, 20, 523, 525—*Civil Procedure Code (Act V of* 1908), *Sch. II, ss.* 17, 20.

During the pendency of a suit in a Court, it is not open to the parties to refer the matters in dispute to arbitration *without the intervention of the Court*, or, after an award has been made by the arbitrator appointed in this way, to apply to the Court that the award be filed.

Such a submission and the award made in pursuance thereof are quite invalid.

The provisions of sections 523 and 525 of the Civil Procedure Code, 1882, and sections 17 and 20, Schedule II of the Code of 1908, apply only to cases when there is no suit relating to the same matter already pending between the parties who are affected by the agreement to refer or by the award.

The previously instituted suit is not barred by reason only of an agreement being made between the parties for reference to arbitration without the intervention of the Court.

An award made by an arbitrator in pursuance of such an agreement cannot be taken cognizance of by the Court so as to be made the basis of a proceeding under section 525 of the Civil Procedure Code, 1882. DHAN SINGH *v.* KAHN SINGH, 191 P. W. R. 1912 **140**

————Ex parte *proceeding ordered by arbitrator against one party—Right of that party to file objections to award.*

The mere fact that *ex parte* proceedings have been taken against one party by an arbitrator is not sufficient to justify the summary rejection of the objections to the arbitrators' award filed by that party. Whether *ex parte* proceedings taken by the arbitrator are justified or not, the award made by the arbitrator is one the validity or invalidity of which has to be considered by the Court.

The party, against whom *ex parte* proceedings are ordered by the arbitrator, has every right to an op-

Arbitration—concld.

portunity to file objections to the award which the Court is bound to consider, if they are filed within the time prescribed by law. LILA RAM *v.* MUKAND RAI **57**

——————*Whole* muqaddama *referred—Power to arbitrator to award money or impose other conditions when asked to divide property--Duty of Court in dealing with award when fairly made.*

Where parties apply to the Court to refer their *muqaddama* to the arbitration of a particular person, the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties ask for the settling of all their disputes through arbitration.

Where an arbitrator divides property in a particular manner or in dividing it lays down certain directions or awards certain amounts to one party, his act is well within his jurisdiction and the Court is not competent to interfere with the award on its merits.

Where parties agree to refer their dispute to the decision of an arbitrator, they ought not be allowed to resile from the position which they took up at the time of the reference and objections which are merely technical and not objections of substance should not be allowed to prevail so as to disturb an award, which has been fairly made and which, when the real nature of the dispute between the parties is looked to, might reasonably be considered as directed to a decision on the matters which were in dispute. LAL BEHARI LAL *v.* RAM DIAL **321**

Arbitration Act (IX of 1899), ss. 2, 3, 19 **402**

Arms Act (XI of 1878), ss. 14, 15, 19 (f)—*Possession of gun—Servant—Master having license, dead—License not renewed—Servant continuing to retain possession of gun.*

A. was licensed to possess a gun: the gun was kept by his servant the accused. *A.* died and *B.*, who succeeded to the management of *A.*'s property, failed to renew the license.

Two years after *A.*'s death, the quarters belonging to the accused were searched and the gun found therein.

The accused contended that the responsibility could not be attributed to him but ought to be attributed to *B*:

Held, that the accused had possession and control of the gun in contravention of the provisions of sections 14, 15 of the Arms Act and was, therefore, guilty of an offence under section 19 (*f*). EMPEROR *v.* JAFU BAPU, 14 BOM. L. R. 503; 13 CR. L. J. 521 **797**

——————— **ss. 15, 19 (f)** **797**

Arrest on warrant with bail—No intimation that bail was allowed—Arrest, whether legal **1006**

Assault on a girl. *See* PENAL CODE, s. 354 **309**

——————Threatening to beat with a shoe **505**

Assessors, opinion of, how to be taken **65**

Assessor's opinions how to be taken—Cross-examining assessors, contrary to law **641**

Assignment of debt—*Fraud on creditors--Creditor entitled to impeach such assignment and attach the debt—Purchaser of debt at Court-auction entitled to the same rights—Whether debtor entitled to say that he is bound to pay one claimant and not another.*

A. assigned to *B.* a debt due to himself with the object of defeating his creditors. Notice of assignment was given to *A.*'s debtor.

Subsequently, *C.*, one of *A.*'s creditors, attached the debt in execution of a decree. The debt was sold and purchased by *D.* In a suit by *B.* against the debtor and *D.* for recovery of the debt:

Held, that *D.* was entitled to impeach *B.*'s right on the ground that the assignment was intended to defeat *A.*'s creditors.

Although as between a transferor and his transferee, an assignment may be complete, the creditors of the assignor are not bound by it, if it be in fraud of creditors, and they are entitled to attach the property assigned as being still the property of the assignor, so far as the debts are concerned.

If there are two competing claimants to the same debt, the debtor is entitled to say that one of them is the person really entitled to payment from him and not the other. The debtor is entitled to refuse to pay the amount to the person who is not really entitled to payment. Although a creditor has notice of an assignment, there is no duty at law on him, under the old Code of Civil Procedure, to bring it to the notice of the attaching Court. SUBRAMANIA PILLAY *v.* DAKSHNAMURTHI MUDALIAR, (1912) 1 M. W. N. 363; 11 M. L. T. 262 **193**

——————— of promissory-note executed in favour of partners **380**

Attachment before a judgment. *See* CIVIL PROCEDURE CODE, 1908, O XXXVIII.

——————. *See* EXECUTION OF DECREE **49**

——————Difference between attachment before judgment and attachment after judgment **668**

——————Effect of want of proper attachment—Sanction, effect of absence of—Sale, validity of **780**

——————Part payment of decree certified—Whether attachment withdrawn—Execution **677**

Attestation—Executant if can be attesting witness **666**

Auction-purchaser's title—Fraud **433**

Award. *See* ARBITRATION.

——————accepted by parties—Adjustment **959**

——————Judgment of High Court based on award—Appeal to Privy Council **2**

——————*Family arrangement acted upon for a very long time, whether binding on family.*

In 1876, disputes arose between a daughter and the daughter's sons by another daughter of one *C.* in respect of the property left by *C.* The disputes were referred to arbitrators, and the arbitrators gave a portion of the property to the daughter and a portion to the daughter's sons by another daughter. The award was made a rule of Court and was acted upon for a very long time:

Held, that the award was a family arrangement which was binding not only upon the actual parties to it but upon the whole family. MADAN LAL *v.* CHUTTAN SINGH, 10 A. L. J. 101 **297**

Bail—Security for breach of peace 79

Bail-bond—*Prisoner committing suicide—Surety—Discharge.*

When a person on bail commits suicide, the surety is discharged. NRISINGHA DEB CHATTERJEE *v.* EMPEROR, 16 C. W. N. 550; 13 CR. L. J. 592 **1008**

Bailment—*Specific property—Debtor and creditor—Liability of a goldsmith—Contract Act (IX of 1872), ss. 148, 151—Revision—Material irregularity.*

Where some precious stones and lumps of gold of special quality and three sovereigns were given to a goldsmith to convert into jewellery and were lost by theft, not caused by want of proper care:

Held, (1) that as the intention was to convert the identical stones and lumps of gold into jewellery, the ownership did not pass to the goldsmith and the transaction being one of bailment, he was absolved from liability for the loss under sections 148 and 151, Indian Contract Act, but that as regards the three sovereigns; as the identical sovereigns were not intended to be melted and turned into jewellery, the property had passed to the goldsmith and he was indebted to the owner thereof and was liable to make good the loss;

(2) that as the above distinction had escaped the attention of the lower Court, there had been material irregularity in the exercise of jurisdiction. MAUNG SAN MYAING *v.* MAUNG PO HMAN, 5 BUR. L. T. 106 **431**

Bengal Cess Act (IX of 1880), s. 20, sch. A, Part I—*Tenant's name not entered in Part I or II—Whether rent suit maintainable.*

A landlord, in a return under Part I of Schedule A of the Bengal Cess Act, put down the names of his *batai jote raiyats*. Subsequently, he brought rent suits against them:

Held, that the return should have been made under Part II or Part III of the Schedule, as the case may be of Schedule A and not under Part I, and the names of the *raiyats* or tenure-holders, as the case may be, should have been mentioned; and there was, therefore, no proper return within the meaning of the Cess Act and section 20 was a bar to the suits. SAMDANI *v.* KAMALAKANT JHA **424**

——— s. 95 **284**

——— Sch. A, Part I **424**

Bengal Court of Wards Act (IX of 1879), ss. 10, 64A—*Notice—Presumption—Non-presentation of claim to the Collector, effect of—Interest, loss of.*

The Bengal Court of Wards Act, 1879, does not require a Collector to give notice to the creditors entered in any list, but it does require the issue of a general notice.

If the provisions of clauses *(b)* and *(c)* of section 64A of the Court of Wards Act are complied with in full and those of clause *(a)* are complied with partly, the Court may presume that all the notices required by the section were published.

If a creditor does not submit his claim after the publication of the notice under the Act, the creditor loses his interest from that date. BARROW *v.* GAYA PRASAD, 9 A. L. J. 558 **729**

——— s. 64A **729**

Bengal Excise Act (V, B. C. of 1909), ss. 2 (14), (20), 9 (2), 10, 46, 52, 55, 57—*Exciseable liquor, meaning of—Tinctures, whether liquor—Prevention of smuggling of drugs prepared in French territory, how to be effected—"Juice drawn from any cocoanut," meaning of—Taking order for foreign goods, whether constitutes abetment of transport.*

The definition of "Exciseable liquor" given in the new Excise Act (V, B. C. of 1909), prevents chemists and vendors of drugs selling intoxicating liquors or otherwise dealing with them as medicinal preparations.

Tinctures of Cinchona, Cardamom or Ginger and Spirits of Nitric Ether are not exciseable liquor.

The smuggling of drugs prepared in French territory with French spirits in Bond into British territory can be prevented under the customs law. Therefore, those articles ought to be dealt with by the Customs Authorities; but the omission of these authorities to do so does not render the accused liable to punishment under the Excise Act.

"Juice drawn from any cocoanut" in section 2, clause 20, of the Excise Act, does not refer to the milk of the cocoanut itself but means the juice of the palm tree of whatever species and not its fruit.

The act of taking an order for foreign goods does not constitute an abetment of their transport, though it might be an abetment of their import. EMPEROR *v.* MOTI LAL CHANDER, 16 C. W. N. 785; 13 CR. L. J. 545 **961**

——— ss. 9 (2), 10, 46 **961**

——— ss. 46, 56—*Master's liability for offence by servant—Removing* ganja—*Acting on behalf of master, meaning of.*

A master is not criminally responsible for the wrongful act of a servant unless he can be shown to have expressly authorized it.

Under section 56 of the Bengal Excise Act, the prosecution must show that the servant was not only in the employ of his master but also acted on his behalf in committing the offence. The expression "on behalf of" connotes some benefit to the person on whose behalf another person may act.

When a servant does anything within the scope of his employment for that purpose, his action will be binding on his master, and the master will be criminally liable for any wrongful act of the servant. UTTAM CHAND *v.* EMPEROR, 16 C. W. N. 551; 15 C. L. J. 401; 39 C. 344; 13 CR. L. J. 591 **1007**

——— ss. 52, 55 **961**

——— s. 56 **1007**

——— s. 57 **961**

Bengal Local Self-Government Act (III B. C. of 1885), s. 76—*Channel—Property of private person—How can be brought under District Board.*

A District Board can only bring a private channel under its control and administration by making an agreement with the person in whom the property in any channel is vested, under section 76 of the Bengal Local Self-Government Act.

Where a District Board had a certain private channel entered on its books and had spent some money on its up-keep:

Bengal Local Self-Government Act —concld.

Held, that, this was not sufficient to bring the channel under the control and administration of the District Board, and that the persons erecting weirs and fishing in it, with the permission of the owners, committed no offence against the District Board's by-laws. SHASHI BHUSHAN GUPTA *v.* EMPEROR, 13 CR. L. J. 580 **996**

Bengal Municipal Act (III B. C. of 1884), s. 6 (3) **548**

——— **s. 85, cl. (a)**—*Assessment*—Naib *residing in* zemindar's *house adjoining* kacheri *without paying rent*—Zemindar *occupier and liable to tax, not* naib—*House and* kacheri, *separate holdings.*

The plaintiff as the *naib* of a *zemindar* occupied a small house adjoining the *zemindar's kacheri*, and paid no rent. The Municipality assessed him with Municipal taxes under section 85 clause *(a)* of the Bengal Municipal Act whereupon he brought this suit for a declaration that the imposition of the taxes is illegal:

Held, that the occupier of the house was the *zemindar*, and that he, and not the plaintiff, was liable to be taxed in respect of it.

Obiter dictum:—The plaintiff's house and the *kacheri* house were not one holding for the purposes of the assessment under section 85 clause *(a)* of the Bengal Municipial Act. GOBINDA CHANDRA GANGULY *v.* KAILASH CHANDRA SANYAL, 15 C. L. J. 689 **909**

——— **ss. 101, 103, 110** **548**

——— **ss. 217, 273, 353**—*Prosecution—Offence under Act—Institution of prosecution—Consent of Commissioners—Evidence of sanction what is—Public authority—Consent in writing—Tabular form—"I have seen," "prosecute," whether valid consent.*

The only evidence of sanction of prosecution by a public authority, is a writing under the seal and signature of that authority.

In a tabular form, called the form of prosecution, there was the name, whether of the accused or the complainant was not shown, the second head "prosecute," presumably the charge which was laid against the man, the cause; names of witnesses; the date; and column of remarks; the Chairman or Vice-Chairman (of the Municipality); and in this column of remarks were the words: "I have seen myself" signed S. C. G. In another similar form, in the column of remarks, was the word "prosecute:"

Held, that this was not authority, written or otherwise, showing the consent of the Commissioners or the Vice-Chairman on their behalf to a prosecution within section 353 of the Bengal Municipal Act, 1884.

The authority which the Vice-Chairman has is to convey the sanction of the Commissioners, and not to pass any order of any kind, and he must convey that sanction under his own seal and signature to the Magistrate. RASLU BAKSH *v.* MUNICIPAL BOARD OF CHAPRA, 16 C. W. N. 934; 13 CR. L. J. 524 **796**

——— **ss. 273, 353** **796**

Bengal Rent Act (X of 1859), s. 109, *scope of—Single execution creditor and single judgment-debtor—Case of several judgment-debtors—Execution against some of judgment-debtors—Proceeding against immoveable property of some judgment-debtors whose moveables and persons also were proceeded against, though no proceeding taken against other judgment-debtors—Process against moveables on first execution—Proceedings against immoveable property subsequently, though moveables came into judgment-debtor's possession in the meantime—Sale of immoveable property*—Onus *of proof—Decree to be self-contained—Execution as decree stands.*

Section 109 of the Bengal Rent Act, 1859, contemplates the case of a single execution-creditor and a single judgment-debtor; it does not specifically refer to the case of a joint and several decree against a number of judgment-debtors, in which case the decree-holder is at liberty to take out execution against any or as many of the judgment-debtors as he may choose. And the requirements of the section are satisfied if, in so far as an individual judgment-debtor is concerned, proceedings have been taken against his person or moveable property before an attempt is made to reach his immoveable property; he has no concern with his fellow judgment-debtors against whom the decree-holder may not proceed at all at his choice. In other words, execution can be taken out of a decree for money under the Bengal Rent Act, 1859, not being money due as arrears of rent of a saleable under-tenure, against the immoveable property of some of the judgment-debtors, whose moveable property and person had been proceeded against previously, although the moveables belonging to the other judgment-debtors have not yet been sold.

Process against moveable property must be taken upon the first application for execution of such a decree; and after moveable property has been exhausted, the decree-holder is free to proceed against immoveable property upon succeeding applications for execution, notwithstanding that other moveable property has come into the possession of the judgment-debtor in the meantime.

An application against the person of the judgment-debtor is not a condition precedent to the maintenance of an application for execution against immoveable property.

It is not the true meaning of section 109 that if an application has been made for execution against the immoveable property of the judgment-debtor, it can be defeated by him only if he proves that he has moveable property within the district sufficient for the *complete satisfaction* of the judgment-debt. The decree-holder is not free to ignore the moveable property, even upon the first application for execution although its value is not sufficient for the full satisfaction of his decree.

A decree must be self-contained and must be executed as it stands.

In a suit it was ordered that a decree be passed in accordance with the *solenamah* filed by the parties, but the provision in the *solenamah*, as to the payment of interest in the event of default, was not incorporated in the decree:

Held, that the decree-holder was not entitled to take out execution of interest under the decree as it stood, but he might apply for amendment of the decree. BHIKARI SUKUL *v.* GADADHAR RAMANUJ DAS **735**

Bengal Rent Recovery Act (VIII B. C. of 1865), ss. 5, 16 842

Bengal Tenancy Act (VIII of 1885), s. 3 (9) 453, 847

——————— ss. 15, 16—*Deposit of landlord's fee subsequent to institution of suit, whether sufficient.*

It is a sufficient compliance with the provisions of sections 15 and 16 of the Bengal Tenancy Act, if the landlord's fees, etc., be deposited with the Collector after the institution of rent suit. RAJANI KANTA SARKAR *v.* MAKHAN LAL GOSWAMI 542

——————— s. 16 542

——————— ss. 22, cl. (2), 49—*Eastern Bengal and Assam Act (I of* 1908), *s.* 10 *cl.* (*b*)—*Acquisition of occupancy-right by co-sharer tenure-holder—Destruction of occupancy-right—Existence of* raiyati—*Tenant under* raiyat *to be under-*raiyat *under co-sharer tenure-holder—Amending Act—Retrospective effect.*

The Eastern Bengal and Assam Act I of 1908, section 10, clause (*b*), which amends section 22, clause (2) of the Bengal Tenancy Act, has no retrospective operation.

Therefore, if a co-sharer tenure-holder purchased an occupancy-holding under the tenure, before the amending Act came into operation, he acquired the rights of a *raiyat* though not those of an occupancy-*raiyat*.

And he can bring a suit to eject a tenant of the holding who is an under-*raiyat*, under section 49 clause (*b*) of the Bengal Tenancy Act, after the amending Act came into force. NABIN CHANDRA PAL *v.* BANGA CHANDRA CHOWDHURY 705

——————— s. 22—*Occupancy, non-transferable—Purchase by co-sharer landlord of non-transferable occupancy-right, effect of.*

The case of *Girish Chandra Chowdhury* v. *Kedar Chandra Roy*, 27 C. 473, which lays down that, in the case of a non-transferable occupancy-holding, the holding itself, as apart from the right of occupancy, cannot be sold so as to give the transferee a right to retain possession of it, has not been overruled by any subsequent decision of a Full Bench.

Where such a holding is transferred to one of the co-proprietors, the occupancy-right ceases to exist, and the other co-proprietors are entitled to have joint possession with the transferee co-proprietor. SALIMA SAHATANNESSA BIBI *v.* ENATULLA TALUKDAR 524

——————— ss. 23, 25, cl. (a), 76—*Ejectment—Excavation of tank—Suit for ejectment—Subsequent suit for rent—Forfeiture—Waiver—Improvement—Use of land rendering same unfit for purposes of tenancy—Digging tank which is a practical necessity—Ground of ejectment.*

The plaintiffs instituted a suit for ejectment against certain occupancy-*raiyats* under clause (*a*) of section 25 of the Bengal Tenancy Act. A suit for rent was subsequently commenced in respect of a period subsequent to the alleged forfeiture:

Held, that there was no waiver at the date of the commencement of the suit, and the claim for ejectment could not be defeated on that ground.

Before a landlord can succeed in an action under section 25, clause (*a*), of the Bengal Tenancy Act, it is obligatory upon him to prove that the land has been used in a manner which renders it unfit for the purposes of the tenancy; what has to be considered is the effect of the act upon the entire land comprised in the tenancy.

Therefore, where a holding comprises 66 *bighas* and the tenants sub-let 4 *bighas* to an under-lessee who excavated a tank on 2 *bighas*, and it was found that the tank had not rendered the land of the tenancy unfit for the purposes thereof, but was a practical necessity:

Held, that the *raiyat* could not be ejected under clause (2) of section 25 of the Bengal Tenancy Act. SOURINDRA MOHAN *v.* RAHIM BAKHSH 497

——————— s. 25 (a) 497

——————— s. 29 878

——————— s. 30 453, 847

——————— s. 48—*Land in holding of* raiyat, *of different qualities—No indication to show rates of assessment of various classes of lands—Part of land sub-let to under-*raiyat—*Whether s.* 48 *applicable.*

Section 48 of the Bengal Tenancy Act does not expressly mention the land held by the under-*raiyat*, but the meaning plainly is that the landlord of the under-*raiyat* who holds under a money rent is not entitled to recover rent exceeding by more than a quarter the rent which he himself pays in respect of the land let out to the under-*raiyat*.

Therefore, in cases in which the land comprised in the holding of the *raiyat* is of different qualities and there is no indication to show at what rates the various classes of lands were assessed, section 48 cannot be made applicable, if only a part of the land has been sub-let to an under-*raiyat*. NIM CHAND SHAHA *v.* JOY CHANDRA NATH, 16 C. W. N. 857; 39 C. 839 256

——————— s. 49 705

——————— ss. 52, 109A—*Decision fixing area of holding, whether decision settling rent—Appeal, bar of—Additional rent for additional area, when landlord is entitled to.*

A decision fixing the area for which the tenant must pay rent, is not a decision settling a rent from which an appeal is barred by section 109*A* of the Bengal Tenancy Act.

If the landlord originally intended to let and the tenant intended to take such and such a piece of land, be the number of *bighas* in it what they may, the fact that the area proves to be larger than what was originally stated would not entitle the landlord to additional rent. If, however, he intended to let and the tenant intended to take so many *bighas*, be the actual piece of land what it may, the landlord would be entitled to additional rent when the tenant was proved to hold more *bighas* than were originally let to him. AKBAR ALI MIAN *v.* HIRA BIBI, 16 C. L. J. 182 332

——————— s. 76 497

——————— s. 85 cl. (2)—*Lease in contravention of cl.* (2) *s.* 85—*Who is entitled to question validity of lease.*

The true object of section 85 of the Bengal Tenancy Act, is to entitle the landlord of a *raiyat* to question the validity of a sub-lease granted in contravention thereof. Therefore, an under-*raiyat*, who holds under a permanent lease granted by a *raiyat*, can successfully maintain a suit for possession or defend his possession against the *raiyat* or his representatives-

in-interest. It is not open to the *raiyat* in such a suit to question the validity of the sub-lease on the ground that it was granted in contravention of clause (2) of section 85 of the Bengal Tenancy Act. SADHAN SARDAR *v.* LAKAN MANDAL **255**

——— ——— ——— ——— **s. 85 cl. (2)**—*Sub-letting by* raiyat—*Permanent lease—Registration effected in contravention of law—Effect of lease.*

A sub-lease by a *raiyat* purporting to create a permanent tenancy, that is, to create a term exceeding nine years, even if registered in breach of section 85 clause (2) of the Bengal Tenancy Act, must be treated as though it was not registered, for it was a registration in contravention of law. The document, therefore, is inadmissible in evidence, and cannot affect the holding. JARIP KHAN *v.* DURFA BEWA, 16 C. L. J. 144 **476**

——— ——— ——— ——— **s. 86** **264**

——— ——— ——— ——— **s. 87 (2), (3)** **639**

——— ——— ——— ——— **ss. 104A to 104F, 104J, 104H, 113**—*Record of Rights, final publication of—No suit brought to alter rent entered in Record of Rights—Bar of claim in excess of rent entered therein.*

The meaning of section 104J of the Bengal Tenancy Act is, that unless an entry in the Record of Rights, settling a rent in accordance with the provisions of sections 104A to 104F, has been altered by means of a suit brought as contemplated by section 104H, the entry shall prevail.

The defendant executed a *kabulyat* in favour of the plaintiff agreeing to occupy 96 *bighas* of land at a rental of Rs. 220 and to pay for any excess land which he may be found to occupy. Subsequently, settlement proceedings were undertaken and a Record of Rights was finally published according to which the defendant then held 117 *bighas* of land, but the rent fixed for that area was Rs. 220. The plaintiff brought this suit for arrears of rent at the rate of Rs. 268 per annum:

Held, (1) that section 113 of the Bengal Tenancy Act was not applicable and was, therefore, no bar to the plaintiff's claim;

(2) that section 104 J rendered the entry in the Record of Rights conclusive in this case and barred the plaintiff's claim beyond Rs. 220 per annum. PRASANNA KUMAR ADHIKARY *v.* RACHIMUDDIN HOWLDAR **327**

——— ——— ——— ——— **ss. 104B, 104C, 104D, 104E, 104F, 104H, 104J, 113** **327**

——— ——— ——— ——— **s. 106** **863**

——— ——— ——— ——— **s. 109A** **332**

——— ——— ——— ——— **ss. 153, 174**—*Appeal—Rent decree—Sale—Order setting aside or refusing to set aside sale—Question relating to title to land between conflicting parties—Effect of explanation to section 153—Question, whether judgment-debtor complied with section 174 Decision whether appealable—Poundage fee, whether judgment-debtor bound to deposit—Execution proceedings, whether decree may be challenged.*

A decree for rent under Rs. 50 in value was made by a Munsif with final jurisdiction under section 153 of the Bengal Tenancy Act. An appeal was preferred against that decree and heard without jurisdiction.

The decree was modified. In execution of that decree the holding was sold and purchased by the decree-holder. The judgment-debtor brought into Court a sum for the reversal of the sale under section 174 of the Bengal Tenancy Act. An application to set aside the sale was refused on the ground that the poundage fee had not been deposited. This order was made by a Munsif who had final jurisdiction under section 153. The judgment-debtor appealed to the District Judge who overruled an objection to the competency of the appeal. On the hearing of the appeal, it was held that the judgment-debtor was not bound to deposit the poundage fee as under the High Court Rules, the decree-holder, upon reversal of the sale, would be entitled to a refund of the sum he had deposited on that account. The sale was consequently reversed. The decree-holder moved the High Court against that order:

Held, (1) that an order of this description made under section 174 of the Bengal Tenancy Act is ordinarily appealable.

(2) That an order setting aside or refusing to set aside a sale held in execution of a rent-decree is an order which decides a question relating to title to land as between parties having conflicting claims thereto.

(3) That the effect of the explanation newly added to section 153 of the Bengal Tenancy Act is not to practically supersede the Full Bench case of *Kali Mondul* v. *Ram Sarbeswar Chakrabutty*, 32 C. 957; 9 C. W. N. 721; 1 C. L. J. 476 (F. B.), although the effect of the explanation is to restrict considerably the effect of the Full Bench decision.

(4) That where the question is, whether the judgment-debtor has complied with the requirements of section 174 for reversal of the sale, the case is not covered by the explanation and the rule laid down in the Full Bench governs the matter.

(5) That the appeal to the District Judge was competent.

Obiter dictum:—(1) The judgment-debtor was not bound to deposit the poundage fee.

(2) It was not open to the judgment-debtor to challenge the validity of the decree in execution proceedings after that decree had been executed without objection and the sale had actually taken place. BENI MADHAB ROY *v.* BISSESSWAR BHARATI **436**

——— ——— ——— **s. 153 (b)**—*Rent suit valued at less than Rs. 50—Trial by Munsif—Appeal—Jurisdiction of Appellate Court—Civil Procedure Code (Act V of 1908), s. 115—Two decrees of first Court—Decision of Appellate Court by one judgment—One rule on single petition—High Court's power to interfere—Question of jurisdiction not taken before Appellate Court—High Court's power to entertain objection.*

Two rent suits were tried by a Munsif who was invested with powers under section 153 (*b*) of the Bengal Tenancy Act. In both the suits the amount claimed was less than fifty rupees. The Munsif decreed them and the defendants appealed. The Sub-Judge decreed the appeals in one judgment. A Rule was granted by the High Court on a single petition in both the cases:

Held, (1) that no appeal lay to the Sub-Judge, and that, although the point was not taken before the lower Appellate Court, the High Court could entertain the objection as it was a question of jurisdiction.

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(2) that it was competent to the High Court to grant a Rule on a single petition which would have the effect of setting aside two decrees which were made the matter of a single appeal. SARAT CHANDRA BISWAS *v.* ASHRAF ALI **669**

——————— **ss. 159, 160 (d), 161 (a)**—*Burden of proof—Existence or non-existence of protected interest—Incumbrance—Annulment.*

It rests upon an auction-purchaser in the first instance to show that the interest which he wishes to annul, is an incumbrance. But when that is established, the *onus* shifts on to the incumbrancer to prove that his incumbrance is saved through being a "protected interest." HARI MONI DEBI *v.* MOTI SHEIKH, 16 C. W. N. 779 **30**

——————— **ss. 160 (d), 161 (a)** **30**

——————— **s. 167** **479**

——————— **s. 167** — *Incumbrance, annulment of—"Date of sale," whether means actual date of sale or date of confirmation—"Has notice," whether means has received notice or has knowledge or "information"—Incumbrance annulled from what date.*

In section 167 of the Bengal Tenancy Act, the words "date of the sale" mean the actual date of the sale, and not the date of the confirmation of sale.

In the same section, the words "has notice" mean, has knowledge or information "and not has received a notice."

It is provided by the section that the incumbrance shall be annulled from the date on which the notice is served on the incumbrancer. It cannot mean the date on which the application for service of notice is made to the Collector. YUSUF GAZI *v.* ASMATULLAH, 16 C. L. J. 131 **430**

——————— **s. 174** **436**

——————— **s. 174** — *Execution of rent-decree—Sale of holding—Deposit of decretal amount—Deposit to be made only by judgment-debtor—Deposit by judgment-debtor's alleged attorney—Authority of attorney to be proved if challenged.*

An application, under section 174 of the Bengal Tenancy Act, to set aside the sale of a holding in execution of a rent-decree, by deposit of the decretal amount, can be made by the judgment-debtor alone and by no other person.

Consequently, if a person deposits money by professing to act on behalf of the judgment-debtor, his authority to do so, if challenged, must be duly established. RANJIT KUMAR GHOSE *v.* JOGENDRA NATH ROY **561**

——————— **s. 178** **575**

——————— **s. 188** **847**

Berar Land Revenue Code, s. 4 **895**

——————— **s. 4 (14), (15)** **899**

——————— **s. 15** **895**

——————— **s. 60** **899**

——————— **s. 72** **895, 899**

——————— **ss. 73, 74, 76** **895**

——————— **s. 105** **899**

Berar Land Revenue Code—concld.

——————— **ss. 205, 211** — *Pre-emption—"Co-occupant having a right of pre-emption"—Subsequent transferee from person having right of pre-emption.*

The words "co-occupant having a right of pre-emption" in section 211 of the Berar Land Revenue Code, refer only to the person who was co-occupant at the date of the transfer on which the claim for pre-emption is based or a transferee from that co-occupant by inheritance. The words do not include an entire stranger to whom the co-occupancy right has passed by voluntary transfer, that is, by sale or gift, subsequent to the sale sought to be pre-empted.

A right to sue for pre-emption, which has already accrued, cannot be transferred to an entire stranger. Consequently, a stranger, who has become a co-occupant by a transfer subsequent to the sale sought to be pre-empted, is not entitled to the right of pre-emption. RAMJI *v.* MUKTAI, 8 N. L. R. 662 **570**

——————— **s. 211** **570**

Bombay District Police Act (IV of 1890), s. 3 (e)—*Street, definition of—"Accessible to the public"—"Access to."*

The definition of "street" in section 3, clause (*e*) of the Bombay District Police Act, 1890, is inclusive in its terms, and includes a place accessible to the public. The words "accessible to the public" mean that any member of the public as such has access to the land: and "by access to" would ordinarily be understood unimpeded entrance upon the land. EMPEROR *v.* MANILAL, 14 BOM. L. R. 499; 13 CR. L. J. 513 **785**

——————— **ss. 57, 58** — *Finder's rights of—Finder producing property on Police requisition—Rights not waived—Power of Magistrate to order property to vest in Government.*

Where the finder of property hands it over to the Police on their requisition but does not waive his rights as finder, the Magistrate ought not, under section 58 (2) of the Bombay District Police Act, to order the property to vest in Government. ALIMIA, *In re*, 14 BOM. L. R. 304; 13 CR. L. J. 503 **647**

——————— **s. 58** **647**

Bombay Hereditary Offices Act (Bom. Act III of 1874), s. 67 (d)—*Jurisdiction of Civil Court—Vatandar—Suit for declaration that plaintiff was head of Vatan family and entitled to certain share.*

A suit to obtain a declaration that the plaintiff is the head of a family of Vatandars and in consequence is entitled to a certain share in the Vatan belonging to the family, falls under the bar of section 67 (*d*) of the Hereditary Offices Act and, consequently, is not cognizable by a Civil Court. JIVAJI SAMBHAJI KAMBLI *v.* FAKIR SABAJI KAMBLI, 14 BOM. L R. 895; 36 B. 420 **840**

Bombay Land Revenue Code (V of 1879), ss. 73, 135 **517**

Bond—*Money re-payable within one year, meaning of—Construction.*

In a mortgage-bond, it was stipulated that the principal and interest would be paid within one year:

Held, that the case fell within the class of cases in

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which the mortgage-money was payable *before* a certain day, and not within the class where a day was fixed for the payment of the debt, and that, therefore, the debtor was entitled to pay off the debt on any day within one year. PURNA CHANDRA SARMA *v.* PEARY MOHAN PAL, 39 C. 828 **287**

Buddhist Law—*Inheritance* — Hnapazon *and* lettetpwa—*Husband's share in* lettetpwa *inherited by wife during coverture.*

Property inherited by the wife from her father after her marriage is *lettetpwa* and not *Hnapazon.* The husband, as the party through whom the inheritance did not come, is entitled to one-third share of such property. TOLA RAM *v.* MA KAING, 5 BUR. L. T. 98 **380**

——— ——— ———*Inheritance — Status of eldest daughter on death of the eldest child who was a son —Status devolves on the elder of two daughters where there is no other son.*

The first born child in a family was a son, who died in infancy; the second child was a daughter *A.* The only other child was a daughter who was born 7 years after *A* :

Held, (1) that *A.* was the eldest daughter within the meaning of section 163 of the Digest ;

(2) that if the eldest child, who died in infancy, were a daughter, the status of eldest daughter would have devolved on *A.* as the next eldest daughter and that the fact that the eldest child was a son made no substantial difference, as no other son was born who could fill the place of the deceased *orasa.*

The texts cited in section 163 of the Digest give the issue of the eldest daughter a share equal to that of the youngest of his aunts and there seems to be no authority for holding that these texts apply exclusively to families consisting of daughters only.

The texts are applicable to a family where the only children arriving at maturity were two daughters and the only other child was a son who died in infancy. MA EIN THU *v.* MAUNG HLA DUN, 5 BUR. L. T. 73 **360**

——— ——— ———*Inheritance—Widow—Eldest son —Eldest-daughter—Power of widow to dispose of property inherited by the eldest son or reserved for the eldest daughter—Necessity.*

Where there has been a complete divorce, a daughter, who goes to live with her mother and does not maintain filial relations with her father, is not entitled to inherit the latter's estate on his death.

The heir of a deceased husband, under Buddhist law, is his widow and not any of his children except the eldest son in respect of a-fourth of the estate until the death of the widow. The three-fourths share which goes to the widow is her absolute property, to do what she will with.

But she has no right to dispose of the one-fourth share of the eldest son even in the case of necessity. To the eldest daughter also certain specified property is allotted and the remainder goes to the widow as her absolute property. But in the case of necessity, *e. g.,* for the maintenance of younger children, the widow can dispose of the special property reserved for the eldest daughter. MI SAW MYIN *v.* MI SHWE THIN, U. B. R. 1912, I p. 125 **919**

Bundelkhand Encumberd Estates Act (I of 1903),—*Benefit under the Act claimed only by some mortgagors—Integrity of mortgage broken.*

The failure of the mortgagee to make any claim against some of the mortgagors, who had obtained the benefits of the Bundelkhand Encumbered Estates Act, in a case in which some of the mortgagors had, while others had not, obtained this benefit, cannot put the mortgagee in a worse position than he would have occupied if he had allowed the integrity of the mortgage to be broken up by permitting the holder of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. In such a case, the mortgagee is entitled to proceed against the share of the mortgagors, who have not obtained the benefit of the Act, for a proportionate share of the mortgage-money. POHKAR SINGH *v.* RAM DIN, 10 A. L. J. 171 **849**

Burden of proof—Consideration—Mortgage **121**

——— ——— ———Consignment of goods to railway—Loss **56**

——— ——— ———Existence or non-existence of protected interest—Incumbrance—Annulment **30**

——— ——— ——— ———Express or implied surrender of occupancy rights granted to a community **119**

——— ——— ———Fraudulent transfer **509**

——— ——— ———Non-delivery of possession after sale—Acquisition of prescriptive title **282**

——— ——— ———Validity of deed of gift **529**

——— ——— ———Sale subject to mortgage—Purchaser to prove failure of consideration of mortgage **5**

——— ——— ——— ———Suit for *Malikana* **911**

——— ——— ——— ———Suit for possession by auction purchaser **10**

——— ——— ——— ———*Execution of document admitted or proved—Consideration.*

When a document is admitted in evidence, and its execution is either admitted by the defendant or proved against him and the receipt of consideration is acknowledged therein, the burden would lie upon the defendant to prove the want of consideration. MOHAMMAD AMIR MIRZA BEG *v.* KEDAR NATH, 15 O. C. 58 **202**

——— ——— ———Hiba-bil-iwaz -- *Proof of payment of consideration.*

The burden of proving the payment of consideration for a *hiba-bil-iwaz,* is upon the person who relies upon it as the foundation of his title. RAHIMJAN BIBI *v.* IMANJAN BIBI **698**

——— ——— ———*Suit for possession by purchaser at revenue sale—Defence—Protected interest—Revenue Sale Law (Act XI of 1859), s. 37.*

In a suit for recovery of possession of an undivided half share of certain land on the allegation that the share was included within a *taluq* which the plaintiff purchased at a revenue sale, the defence was that the land fell within a certain *howla* which was a protected interest.

The lower Appellate Court came to the conclusion that the defendants had failed to prove that the dis-

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puted land appertained to the *howla*, and gave a decree to the plaintiff.

On appeal, Coxe, J., held that it was incumbent upon the plaintiff to show that the lands in dispute were not in the *howla*, and remanded the suit:

Held, that there was a finding of fact by the lower Appellate Court vitiated by no error of law and that the case was concluded by that finding.

Judgment of Coxe, J., reversed. RUTNESSUR SEN *v.* KALI KUMAR BIDYABHUSAN, 16 C. W. N. 693 **701**

Burma Forest Act (IV of 1902), s. 62 **990**

Burma Land and Revenue Act (II of 1876), s. 48—*Burma Municipal Act (III B. C. of 1893), s. 203—Fraud—Auction-purchaser's title—Fraud vitiates all judicial acts.*

Certain property was mortgaged to plaintiff but was in the occupation of the mortgagors, who failed to pay the Municipal taxes and allowed it to be sold for arrears of revenue. The auction-purchaser, who had acted in collusion with the mortgagors, was, in the plaintiff's suit for a mortgage-decree, made a co-defendant. Both the lower Courts found that he had colluded with the mortgagors in order to defraud the mortgagee, the plaintiff:

Held, that the auction-purchaser had not acquired a good title free from the plaintiff's incumbrance and section 48 of the Land and Revenue Act was no reply to plaintiff's action. It was open to the plaintiff to show that in conferring a title free from incumbrance, the Revenue Officer was misled by the fraud of the mortgagor and the purchaser acting in collusion. SABEID ALI *v.* SWAMINATHEN CHETTY, 5 BUR. L. T. 109 **433**

Burma Municipal Act (III B. C. of 1898), s. 206 **433**

Calcutta Municipal Act (III of 1899), s. 38, Sch. IV, rr. 4 (4), 9, 10 sub-r. (9)—*Whether stranger can represent body corporate, joint Hindu family or firm to be entered on the list of voters—Specific Relief Act (I of 1877), s. 42—High Court's power to issue mandamus on public officer.*

Rules 9 and 10, sub-rule (9), of Schedule IV of the Calcutta Municipal Act, taken together, merely authorise a person, who is a member of an association, etc., to be entered on the list of voters.

Therefore, a person foreign to the body corporate, joint Hindu family or firm, as the case may be, cannot be authorised by such corporation, etc., to represent them. MR. NISITH CHANDRA SEN, *In re*, 15 C. L. J. 488; 39 C. 754 **441**

——— ——— ——— **s. 162**—*Appeal—Question of valuation—Jurisdiction of Small Cause Court—How land is to be assessed, if question within jurisdiction.*

In appeals preferred under section 162 of the Calcutta Municipal Act, it is competent to the Small Cause Court Judge to deal with the question of valuation and that question alone.

As to the manner in which land is to be assessed after the valuation has been settled, whether it is or is not to be assessed as vacant land, is a question entirely beyond the jurisdiction of the Small Cause Court Judge. CORPORATION OF CALCUTTA *v.* PEARY MOHAN ROY, 15 C. L. J. 509 **452**

——— ——— ——— **Sch. IV, rr. 4 (4), 9, 10 (9)** **441**

Cause of action, accrual of—Parties resident of the place where money advanced—Absence of agreement to re-pay at other place—Presumption that money to be re-paid where transaction took place **885**

——— ——— ———Condition that if any one lays claim and dispossess purchaser, purchase-money would be refunded—Attachment of property by third party in execution of decree against vendor—Claim by purchaser—Dismissal of claim—Suit for purchase-money **334**

——— ——— ———Execution of decree—Obstruction by third person—Damages **541**

——— ——— ———Infringement of trade-mark—Actual deception not necessary **116**

——— ——— ———Suit for refund of penal assessment levied—Party aggrieved—Notice by Government, whether constitutes cause of action **257**

Central Provinces Courts Act (II of 1904), ss. 15, 17 **642**

Channel—Property of private person—How can be brought under District Board **996**

Charge—Bond—Construction of deed **851**

——— ——— under a mortgage executed by daughters during the life-time of widow **206**

——— ———Mortgage invalid for want of attestation **666**

Cheating. *See* PENAL CODE, s. 420.

——— ———Landlord sending for tenant—Payment of rent by tenant—Illegal demand by landlord—Detention of money paid—Criminal offence **656**

——— ———*Judgment-debtor raising money on the mortgage of his house already sold in execution of decree—Penal Code (Act XLV of 1860), s. 420—Discharge—Re-trial—Criminal Procedure Code (Act V of 1898), s. 439.*

To constitute the offence of cheating, it is not necessary that the deception should be by express words; it may be by conduct or implied in the nature of the transaction itself.

A., a judgment-debtor in an execution case, applied under Order XXI, rule 83 of the Civil Procedure Code, 1908, for permission to raise the amount of the decree by a private transfer of his house which had already been sold in auction. The application was rejected by the Court and yet he induced a person to advance him money on a mortgage of the house in question on the representation that he was empowered to effect the mortgage in order to pay off the decretal amount due to the decree-holder. *A.* received a portion of the money himself and induced the mortgagee to pay the rest to the decree-holder, but allowed the sale to be confirmed by the Court and subsequently received from the executing Court the sale-proceeds stating that he had paid the decree-holder out of his own pocket:

Held, that a *prima facie* case of the offence of cheating under section 420, Indian Penal Code, existed against *A.* RAM CHAND *v.* JAI DIAL, 10 P. W. R. 1912 CR; 13 CR. L. J. 456; 114 P. L. R. 1912 **88**

Chota Nagpur Landlord and Tenant Procedure Act (I of 1879 B.C.), s. 123—*Chota Nagpur Tenancy Act (V of 1908 B. C.), s. 208, sub-s. (1)—Bengal Rent Reeovery Act (VIII B. C. of 1865), ss. 5, 16—Decree for rent of tenure—Exemption of portion of tenure by Commissioner in favour of maintenance grantees—Sale of*

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unexempted portion of tenure in execution of decree for rent of tenure—Whether purchaser gets free of encumbrance or not—Sale proclamation, what to be stated in—Apportionment of rent of exempted and unexempted portion.

A decree for rent was obtained in respect of a tenure comprising several villages. The judgment-debtor tenure-holder had created, upon some of the villages, encumbrances by way of maintenance grants in favour of his dependents. When the decree-holder applied for execution of his decree by sale of the tenure, the maintenance grantees applied for exemption of the villages comprised in their grants under section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and an order of exemption was made by the Commissioner:

Held, (1) that, notwithstanding the order for partial exemption of the tenure from sale, the decree was to be executed as a decree for rent in respect of the unexempted portion, and the effect of a sale of the unexempted portion was to pass the property to the purchaser free of all encumbrances:

(2) that the decree-holder was not bound to apportion the rent that might be leviable from the exempted and unexempted villages respectively, and that he would comply with the provisions of section 5 of the Bengal Rent Recovery Act of 1865 if he stated in the sale proclamation the yearly rent payable in respect of the entire tenure together with a note that the villages named were exempted from sale under the order of the Commissioner. MADAN MOHAN NATH SAHI DEO *v.* PRATAP UDAI NATH SAHI DEO, 16 C. W. N. 1024 **842**

Chota Nagpur Tenancy Act (VI of 1908), s. 178, sub-ss. (2), (3)—*Enlargement of time—Application made after execution—Power of Court to grant time.*

Certain landlords obtained a decree against their tenant in accordance with the provisions of sub-section (2) of section 178 of the Chota Nagpur Tenancy Act, 1908. The tenants made default in the payment of the decretal amount within the time fixed by the decree, and the decree-holders applied for execution by way of ejectment. The judgment-debtors then applied for extension of time under sub-section (3). That application was granted and the decretal amount as directed by the Court was deposited:

Held, (1) that the Court executing the decree, being the Court which had tried the suit and made the decree, had power to grant an extension of time and thus in a manner alter the decree:

(2) that it was competent to the Court to entertain an application for enlargement of time under sub-section (3) of section 178 of the Act, even after the expiry of the period prescribed in the decree in conformity with sub-section (2) and even after the decree-holder had applied for execution. SURNAMAN SINGH *v.* SHAM CHARAN OHDAR, 16 C. W. N. 1090 **689**

——— ——— ——— s. 208 (1) **842**

Christian Marriage Act (XV of 1872), ss. 41, 46—*Jewess—Divorce—Intended marriage with Christian—Registrar, refusal by, to solemnize marriage—High Court—Direction to solemnize marriage.*

A Jewess was married and subsequently divorced from her husband according to the Jewish law. She desired to marry a Christian who applied to the senior Marriage Registrar of Calcutta to marry them, but the Registrar refused to do so without an order of the High Court. In the circumstances, the High Court directed the Registrar to take the necessary steps to solemnize the marriage. HAROLD TUCKER, *In re*, 16 C. W. N. 417 **398**

——— ——— ——— ——— s. 46 **398**

Civil Procedure Code (Act XIV of 1882), s. 12 **140**

——— ——— ——— ——— s. 13—Suit for enhancement of rent—Decision that suit maintainable but suit dismissed on merits—Decision that suit maintainable, whether *res judicata* in subsequent suit **453**

——— ——— ——— ——— s. 17 expl. 3 **12**

——— ——— ——— ——— s. 20 **140**

——— ——— ——— ——— s. 53 **583**

——— ——— ——— ——— s. 103 **903**

——— ——— ——— ——— s. 162—*Suit adjourned for want of time—No duty on trying Court to direct witnesses to appear—Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 cl. (u)—Remand order not passed under Order XLI, rule 23, not appealable—Appeal against* ex parte *decree—Proper procedure, if Appellate Court is satisfied that the defendant had no opportunity of adducing evidence.*

Where a suit is adjourned by a Court of its own motion for want of time, and not at the request of parties, there is no duty on the Court to direct the witnesses who are present to appear on the adjourned date of hearing. Section 162 of the Civil Procedure Code of 1882 imposes no such duty on the trying Court.

Order XLIII, rule 1, clause *(u)*, Civil Procedure Code, 1908, apparently does not allow an appeal against an order of remand, which is not passed under Order XLI, rule 23.

Quære:—Whether an Appellate Court can, in hearing an appeal against an *ex parte* decree, set aside the decree and remand the case to the Court of first instance, if the defendant was not given sufficient opportunity to adduce his evidence or whether the proper procedure is not to ask the lower Court to take further evidence and submit it to the Appellate Court for disposing of the appeal on the merits? VIJAYARAGHAVAREDDI *v.* KOMARAPPA REDDI, 11 M. L. T. 199; (1912) 1 M. W. N. 410; 22 M. L. J. 409 **367**

——— ——— ——— ——— s. 223 **738**

——— ——— ——— ——— s. 244 **679**

——— ——— ——— s. 295—Realisation of assets **406**

——— ——— ——— s. 313—*Execution sale—Sale in one lot of separate parcels of land—Power of Court to sever sale—Absence of saleable interest of judgment-debtor in some of the plots—Onus of proof.*

Where, in an execution sale, several parcels of land are sold in one lot and it is found that the judgment-debtor has a saleable interest in one survey number, the Court cannot, for the purposes of section 313 of the Code of Civil Procedure, sever the single sale.

Civil Procedure Code—(1882)—contd.

When the saleable interest of a judgment-debtor in one of the numbers thus sold is admitted, it is for the decree-holder to prove that the judgment-debtor had no saleable interest in the property sold. KRISHNAMMA NAICKEN *v.* KANDASAMI GOUNDEN, 23 M. L. J. 108; 12 M. L. T. 164; (1912) 1 M. W. N. 824 **109**

——— ——— ——— ——— **s. 317**—*Civil Procedure Code (Act V of* 1908*), s.* 66—*Bar of suit against certified purchaser buying* benami—*Provision applicable to purchaser in execution of certificate under Public Demands Recovery Act—Public Demands Recovery Act (I of* 1895*), s.* 19 *sub-s. (2).*

The provisions of section 317 of the Code of Civil Procedure, 1882, which bar a suit against a certified purchaser buying *benami* at a sale in execution of a decree, apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act, (I of 1895), by virtue of sub-section (2) of section 19 of that Act. BANGA CHANDRA NANDI *v.* TARA KINKAR PAL, 16 C. W. N. 973 **291**

——— ——— ——— **s. 411** **177**

——— ——— ——— **ss. 462, 506**—*Civil Procedure Code* (*Act V of* 1908), *O. XXXII, r. 7, and Sch. II, Para.*1—*Application to Court for reference to arbitration, whether an "agreement"—Guardian* ad litem *or next friend of minor, whether can make application without leave of Court, or whether he can agree to be bound by oath of the other party without such leave—Leave to be expressly recorded—Effect of absence of such leave—Agreement* void *against minor but only* voidable *against other parties—Minor—Duty of Court.*

Under the Civil Procedure Code of 1882, as well as under the Code of 1908, the guardian *ad litem* of a minor defendant, or the next friend of a minor plaintiff, must obtain the express sanction of the Court, if he wishes, on behalf of his ward, to refer the matter in dispute or any question involved in the suit to arbitration; and an omission, on the part of such guardian or next friend, to obtain such sanction has the effect of making all proceedings consequent on such reference *voidable* against all parties other than the minor. In other words, an application of the guardian or next friend under section 506 of the former Code or under Schedule II, para. 1 of the present Code, comes within the purview of section 462 of the former Code or Order XXXII, rule 7 of the present Code, as the case may be, and unless the leave of the Court is expressly obtained and recorded, the application to refer will have the same effect, and be open to the same objections, as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court expressly recorded in the proceedings.

The leave or sanction of the Court must be obtained and must be expressly recorded if the reference to arbitration is to be *valid* for all purposes and against all parties including the minor, but in a case where such sanction has not been obtained, the reference is not necessarily invalid or void. The minor alone can claim to avoid it.

A reference to arbitration, is an agreement with reference to the suit and as such within the purview of the general provisions of law embodied in section 462 of the former Code and Order XXXII, rule 7 of the present Code.

Civil Procedure Code—(1882)—concld.

A reference to arbitration, under section 462 of the Code of 1882, or under the first para. of the second Schedule to the present Code, has "reference to the suit," for it is only matters in difference in the suit that can be so referred to arbitration through the Court. Therefore, an application preferred to the Court by the parties, agreeing to make such reference, is an "agreement."

The provisions of section 462 of the Code of 1882 or of Order XXXII, rule 7 of the present Code are enacted for the protection of minors who are unable to look after their own interests and to whom the Court stands in a *quasi*-tutelary position. The guardians and next friends of minors are not invariably honest, and even if honest, are sometimes careless and occasionally lacking in intelligence. Therefore, the duty of safeguarding the interests of the minors, so far as is practicable, is thrown upon the Courts.

Quære—Whether the express sanction of the Court is not needed when a guardian or next friend of a minor agrees, on his behalf, to be bound by the oath of the other party to the suit? GANESHA *v.* MUL CHAND, 159 P. W. R. 1912 **161 F. B.**

——— ——— ——— ——— **s. 506**—Reference to arbitration by guardian of minor **161**

——— ——— ——— **s. 523** **140**

——— ——— ——— ——— **s. 578** **583**

Civil Procedure Code (Act V of 1908), s. 2 **399**

——— ——— ——— **s. 2 (2)** **512**

——— ——— ——— ——— **s. 2 (2)**—*Decree — Preliminary decree—Decision on preliminary issues—No decree drawn up—Remedy of aggrieved party—Appeal.*

A judgment under the Civil Procedure Code is only the basis of a decree or order. The decree which itself is the *formal expression* of the judgment, is, and the order may or may not be, appealable, but the judgment itself gives no right of appeal.

The drawing up of a decree is a conscious and formal act, whereby the Court notifies its disposal of matter in controversy in accordance with its adjudication thereupon; and no right of appeal arises until such decree has been drawn up.

In certain cases, the passing of a preliminary decree is imperative but in other cases, it is a matter within the discretion of the Court. But unless a preliminary adjudication is finally expressed by a decree, or followed by an appealable order, no right of appeal can arise.

In a redemption suit brought by sons of a Hindu to redeem a mortgage, which had already been foreclosed by a decree against their father, the mortgagee pleaded, *inter alia*, that he had no notice of the plaintiffs' interest at the time of bringing his foreclosure suit, that the foreclosure decree was binding on the plaintiffs, and that the father of the plaintiffs was the managing member of his family. The Court framed preliminary issues on the above points and found against the defendant. No formal decree was drawn up:

Held, that the decision of the Court on the preliminary issues was not a preliminary decree, and, therefore, was not appealable.

Civil Procedure Code—(1908)—contd.

Obiter.—If a Court, having written a judgment, which should be followed by a decree, fails to draw up such decree, the remedy of the party who wants that decree, whether for appeal or execution, is to apply for it, and, if it is refused, to move the High Court in revision. But until the decree has been drawn up, there can be neither appeal nor execution. MAHU *v.* KISHAN, 8 N. L. R. 92 **935**

——— ——— ——— **s. 2, sub-s. (2), O. IX, r. 8**—*Decree where defendant only appears—Appeal.*

A decree under rule 8 of Order IX of the Civil Procedure Code of 1908 is not an order of dismissal for default within the meaning of sub-section (2) of section 2 of the Code, and is, therefore, appealable. BIJOY CHAND MAHATAP *v.* RAKHAL CHATTORAJ **601**

——— ——— ——— **s. 2 (2)**—*Preliminary decree—Decision on the question of* res judicata.

The decision of a Court on a preliminary issue framed on a plea of *res judicata* is not a preliminary decree and is, therefore, not appealable. PARSOTAM RAO TANTIA *v.* RADHA BAI, 10 A. L. J. 78 **566**

——— ——— ——— **s. 2 (2)**—*Preliminary decree—Decision on the question of* res judicata.

The decision of a Court on a preliminary issue framed on a plea of *res judicata* is not a preliminary decree and is, therefore, not appealable. GEHNA *v.* KHUDA BAKHSH, 191 P. L. R. 1912 **563**

——— ——— ——— **s. 2 (9), O. VIII, r. 10**—*Judgment, Court's power to pronounce, when written statement not filed — Revision—Material irregularity.*

A defendant did not file his written statement on the date on which he was ordered to file it, nor on the date fixed for hearing. The Munsif thereupon decreed the claim of plaintiff under Order VIII, rule 10, Civil Procedure Code, without going into the merits of the case or without stating the grounds of his order decreeing the claim:

Held, that the Munsif's order was not a judgment, but merely an order decreeing the plaintiff's claim, it was held that the Munsif acted with material irregularity and his decision was set aside. NANHE *v.* TASADDUQ HUSSAIN, 15 O. C. 78 **212**

——— ——— ——— **s. 2 (12)** **1**

——— ——— ——— **s. 2 (14)** **937**

——— ——— ——— **s. 11** **863**

——— ——— ——— **s. 11, O. II, rr. 1, 2**—*First suit on contract—Second suit for compensation for services*—Res judicata.

In a previous suit the plaintiff based his claim on a personal contract with the defendant for the supply of boats at an agreed rate and on failing to prove that agreement, brought this suit for recovery of the same money as compensation for services rendered:

Held, that the 2nd suit was barred as *res judicata* under section 11 of the Civil Procedure Code. The matter directly and substantially in issue in the first suit was whether the defendant owed the plaintiff any sum on account of the use by him of the plaintiff's boats. The ground in the second suit ought to have been taken as an alternative in the first suit in the event of the respondent not having been able to prove a direct contract. CHRISTENSEN *v.* SATTIA, 5 BUR. L. T. 95 **374**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 11, O. II, r. 2**—*Previous suit decreed only against some defendants and dismissed against the rest for non-disclosure of cause of action, whether adjudication between parties—Subsequent suit, whether barred.*

Where a declaratory suit was decreed against only some of the defendants—who compromised their dispute with plaintiffs—and was dismissed against the remaining defendants on the ground that no cause of action had been disclosed against them, and it was also stated in the judgment that the plaintiffs were at liberty, if so advised, to bring another suit against these latter defendants:

Held, that there was no adjudication between the plaintiffs and defendants against whom the suit was dismissed, and that, consequently, a subsequent suit by plaintiffs against the same defendants was not barred either by the rule of *res judicata*, or by Order II, rule 2 of the Civil Procedure Code. DEVIDITTA *v.* NATHU, 56 P. R. 1912 **930**

——— ——— ——— **s. 11**—Res judicata—*Appellate Court not recording findings on some points—Vakil not arguing some points—Absence of finding on those points.*

Where an Appellate Court, in the exercise of its discretion, omits to record findings on certain points raised in the case, on the ground that they were unnecessary for the decision of the case, its judgment does not, in respect of those points, operate as *res judicata*.

Quære:—Whether, when an appellant in a Court of appeal does not argue against the findings on some of the points and confines his arguments to some particular issues, the decision of the Appellate Court, which goes against him, will be *res judicata* on the points not argued? AIYAGARI NARAYANAMURTY *v.* DHALIPALA VENKATARAMAYYA **229**

——— ——— ——— **s. 11**—Res judicata—*Suit for declaration of right—Defence on ground of special custom — Suit decreed — Second suit by plaintiff for partition—Same defence taken by son of previous defendant.*

G., the father of the present defendant, was recorded as a *jagirdar* in the Collector's Register. A suit was brought by the present plaintiff for declaration of his rights against *G.*, which seems to have been almost identical in nature with the present suit. The plaintiff claimed under the ordinary law, but *G.* contested the suit on the ground that he was entitled to the *jagir* under a custom of primogeniture. The Court held in that case that the special custom was not proved and that the plaintiff was entitled to succeed. The plaintiff then brought this suit for partition. Defendant was not made a party to the previous suit. He contested the suit on the ground of primogeniture:

Held, that the matter was now *res judicata*, and the defendant could not take up the same defence which his father had taken in the former suit. KALI CHURN SINGH *v.* SHEO BAKHSH SINGH, 16 C. W. N. 783 **657**

——— ——— ——— **s. 20 cl. (c)**—*Cause of action, accrual of—Parties resident of place where money advanced—Absence of agreement to re-pay at other place—Presumption that money to be re-paid where transaction took place—Jurisdiction of Court—Contract Act (IX of 1872), ss. 49, 50.*

Civil Procedure Code—(1908)—contd.

In a *hat-chita*, on which a suit was brought, the creditor was described as resident of S. within the jurisdiction of the Katwa Court, the money was alleged to have been advanced at S., and the parties at the time of the loan were residents of that place:

Held, that the money was presumably re-payable at S. where it was advanced and where the parties resided at the time of the transaction, and the Court at Katwa only had jurisdiction to take cognizance of the matter in the absence of any proof of any agreement for re-payment of the money at some other place.

Section 49 of the Contract Act does not apply where the money is payable on demand and not "without application by the promisee."

Section 50 of the Contract Act merely lays down the elementary rule that a promisor is discharged from liability if he performs the promise in a manner or at a time prescribed or sanctioned by the promisee. SAILENDRA NATH MOOKERJEE *v.* RAM SUNDAR GHOSH, 16 C. L. J. 279 **885**

——————— **s. 24 (1) (b)** **565**

——————— **s. 24** — *Withdrawal of suit by District Judge—When should be made—Scope of section 24—Erroneous view of law.*

A District Judge should not withdraw a suit under section 24 of the Civil Procedure Code, merely because in an analogous case a Subordinate Judge had taken what, in his opinion, was an erroneous view of the law. If the District Judge does not intend to try a suit finally, the case ought not to be transferred merely to enable him to dispose of it on a preliminary ground. BHOJA HARI PARIA *v.* SECRETARY OF STATE **569**

——————— **s. 35** **429**

——————— **ss. 38, 39, 41** — *Civil Procedure Code (Act XIV of 1882), s. 223—Transmission of decree for execution—Simultaneous or concurrent execution by Court which passed decree and to which it is sent for execution—Application to latter Court for execution—Dismissal of petition—Subsequent application to Court which passed decree—Application to 'proper Court'—Limitation.*

The Court which passed a decree can order concurrent execution of it simultaneously with execution proceedings initiated by the Court to which it has been sent for execution, but such execution should be allowed only in exceptional circumstances. It is only when such execution is necessary in the interests of the decree-holder, and when it can be carried on without hardship to the judgment-debtor, that it ought to be allowed by the Court which passed the decree.

When a decree is transferred by the Court which passed it to another Court for execution, and an application made to the latter Court is dismissed, a subsequent application for execution made to the Court which passed the decree, while the result of execution has not been certified by the Court to which it was sent for execution, is not an application made to the 'proper Court,' unless there is an order permitting simultaneous execution along with execution proceedings initiated in the Court to which the decree was sent for execution.

Plaintiff obtained a decree in the District Court of Vizagapatam. It was sent for execution to the Parvatipur Munsif's Court on 5th October 1904. There

Civil Procedure Code—(1908)—contd.

the petition for execution was dismissed by the Munsif on 10th March 1905. On 13th December 1907, plaintiff applied for execution to the District Court of Vizagapatam, which returned the petition for amendment under section 235, Civil Procedure Code, 1882. The petition was represented without amendment and the District Court simply recorded it. On 21st October 1910, the decree-holder applied to the District Court for execution:

Held, (1) that the application, of 13th October 1907, was a step-in-aid of execution which saved limitation:

(2) that the application, dated 13th October 1907, was not made to the 'proper Court' as the District Munsif's Court of Parvatipur had seisin of the execution proceedings. MAHARAJA OF BOBBILI *v.* NARASARAJU PEDA, 12 M. L. T. 119; 23 M. L. J. 236; (1912) 1 M. W. N. 721 **738**

——————— **ss. 39, 41** **738**

——————— **s. 47** **50, 389**

——————— **s. 47**—Liability of ancestral property **866**

——————— **s. 47**—*Custom—Succession—Decree obtained against widow, how far binding on reversioners—Representative of judgment-debtor—Jurisdiction.*

On a bond executed by one *H. S.*, a decree was obtained against his widow. On the re-marriage of the widow, the property of *H. S.* came into the possession of his reversioners. The decree-holder sought execution of his decree by attachment of the property of *H. S.* in the hands of his reversioners. One of the reversioners made an application stating that *H. S.* had not raised any loan from the decree-holder, that he had no necessity for doing so, that the decree obtained against the widow was collusive and fraudulent and not binding on the reversioners. On this application, the Court referred the decree-holder, to a regular suit to establish his right to proceed against the property of *H. S.* in the hands of his reversioners. But, instead of instituting a suit, the decree-holder preferred an appeal to the Divisional Judge who entertained the appeal:

Held, that as the reversioners did not claim under *H. S.* or his widow and had succeeded to the property on the re-marriage of the widow by virtue of their own rights of collateral succession, they were not representatives of the judgment-debtor under section 47 of the Civil Procedure Code, and that as the said section was inapplicable, the Divisional Judge had no jurisdiction to entertain an appeal against the order of the first Court. ALA SINGH *v.* WASAWA, 175 P. W. R. 1912 **25**

——————— **s. 48** — *Execution of decree—Decree obtained by person under no disability—Limitation—Minor heir—Effect of subsequent disability on the running of limitation—Limitation Act (IX of 1908), s. 9.*

When once the period of 12 years prescribed by section 48, Civil Procedure Code, has begun to run from the date of the decree, such period must be computed from that day.

Where a decree-holder, who is not under any disability, obtains a decree and thereafter dies leaving a minor son as his heir, the minority of the son cannot arrest the running of the period of 12 years

Civil Procedure Code—(1908)—contd.

prescribed by section 48, Civil Procedure Code, which must be computed from the date of the decree irrespective of the son's minority. BHAGWANT RAMCHANDRA *v.* KAJI MAHAMAD ABBAS, 14 BOM. L. R. 387 **829**

——————— **s. 48**—*Execution of decree—Limitation—Twelve years' period to commence from the date when decree is capable of execution.*

Before the execution of a decree can be held barred under section 48 of the Code of Civil Procedure, it must be shown that the decree was in all its parts ripe for execution on the date from which the period of twelve years is to be computed.

The execution and application contemplated by the section relate to a decree which is executable on the date of the decree in respect of the application made and execution sought, and 'the order for execution' contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree.

A decree was passed on 14th December 1892 and provided, *inter alia*, that if there should be 'any deficit or any just and legal obstruction of whatever nature' to the mortgaged property being sold, the decree-holder should recover the deficiency or whatever might be due from the judgment-debtor personally and from his other property.

There was default in the payment of the decretal money. A part of the mortgaged property was sold. But as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, the decree-holder was about to bring to sale the rest of the mortgaged property when the Collector intervened in 1908, and had the impending sale stopped on the ground that it was *vatan* property.

On the 19th of December 1910, the decree-holder applied to have the personal remedy enforced against the judgment-debtor:

Held, that the application of 19th December 1910, was not barred under section 48, Civil Procedure Code, as the 12 years' period must be counted from 1908. NARHAR RAGHUNATH NAPHAD *v.* KRISHNAJI GOVIND NADGAVANDI, 14 BOM. L. R. 381; 36 B. 368 **822**

——————— **s. 50**—Liability of ancestral property **866**

——————— **s. 64** **860**

——————— **ss. 64, 73** - *Execution of decree—Private alienation—Subsequent application for rateable distribution by other creditors—Attachment of same property by other creditor—First attaching creditor paid off—Rights of subsequent creditors—Insolvency—Effect of vesting order—Attachment after vesting order.*

Where there is an attachment, and after that attachment a private alienation, and after that private alienation again other creditors obtain decrees and put in claims for rateable distribution, then although those claims are made by persons different from the original attaching creditor and referable to different decrees, nevertheless they are, by the new Code of Civil Procedure, expressly made *claims enforceable* under the first attachment, provided that the first attachment is carried out and assets are in execution actually realized under that attachment and so made available for distribution rateably. In such circumstances, the main private alienation is void against

Civil Procedure Code—(1908)—contd.

all the claims of the creditors who have put in petitions for rateable distribution of assets after that private alienation was made.

Where, however, there has been an attachment, and after that a private alienation and after that again petitions for rateable distribution by other creditors, and the first attachment is swept away by reason of the attaching creditor declining to proceed with it, or accepting satisfaction privately, then all the subsequent claims to rateable distribution go with the attachment.

In this case, the subsequent creditors obtain no protection under section 64, Civil Procedure Code, against private alienation, for their claims to rateable distribution are only claims enforceable under the attachment, provided that attachment results in the realisation of assets which the Courts can rateably distribute.

Semble:—Where a creditor has attached the property of a judgment-debtor, who thereafter privately alienates the property, and after that alienation other creditors of the judgment-debtor impose attachments, then subsequent attaching creditors will not be entitled to the protection of section 64, when the prior attachment has fallen through.

A claim by way of second attachment cannot be said to be enforceable under a prior attachment when a condition precedent for enforcing the former is removal of the latter.

Upon a vesting order being made, all the property of an insolvent passes to the Official Assignee and all decrees and other proceedings against the insolvent are ordinarily stayed.

After a vesting order has been made, any subsequent attachment on the property of the insolvent is, for all legal intents and purposes, a nullity in itself, and does not confer any advantage thereby under any of the sections dealing with ordinary execution proceeding under the Code of Civil Procedure.

In 1894, *A.* obtained a decree against *B.* and in execution of the decree attached certain property of *B.* Shortly after *B.* assigned the whole of his right, title and interest to *C.* In 1898, *D.* obtained a decree against *B.* In 1899, *B.* took the benefit of the Insolvency Act and his insolvency continued up to the present. In 1904, *D.* levied an attachment on the property already attached by *A.* *A.*'s debt was paid off and his attachment raised in 1907. *C.* thereupon applied to the Court and got *D.*'s attachment on the property raised. *D.* then brought the present suit to have it declared that the property upon which his attachment had been placed was the property of his judgment-debtor and was, therefore, still liable to attachment:

Held, (1) that *D*'s attachment of 1904, while the insolvency was still continuing, was a nullity in itself and of no service to *D.* under the attachment of *A.* to be made a ground of claiming the protection of section 64 against the private assignment to *C*;

(2) that the private assignment to *C.* was not void against *D.* JETHA BHIMA AND CO. *v.* LADY JANBAI, 14 BOM. L. R. 511 **950**

——————— **s. 66** **291**

——————— **s. 73** **950**

——————— **s. 80** — *Notice — Suit against Government—Plaintiff taking steps before*

Revenue authorities against the order of a Government official.

A District Deputy Collector by an order directed that certain land belonged to Government and that the person in possession, one *A.* had trespassed upon the said land and should, therefore, be ordered to vacate and give possession of it. *A.* occupied himself in filing the necessary appeals against the orders of the different Government officials with reference to this original order of the District Deputy Collector.

Subsequently, *A.* sued the Secretary of State for a declaration of his ownership of the land:

Held, that *A.* was bound to give notice under section 80 of the Civil Procedure Code before bringing the suit, and the fact that *A.* was taking other steps before the Revenue authorities, with reference to the Deputy Collector's order, did not affect the question of notice.

Per Chandavarkar, J.—In order to take the case out of section 80, there must be something in the conduct of the Secretary of State which had brought about a state of things preventing the plaintiff from complying with the provisions of the section in question; that is to say, the evidence must be such as to show that humanly speaking it was impossible for the plaintiff to give a notice and comply with the provisions of the law as laid down in section 80. SAKHARAM *v.* SECRETARY OF STATE, 14 BOM. L. R. 353 **539**

——— ss. 93, 96, 100 **512**

——— s. 100—*Second Appeal —Finding of lower Appellate Court based upon alleged evidence not existing in record—Decision "contrary to law".*

The circumstance that a finding of a lower Appellate Court is based mainly upon evidence which is explicitly referred to and avowedly re-produced in the judgment, but is not to be found anywhere in the record, vitiates the decision and renders it contrary to law within the meaning of section 100 of the Civil Procedure Code of 1908. BHUPENDRA KUMAR CHAKRAVARTI *v.* PYARI MOHAN ROY **515**

——— s. 104, sub-s. (1), cl. (c)—*Appeal—Award—Order modifying award —How far appealable.*

The provision in clause (*c*) of sub-section (1) of section 104 of the Civil Procedure Code that an appeal shall lie from an order modifying or correcting an award, does not confer an unrestricted right of appeal, and when an order has been made modifying an award, the validity of the whole award cannot be called in question in an appeal preferred against that order, but the appeal is allowed against the order only in so far as it modifies the award. RAJBANS SAHAY *v.* SOORJA LAL **519**

——— s. 104 (2) **679**

——— s. 105 (2) **191**

——— s. 105 (2), O XLI, r. 23, O. XLIII, r. 1 (u)—*Appeal against order of remand—Decision of first Court on remand order, no bar to appeal—Court of appeal, power of.*

Where a Court of first appeal, setting aside the decision of the Court of first instance on a preliminary point, remands the case for decision on the merits

and there is an appeal against the order of remand, the fact of the case being decided by the Court of first instance in accordance with the remand order before the appeal comes on for hearing, is no bar to its being heard and disposed of.

A Court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not but also whether the decision is correct or not and to dispose of the suit accordingly. GIRDHARI LAL *v.* JASWANT SINGH **181**

——— ss. 109, 110, 111 **2**

——— s. 114 **559**

——— s. 115—Decision on facts—Failure of Court below to grasp real point—Judicial decision—Interference by High Court—Prejudice to neither party—Question of prejudice, if arises **46**

——— s. 115—Revision—Limitation—Erroneous decision on point of limitation, no ground for interference in revision by High Court **679**

——— s. 115—Two decrees of first Court—Decision of Appellate Court by one judgment—One rule on single petition—High Court's power to interfere—Question of jurisdiction not taken before Appellate Court—High Court's power to entertain objection **669**

——— s. 115—*Revision—Erroneous decision on question of limitation by the Court below.*

An erroneous decision by a lower Court on a question of limitation, would not justify interference in revision by a High Court under section 115 of the Civil Procedure Code. RAMGOPAL JHOONJHOONWALLA *v.* JOHARMALL KHEMKA, 39 C. 473 **547**

——— s. 115—*Revision—Wrong decision on point of* res judicata—*Whether good ground for interference.*

A wrong decision on a question of *res judicata* would ordinarily not be a good ground for interference in revision under section 115 of the Civil Procedure Code, 1908. GANESH *v.* KUNDAN **33**

——— s. 115—*Revisional powers of High Court—Subordinate Court acting in excess of jurisdiction and in violation of express provisions of Code.*

Where a Subordinate Court has acted clearly in excess of its jurisdiction and in violation of an express provision of the Code, the High Court will not hesitate to interfere. GOPAL CHANDRA MUKERJI *v.* NOTOBAR KUNDU, 16 C. W. N. 1029 **53**

——— s. 115 and O. XXI, r. 2—*Uncertified payment, effect of, for purposes of limitation—Wrong decision on a point of law amounts to illegality or material irregularity—Revision.*

A payment or adjustment, not certified or recorded in the manner prescribed by Order XXI, rule 2, cannot be recognized by the Court executing the decree even for the purposes of limitation.

Where by deciding a point of law erroneously, the Judge does what the law forbids him to do, his action

Civil Procedure Code—(1908)—contd.

amounts to an illegality or material irregularity which is liable to be corrected by the High Court in revision. RAM SARUP *v.* JAGAN NATH PRASHAD, 15 O. C. 234 **523**

——————— **s. 148** — *Extension of time after decree.*

After passing a final decree, a Court cannot extend the period fixed by the decree for the doing of any act. HUKAM CHAND *v.* HAYAT, 121 P. W. R. 1912 **941**

——————— **s. 151** **897**

——————— **s. 151, O. XXI, r. 58**—*Claim application, if can be proceeded with after execution sale—Inherent power, doctrine of.*

It is not competent to an execution Court to proceed with a claim application under rule 58 of Order XXI of the Civil Procedure Code after the execution sale has actually taken place.

The doctrine of inherent power has no application to a case of this description. That doctrine is applicable when the Court finds it necessary, for the ends of justice or to prevent an abuse of its process, to make an order for which no express provision has been made by the Legislature. GOPAL CHANDRA MUKERJI *v.* NOTOBAR KUNDU, 16 C. W. N. 1029 **53**

——————— **s. 151**—*Several appeals—Some lying to the lower Court of Appeal—Some lying to the Chief Court—Same questions involved in all appeals—Power of Chief Court to direct all appeals to be heard in the Chief Court without presentation to the lower Appellate Court.*

Where the question involved in several appeals is the same but only some of those appeals lie of right to the Chief Court, it is competent to the Chief Court to direct that all the appeals should be heard in the Chief Court, without going through the formality of presenting those appeals, which lie in the lower Court of Appeal, to that Court and then transferring them to its own file. GHULAM ALI *v.* SHIV NATH, 158 P. W. R. 1912; 189 P. L. R. 1912 **845**

——————— **s. 154** **725**

——————— **O. 1, r. 8, scope of** **399**

——————— **O. 1, r. 9, O. 34, r. 1**—*Mortgage suit by manager of joint Hindu family—Other members not impleaded—Parties, non-joinder of, whether fatal to the suit.*

Where the manager of a joint Hindu family brings a suit on the foot of a mortgage without impleading the other members of the family as parties to the suit, the suit does not fail on account of the non-joinder. MADAN LAL *v.* KISHEN SINGH, 9 A. L. J. 844 **138 F. B.**

——————— **O. 1, r. 13**—*Misjoinder of parties and causes of action—Objection to be taken at the earliest opportunity—Appeal, objection not allowed to be taken in.*

Under the provisions of the Civil Procedure Code, objections as to misjoinder of parties and causes of action should be taken at the earliest possible opportunity, and where no such objection is taken in the written statement, it should not be allowed to be taken for the first time in appeal. PARTAB BAHADUR SINGH *v.* NAURANG SINGH **744**

——————— **O. 2, r. 1** **374**

Civil Procedure Code—(1908)—contd.

——————— **O. 2, r. 2** **214, 374, 930**

——————— **O. 2, r. 2, and O. 22, r. 9**—*Hindu Law—Daughter's estate—Joint owners, effect of one suing for his share—Cause of action—Representation of estate.*

A widow with two daughters, *H.* and *S.*, mortgaged the house left by her husband to the appellant, the deed of mortgage being attested by *S.*

On her death, *H.* sued for possession of half the house and was successful. *S.* then sued for her half share but she died during the pendency of the suit. Upon her death, *H.* sued the appellant for the remaining half share. The appellant contended that the suit was not maintainable in view of the fact that *H.* had sued only for a half share when she ought to have sued for the whole and that in the second litigation, *S.* represented the whole estate, and consequently, *H.* was now bound by the result of that litigation:

Held, (1) that the right to sue for the half share of *S.* accrued to *H.* only after the death of *S.* and that when *S.* sued for her half share, she did not represent the whole estate so as to bind *H.* BUDHU CHAUDHRI *v.* HARDEI **833**

——————— **O. 2, r. 2**—*Relinquishment of a portion of claim, effect of.*

By virtue of an oral agreement, the plaintiff became entitled, in the event of a certain litigation proving successful, to recover a certain sum of money and a quarter share of a certain house. The plaintiff filed a suit in the Small Cause Court for the recovery of the money due to him under the agreement, but omitted to bring a suit with respect to the share of the house to which he was also entitled. After getting a decree in the Small Cause Court, he instituted a suit for recovery of his share in the house:

Held, that the plaintiff's suit for recovery of the share in the house was barred under Order II, rule 2. SHARFUDDIN *v.* NIAMAT ALI **296**

——————— **O. 7, r. 7** **268**

——————— **O. 8, r. 10** **212**

——————— **O. 9, r. 8** **601**

——————— **O. 9, r. 9**—*Rejection of application—Appeal—Revision.*

While an application for restoration of a suit under Order IX, rule 9, Civil Procedure Code, 1908, was pending, the territory within which the parties resided and the cause of action arose was transferred from British territory to a Native State and the Court, holding that it had no longer any jurisdiction in the matter, ordered the application for restoration to be returned to the applicant for presentation to the proper Court:—

Held, that the order of the Court was in substance and in effect an order refusing to grant the application for restoration and was not open to revision but was appealable. SHEOTAHAL *v.* QASIM, 10 A. L. J. 41 **34**

——————— **O. 9, r. 9**—*Restoration of an appeal dismissed for default—Sufficient cause—Advocates must suffer the consequences of keeping careless clerks.*

A Court is bound to set aside an order dismissing an appeal for default of prosecution if it is satisfied

Civil Procedure Code—(1908)—contd.

that there was sufficient cause for non-appearance on the date fixed.

An appeal was duly entered on the printed cause list for the day. The Advocates for appellant were shown as *A.* and *B.* and *B.*'s clerk admitted that when he was sent by *B.* to inspect the cause list, he saw the appeal entered with *A.* and *B.* against it in the list; but as he was under the impression that *A.* and not *B.* was to argue the case, he did not tell *B.* that his attendance was necessary. The appeal was consequently dismissed in default :

Held, that due care and attention were not exercised and the clerk was exceedingly careless in trusting to a defective memory instead of looking up the briefs in the Advocate's office and that there was no sufficient reason for restoring the appeal.

Even if sufficient cause for non-appearance is not shown, it is still open to the Court, to consider, independently of Order IX, rule 9, the question of restoring for just and sufficient cause any appeal which has been dismissed for default.

If it appears that the decree appealed against was unjust or wrong on the merits, that might be a good reason for restoring the appeal on terms. MAUNG PO TU *v.* CHAUNG TAIK, 5 BUR. L. T. 72 **358**

——— ——— ——— **O. 9, r. 13, proviso** **260**

——— ——— ——— **O. 9, r. 14** **260**

——— ——— ——— **O. 9, r. 13, O. 47, r. 1**—Ex parte *decree—Application to set aside—Prevented by sufficient cause from appearing—Review.*

A defendant, against whom an *ex parte* decree has been made, may, instead of applying to set aside the decree, under Order IX, rule 13 of the Civil Procedure Code, apply for a review of judgment under Order XLVII, rule 1 on the ground that he was prevented from appearing on the day, fixed for the hearing of the case, by sufficient cause. CHET NARAIN SAHI *v.* RAMPAL MANJHI, 16 C. W. N. 643 **554**

——— ——— ——— **O. 21, r. 2**—Effect of uncertified payment **523**

——— ——— ——— **O. 21, r. 6** **832**

——— ——— ——— **O. 21, r. 22**—Sale without notice **506**

——— ——— ——— **O. 21, r. 55**—*Attachment—Part payment of decree certified—Whether attachment withdrawn—Execution.*

An attachment of property cannot be deemed to be withdrawn when satisfaction of the decree in part only is certified to the Court, especially when the satisfaction in part is due to the payment of the money attached. KHUB CHAND *v.* NIADAR MAL, 10 A. L. J. 165 **677**

——— ——— ——— **O. 21, r. 57** **49**

——— ——— ——— **O. 21, r. 58** **683**

——— ——— ——— **O. 21, r. 58**—Claim application cannot be proceeded with after execution sale **53**

——— ——— ——— **O. 21, r. 63** **683**

——— ——— ——— **O. 21, rr. 72, 90**—*Permission to bid granted to decree-holder subject to certain conditions, validity of—Purchase without abiding the conditions, effect of—Sale, whether in such a case valid or not—Joinder of a stranger, effect of—Separation of interests purchased in the case of one joint bid.*

The mere fact that a decree-holder has associated with himself a stranger would not make a sale valid when the bid is a joint one and the interest of the decree-holder cannot be separated.

The law authorizes a Court to impose any condition it considers fit on the permission granted to a decree-holder to bid at a sale of the property of his judgment-debtor. An order imposing on the decree-holder a condition that his lowest bid should be the amount of the decree, is not *ultra vires* or illegal, but valid and enforceable.

The conduct of a decree-holder, who evades a condition imposed and colludes with strangers to bid with him in purchasing the property for much less than the decretal sum, amounts clearly to fraud.

The mere fact that the decree-holder agrees to bid for the property for the amount of the decree and purchases it for a sum much less than that amount, is sufficient to show that his fraud has led to substantial loss.

Such a sale is bad and should be set aside. RAJ KUER *v.* CHUNNOO LAL **888**

——— ——— ——— **O. 21, r. 90** **668, 679**

——— ——— ——— **O. 21, r. 90**—Purchase by decree-holder without abiding conditions of leave **888**

——— ——— ——— **O. 21, r. 90, proviso** **728**

——— ——— ——— **O. 21, rr. 97, 99** **683**

——— ——— ——— **O. 22, r. 3** **708**

——— ——— ——— **O. 22, r. 3**—All the legal representatives need not apply **366**

——— ——— ——— **O. 22, r. 3**—*Hindu Law—Suit by a widow for declaring adoption invalid—Death of plaintiff—Abatement of suit—Reversioners of last maleholder whether legal representatives of plaintiff.*

A suit by a Hindu widow to have it declared that an adoption made by her son's widow is invalid abates on the death of the piaintiff, and the right to sue does not survive.

For the purposes of this question, there is no distinction between suits to set aside an adoption and suits to set aside an alienation.

Obiter :—Assuming that the cause of action survives, the reversioners of the last male owner are not the legal representatives of the plaintiff. ARUNACHELLAM PILLAY *v.* VELLAYA PILLAY, 12 M. L. T. 199; (1912) 1 M. W. N. 897 **461**

——— ——— ——— **O. 22, r. 9** **833**

——— ——— ——— **O. 22, r. 9 (2)** **708**

——— ——— ——— **O. 23, r. 3**—*Adjustment—Reference to arbitration without intervention of Court—Acceptance of award by parties.*

The question, whether there has been an adjustment, should be decided by a consideration of the terms and the meaning of Order XXIII, rule 3, of the Code

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of Civil Procedure apart from a consideration of the provisions of the Code which relate to arbitration.

If the parties to a suit agree to refer matters in dispute to arbitration without the intervention of the Court and subsequently accept the award, such acceptance is an adjustment within the meaning of rule 3, Order XXIII. SHANUMUGAM CHETTY *v.* ANNAMALAY CHETTY, 5 BUR. L. T. 125; 6 L. B. R. 55 **959**

——————— **O. 32, r. 7**—Reference to arbitration by guardian of minor **161**

——————— **O. 33, r. 1**—*Withdrawal of claim by plaintiff—Right of plaintiff to resile from withdrawal before Court acts on the withdrawal petition.*

Per Sundara Aiyar, J.—A mere petition withdrawing a suit would not debar the party making the petition from prosecuting the suit unless, in the meanwhile, the suit has been dismissed by the Court. He would have a *locus penitentiæ* until his petition is acted upon by the Court.

Per Sadasiva Aiyar, J.—A plaintiff, after he makes a petition withdrawing a suit, cannot withdraw this petition except on good grounds, nor can he be allowed to play fast and loose with the litigation launched by him at his sweet will and pleasure. MUKKAMMAL *v.* KALIMUTHU PILLAY **852**

——————— **O. 33, r. 5** **184**

——————— **O. 34, r. 1**—Mortgage suit by manager of Hindu family **138**

——————— **O. 34, r. 1**—*Mortgage-suit against the manager of a Hindu joint family—Other members not impleaded as parties—Suit whether maintainable—Parties.*

A suit can be maintained against the manager of a joint Hindu family alone to enforce a mortgage against property belonging to the family. The manager of such family sufficiently represents other members in the suit.

Banerji, J.—It is not essential that the manager when he brings his suit should state in distinct terms that he is suing as manager or that the plaintiff in a suit against the family should describe the defendant as the manager of the family. All that is essential is that the manager is in fact suing or is being sued as such in respect of a family debt. HORI LAL *v.* NIMMAN KUNWAR, 9 A. L. J. 819 **126 F. B.**

——————— **O. 34, rr. 2, 4** **824**

——————— **O. 38, r. 5** **668**

——————— **O. 38, rr. 5, 6**—*Attachment before judgment—Finding of essential elements necessary—Opportunity of furnishing security to be given before attachment before judgment.*

A Court has no power to make an order under Order XXXVIII, rule 6 of the Civil Procedure Code, directing an attachment before judgment, without finding the essential elements mentioned in rule 5 of the Order, and without affording the defendant an opportunity of furnishing security. JAIPARKASH NARAIN SINGH *v.* BASANTA KUMARI DEBI **604**

——————— **O. 38, r. 6** **604**

——————— **O. 39, r. 2** **614**

——————— **O. 41, r. 5** **876**

Civil Procedure Code—(1908)—contd.

——————— **O. 41, r. 20**—*Non-joinder of parties in appeal—Discretion of Court to make parties.*

In a mortgage suit, the sole question was whether the contesting defendant had priority over the plaintiff. The defendant appealed and impleaded the plaintiff only as respondent to the appeal. The Court dismissed the appeal on the ground of non-joinder of other defendants as respondents to the appeal:

Held, that the lower Appellate Court ought to have made them respondents to the appeal under Order XLI, rule 20 of the Civil Procedure Code. JANGLI SAHU *v.* GOPINATH SAHU **295**

——————— **O. 41, r. 23** **367, 725**

——————— **O. 41, r. 23**—Appeal against order of remand—Decision of first Court on remand order, no bar to appeal **181**

——————— **O. 41, r. 23**—Order of remand carrird out by first Court, no bar to appeal **191**

——————— **O. 41, rr. 25, 26**—*—Remission of issues to the lower Court by Court of Appeal—Transfer of case by the Appellate Court to another Court of Appeal before findings were returned—Jurisdiction.*

A District Judge heard an appeal and remitted certain issues to the Court of first instance. Before that Court returned its findings, the District Judge transferred the case from his own file to that of the Subordinate Judge who, after considering the findings of the first Court, decided the case:

Held, that the District Judge was not competent to transfer the case to the Subordinate Judge for disposal. THAKUR PRASAD *v.* NARENDRA BAHADUR SINGH, 10 A. L. J. 89 **862**

——————— **O. 41, r. 25**—*Remission of issue—Direction to take further evidence, whether necessary—Discretion of Court.*

Where an Appellate Court remands a case under Order XLI, rule 25, with the object of obtaining from the lower Court a finding on a specific issue, after a reconsideration of the whole of somewhat complicated evidence in the case, with special reference to the pleas urged on behalf of the plaintiff, it is in the discretion of the Appellate Court not to direct additional evidence to be taken, if it is of opinion that it is not required. BHAGWAN DIN *v.* MATA DAYAL **670**

——————— **O. 41, r. 25**—*Remand for finding—Expression of opinion by Appellate Court—Whether Court can change mind after return of finding.*

When a case is remanded under rule 25 of Order XLI of the Civil Procedure Code, it remains pending and undisposed of on the Appellate Court's file. If the Judge records any expression of opinion but does not intend to express the same finally, he is not bound by it after return of the findings, for a Judge may yield to conviction and change his mind at any time before he has pronounced judgment.

But the Judge is not bound to re-consider after return of the findings any question which he had already dealt with and upon which he had expressed a final opinion before the remand. GANENDRA NATH ROY *v.* SURJA KANTA ROY **39**

Civil Procedure Code—(1908)—concld.

——————— **O. 41, r. 26 862**

——————— **O. 41, r. 27**—*Additional evidence, reasons for admission to be recorded—Especial reasons must exist—Separate proceedings, record of.*

Before an Appellate Court admits additional evidence, it should record separately its reasons for the admission of such additional evidence except for very especial reasons, further evidence should not be admitted in a Court of appeal. The fact that such evidence proves a very important point would not be a sufficient reason. IMDAD ALI *v.* HABIBUNNISSA, 15 O. C. 253 **250**

——————— **O. 43, r. 1 (j) 679**

——————— **O. 43, r. 1 (u) 181, 191, 367, 725**

——————— **O. 45 497**

——————— **O. 45, r. 13 187**

——————— **O. 47, r. 1 554**

——————— **Sch. I, O. 21, r. 32**—*Limitation Act (IX of 1908), Sch. I, Art. 182—Injunction—Application for enforcement of permanent injunction granted by decree.*

An application to a Court to exercise its powers under Order XXI, rule 32 of the Code of Civil Procedure, is an application for the execution of a decree and as regards limitation is governed by Article 182 of the 2nd Schedule of the Limitation Act (IX of 1908). HAJI AHMAD MOOLA DAWOOD *v.* POKER MULL, 5 BUR. L. T. 116 **945**

——————— **Sch. II**—*Arbitration—Award—Objection to award—Award set aside—Power of Appellate Court to go behind the order setting aside the award.*

A Court of Appeal has power to consider the validity of an order setting aside an award and to restore the award if it has been set aside on insufficient grounds.

Case-law on the subject discussed. NARANJAN SINGH *v.* GUJRI **928**

——————— **Sch. II, para. 1**—Reference to by guardian of minor **161**

——————— **Sch. II, para. 14**—*Arbitration—Conditional award—Refusal of Court to remit award—Appeal.*

It is competent to an arbitrator, who is empowered to decide whether a sale should be set aside, to pass an award setting aside the sale on the vendor re-paying the purchase-money.

Obiter:—A refusal by Court to remit an award under rule 14 of Schedule II of the Civil Procedure Code is not appealable. VESUSAMI GAVARAMMA *v.* CHILUKURI PITCHAMMA, (1912) 1 M. W. N. 961 **573**

——————— **Sch. II, paras. 17, 20 140**

——————— **Sch. II, para. 18 402**

——————— **Sch. II, para. 21, cl. 2 2**

Claim application, if can be proceeded with after execution sale—Inherent power, doctrine of **53**

Clog on the equity of redemption. *See* MORTGAGE.

Collector's power to interfere with private property **517**

Complaint aghinst Police officer—Practice **482**

———————All accused persons need not be named **1004**

Composition-deed—Test **850**

———————*Joint promissory-note by insolvent and another person—Creditor joining in composition on the assurance of joint-debtor for payment of balance—Agreement unenforceable—Consideration—Right to sue on pro-note.*

A. and *B.* borrowed money from *C.* on a joint promissory-note on 7th April 1906. *A.* failed in his business and on the 18th August 1906, entered into a composition-deed with his creditors whereby the creditors agreed to accept 8 annas and 6 pies in the rupee and release *A.* *C.* joined in the composition-deed on the assurance of *B.*'s promise that *B.* would pay whatever balance there might remain due on the promissory-note after due credit had been given for the sum received from *A.* *C.* subsequently sued *A.* for the balance due on the pro-note:

Held, (1) that the agreement with *B.* for payment of the balance due was unenforceable against *B.*, as it was material for the other creditors of *A.* to have known of this agreement and *C.* kept it from their knowledge;

(2) that the agreement was void for want of consideration, as even before entering into the agreement, *C.* was at liberty to sue *B.* if he could not have recovered the whole of his debt from *A.*'s estate;

(3) that as the agreement was void, *C.* could sue on the pro-note if his claim thereon was not time-barred. A. P. S. V. FIRM *v.* SHREE SAFATULLA, 5 BUR. L. T. 81 **363**

Compromise—Petition of compromise filed in mutation proceeding affecting immoveable property of value less than 100 rupees—Whether admissible in evidence without registration—Whether it confers title **741**

——————— in prior suit, effect of—Claim for use and occupation **432**

——————— during suit—Court's duty to inquire if parties are bound by compromise set up by one of them—Decision on pleadings of parties **478**

———————*Agreement to abide by decision in another suit—Adjustment—Jurisdiction.*

In a suit to recover the amount due under a pro-note, the parties agreed to abide by the decree of the District Munsif in a suit for cancellation of the same pro-note:

Held, that the agreement was not binding on the parties in the subsequent suit. The agreement could not be regarded as an adjustment of the subject-matter of the suit by a lawful agreement or compromise.

The ordinary rule is that when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule but where the exceptions do not apply, the rule must prevail. RAJA OF VENKATAGIRI *v.* VEMURU CHINTA REDDI, 11 M. L. T. 209; (1912) 1 M. W. N. 393; 22 M. L. J. 447 **378**

Concurrent Sentences. *See* PENAL CODE s. 35; SENTENCE.

Confession to Police Officers — Admission amounting to confession—Admissibility—Admissions made by a person before he was accused of an offence—Admissibility against co-accused **305**

——————— to private person **987**

——————— *Police officer—Evidence Act (I of* 1872), *ss.* 25, 26.

A confession made to a foreign Police officer is inadmissible in evidence according to sections 25 and 26 of the Evidence Act. PUBLIC PROSECUTOR *v.* VEERARAGHAVA PILLAI, 11 M. L. T. 407; 13 CR. L. J. 528 **800**

Consideration. *See* CONTRACT ACT, SECTION 23.

——————————Execution of document admitted **202**

——————————Joint promissory-note by insolvent and another person—Creditor joining in composition on the assurance of joint-debtor for payment of balance—Agreement unenforceable—Right to sue on pro-note **363**

——————————Mortgage—Burden of proof **121**

Consolidation of mortgages **605**

——————— **of suits,** *when can be made—Inherent power of Court—Civil Procedure Code (Act V of* 1908), *s.* 151—*Consent of parties—Revision—Material irregularity — Interference by High Court.*

An order for consolidation of suits can be made in a proper case in the exercise of the inherent power of the Court, now recognized by section 151 of the Civil Procedure Code of 1908.

When many actions are oppressively and vexatiously brought by the same plaintiff for the purpose of trying the same question, the Court will interfere either by staying the proceedings or granting time to plead in all the actions, but only upon terms, or in some other way.

The Court ought not to consolidate actions commenced by the same plaintiff against different defendants unless the issues to be tried are precisely similar or the parties consent to such consolidation.

A Court consolidated a mortgage suit, a money suit and a partnership suit on the ground that the substantial parties were the same and some of the points raised were common to them and so it would be convenient to try them together, in that the evidence on the common points would be the same in all the suits. It appeared, however, that the substantial questions in controversy were not identical, and it was not likely that the questions in controversy between the parties in the money suit and in the mortgage suit could be covered by the decision in the partnership suit:

Held, that the order for consolidation ought not to have been made, that the Court acted with material irregularity in the exercise of its jurisdiction and that irremediable mischief might be done if the High Court refused to interfere. KALI CHARAN DUTT *v.* MANODABALA DASI **897**

Conspiracy—Fellow conspirator acquitted — Conviction of other conspirator **814**

Construction of bond. *See* BOND.

——————— **of deed** **42**

——————————Grant of *inam* village **594**

Construction—concld.

——————— **of deed**—Mortgage-deed—*Moakhiza* **435**

——————————*Bond—Simple mortgage—Charge—Limitation Act (IX of* 1908), *s.* 31, *Sch. I, Art.* 132.

A. executed a usufructuary mortgage in favour of *B.* in 1880. In 1887, *A.* executed a bond in favour of *B.* which contained the following provisions: "If I do not pay on due date then when I come to redeem the land mortgaged, I shall pay this money with interest. Until I pay this money with interest, I shall not pay the mortgage-money.....When I pay, I shall pay the mortgage-money in a lump sum and redeem the fields...On these conditions I have written this *dastawez makfuli:*"

Held, that the bond was not a simple mortgage although it may have effected a charge.

Suits governed by Article 132 of the Limitation Act are not entitled to the benefit of section 31 of that Act.

When the construction of a deed is in question, rulings on the construction of deeds couched in different language are of very little use. BHAGWATI SINGH *v.* SARUP SINGH **851**

——————— **of document** — Authority to adopt—Power "to adopt another boy should the one adopted under authority die," meaning of **673**

——————————Composition deed—Test—Transfer of property to trustees for payment of debts—Registration **850**

——————————Hardship—One part repugnant to another **757**

——————— **of grant.** *See* GRANT.

——————— **of lease.** *See* PATNI LEASE.

——————— **of statute**—Right *in esse* not affected by new Law **725**

——————— **of wajib-ul-arz.** *See* PREEMPTION.

Contempt of Court **72**

——————————*Penal Code (Act XLV of* 1860), *s.* 228—*Criminal Procedure Code (Act V of* 1898), *ss.* 480 *to* 484.

A coarse expression used by a litigant but not addressed to the Court can scarcely be treated as an intentional insult to the Court or an interruption of its proceedings, under section 228, Indian Penal Code, even if the expression was actually overheard by the presiding officer.

Litigants are bound to conduct themselves in an orderly manner, but too much notice should not be taken of a sudden lapse, during a moment of excitement, into language which is unfortunately too common among the lower class of rustics and is not meant to be taken seriously. Where a litigant is detained and adopts a submissive attitude when brought before the Court later after the excitement has worn off, a due admonition or a petty fine at the most is sufficient for preservation of order. JIT SINGH *v.* EMPEROR, 23 P. W. R. 1912; 13 CR. L. J. 567 **983**

——————————*Pending trial—Comments by paper likely to prejudice fair trial—Humorous comments—Repetition of objectionable epithet—Punishment—Apology—Practice.*

It amounts to a contempt of Court to make com-

Contempt of Court--concld.

ments on a pending case, when the comments can in the least be taken to have the effect of prejudicing the fair trial of an accused person.

When during the pendency of a trial, a serious charge made against an accused person is treated by a journalist as a humorous event on which the public are invited to laugh, it is a matter that must be dealt with seriously.

The repetition by a paper of an offensive epithet against an accused person under trial is quite as objectionable as the original assertion of that epithet.

To talk humorously of an accused person's ill-health and to make light of a serious matter is a most objectionable practice on the part of a journalist.

The power of committing a citizen or a journalist to jail or of inflicting a fine on him for contempt of Court, or punishing him in any other way, such as making him pay costs, should be exercised with the greatest caution.

Contempt matters are matters not between parties but are matters between the respondents and the Court and the Court can accept an apology which it considers sufficient. CLARIDGE, *In re*, 14 BOM. L. R. 231; 13 CR. L. J. 461 **93**

Contract by husband to live with wife, to support her, and not take another wife—Breach of contract—Damages—Legal and illegal parts separable—Contract enforceable **915**

——————— by person of unsound mind -- Claims for refund of sums advanced **404**

——————*Agreement reduced to writing—Undue influence or fraud not proved—Discretion of Court—Contract Act (IX of* 1872), *s.* 16.

In the case of an agreement reduced to writing, a Court cannot, in the absence of fraud or undue influence, within the meaning of section 16 of the Contract Act, refuse to enforce its terms, however unreasonable they may be. Under such circumstances, the Court has no discretion. ABDUL KADIR BEARI *v.* BAGADE SHIVA RAO, (1912) 1 M. W. N. 416 **377**

————*Partition—Benefit to a third party—Burden goes with benefit*

By a partition agreement between the plaintiff and his brother, it was provided that the defendant should enjoy certain land for her maintenance and pay the *kist* due on it to the plaintiff and his brother. The plaintiff sued to recover monies paid by him on account of the above *kist*:

Held, that the defendant was liable, even though the defendant was no party to the partition-deed. She took the benefit under it subject to the burden placed on her by that document. KULANDAVELU PEDAYACHI *v.* KAMATCHI AYENGAR, 11 M. L. T. 216; (1912) 1 M. W. N. 409; 22 M. L. J. 456 **388**

Contract Act (IX of 1872), ss. 12, 65

—Contract by person of unsound mind—Claim for refund of sums advanced.

The provisions of section 65 of the Contract Act are not applicable to a contract entered into by a person of unsound mind.

Such a contract is void and no claim for a refund of sums advanced to a person of unsound mind is maintainable. KAMOLA RAM *v.* KAURA KHAN, 41 P. R. 1912; 117 P. W. R. 1912; 149 P. L. R. 1912 **404**

——————— **s. 16** **377**

Contract Act—contd.

——————— **s. 23**—*Bond—Consideration—Promise to withdraw from prosecution of non-compoundable case—Unlawful consideration—Criminal Procedure Code (Act V of* 1898), *s.* 345.

It is against public policy to compound a non-compoundable offence and any agreement to that end is wholly void in law. NUJEBAR RAHMAN *v.* MUKTASHED HUSAIN, 16 C. W. N. 854 **259**

——————— **ss. 23, 26, 57**—*Contract by husband to live with wife, to support her, and not take another wife—Breach of contract—Damages—Legal and illegal parts separable—Contract enforceable.*

On a wife taking steps to divorce her husband, the latter agreed to live in her house, to work and support her, and not to take a lesser wife, but did not carry out the agreement in all three particulars. On these facts, she sued him for damages for breach of contract:

Held, (1) that the suit was maintainable despite the subsistence of defendant's marriage with plaintiff;

(2) that a stipulation not to take a lesser wife was not contrary to the Buddhist law, and, therefore, did not contravene section 23 of the Contract Act;

(3) that, though the stipulation not to take a lesser wife may have been illegal as being in contravention of section 26 of the Contract Act, yet the promises to live in plaintiff's house and to work and support her, were good and lawful and, therefore, enforceable under section 57 of the Contract Act. NGA PO GYI *v.* MI ON, U. B. R. (1912) I, 108 **915**

——————— **ss. 23, 24, 65**—*Illegal contract—Part of consideration being stifling of criminal prosecution—Whole contract illegal—"Discovered to be void"—Restitution by party to illegal transaction.*

The expression "discovered to be void" in section 65 of the Contract Act is appropriate only to cases where the agreement is void by reason of some fact not known to the parties at the time of making it.

Where the agreement is void for illegality, no suit for restitution will lie.

No relief can be obtained on a contract which is tainted with illegality. The reason for the rule is that the Court will not lend itself in any way to assist a person who has taken part in an illegal transaction.

A. agreed, in consideration of the withdrawal by *B.* of a suit against *A.*, to suffer an award to be proved as to payment of money and also to procure that one *C.* should drop an application for sanction to prosecute *B.* for perjury. *A.* performed his part of the agreement but *B.* failed to withdraw the suit. *A.* thereupon sued to recover the benefits conferred on *B.* by the agreement:

Held, (1) that the whole agreement was illegal as *A.* could not ignore the illegal part of the agreement;

(2) that no relief could be granted to *A.* on the illegal contract. HEMANDAS RAMRAKHIOMAL *v.* CHELLARAM DALOOMAL, 5 S. L. R. 267 **836**

——————— **s. 23** — Patwari *prohibited from lending money — Mortgage in favour of* Patwari *opposed to public policy.*

Where by statute a penalty for doing or omitting any act is imposed solely or partly for the protection of the public, such act or omission is impliedly prohibited by the statute and is illegal.

Contract Act—contd.

Therefore, a mortgage in favour of a *Patwari*, who, under the Revenue rules, is liable to dismissal for money-lending, is void as being opposed to public policy. VITHAL *v.* SIWA, 8 N. L. R. 82 **933**

——— ——— **s. 24** **836**

——— ——— **s. 24**—*Court passing decree on a void contract—Jurisdiction—Revision.*

A Court, passing a decree for money upon a plaint which on the face of it sets up as its cause of action the breach of a contract which is void in law, acts illegally in the exercise of its jurisdiction. RABI RAI *v.* DHARAMRAJ RAI **35**

——— ——— **s. 26** **915**

——— ——— **s. 39** **757**

——— ——— **ss. 49, 50** **885**

——— ——— **s. 57** **915**

——— ——— **s. 65** **404, 836**

——— ——— **s. 69** **206, 262**

——— ——— **ss. 69, 70**—*Contribution—Rent decree against plaintiff and defendant No. 2—Transfer by defendant No. 2 of his share to defendant No. 1—Payment of decretal amount by plaintiff—Liability of defendant No. 1 to contribute.*

The plaintiff and defendant No. 2 were under-*ryots* possessing their holding in equal halves. Defendant No. 2 sold his half share in 1904 to defendant No. 1. The superior landlord, who was not bound to recognise the sale, brought a rent suit against the plaintiff and defendant No. 2 for the years 1902 to 1905, and obtained a decree and in execution attached the moveables of the plaintiff who thereupon satisfied the decree and brought this suit for contribution:

Held, that defendant No. 1 was liable to pay his share of the decretal amount under sections 69 and 70 of the Contract Act. PROSONNO KUMAR BASU *v.* JAMALUDDIN MAHOMED **55**

——— ——— **s. 70** **55**

——— ——— **s. 72**—*Suit to recover money paid by mistake—Mistake or ignorance of law cannot be pleaded.*

The petitioner was bailiff in the Municipal Office and as such was authorised to draw commission on taxes which the ward headmen failed to collect within 45 days from the date on which tax tickets were issued. In November 1908, the petitioner represented to the Municipal President that, although the ward headmen were bound to submit any tax tickets on which they had failed to collect taxes within 45 days, yet they were retaining some tickets after the prescribed period and making collections on them. He asked expressly that commission on these belated collections by the headman should be paid to him and not to the headmen. The petition was granted by the President and the Committee passed a resolution which was intended to have the same effect as the President's order. The petitioner drew a sum of Rs. 111-6-2 as commission on collections made by ward headmen after the expiry of the prescribed period of 45 days. Afterwards, objection was raised that the bailiff should not receive commission on taxes which he did not collect. The petitioner was called upon to refund and on his refusal this suit was instituted, the basis of the suit being that the bailiff was not entitled to the money, and, therefore, should refund it:

Held, (1) that if the money was recoverable at all, it was recoverable under section 72 of the Contract Act, which provided that a person to whom the money was paid by mistake must re-pay it, but that the payment in this case was a voluntary payment made with full knowledge of the facts;

(2) that to succeed under section 72 of the Contract Act, the Committee should show that there was some mistake as to the existence of the obligation, but that in this case there was none, as the petitioner was an employee of the Committee and the money must be deemed to have been paid in part remuneration of his services;

(3) that even if it be regarded as a mistake of law, section 72 of the Contract Act should be read as subject to the Common Law rule that ignorance of law cannot be pleaded. MAHOMED SULTAN *v.* MOULMEIN MUNICIPAL COMMITTEE, 5 BUR. L. T. 75 **361**

Contract Act—concld.

——— ——— **s. 73** **757**

——— ——— **s. 139**—*Surety for debtor, discharge of—Remedy against principal debtor impaired owing to conduct of creditor—Costs.*

Where the creditor had committed acts which were inconsistent with the rights of his surety and had also omitted certain acts which his duty to the surety required him to perform and as a result of these acts and omissions, the eventual remedy of the surety against the principal debtor was impaired:

Held, that the surety was discharged from liability under section 139 of the Contract Act to the extent that he was deprived from recovering from the principal debtor the amount claimed by the creditor.

The surety was allowed his costs for it was found that the plaintiff's suit against him was wholly unjustifiable. TULSA SINGH *v.* NATHA SINGH, 58 P. L. R. 1912 **469**

——— ——— ——— **ss. 148, 151** **431**

——— ——— ——— **ss. 217, 221** **785**

Contribution. *See* CONTRACT ACT, s. 69.

——— ——— ———, suit for—Several lands burdened with payment of common revenue—Liability of owners who have not paid to person who pays the revenue—Nature of decree—Plaintiff's right to a charge **262**

——— ——— ———, *suit for—Undissolved partnership—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41.*

A suit for contribution will lie on the Small Cause side even where the debt in respect of which the decree was obtained was one relating to a partnership trade carried on between plaintiff and defendant jointly. To sustain a plea that the suit will not lie on the Small Cause side and that plaintiff's remedy was by asking for a dissolution of the partnership and the taking of its account, the defendant should allege and prove that the partnership is undissolved and continuing. In the case of a dissolved partnership, a suit for contribution is maintainable by a partner who has paid the whole of the debt.

In such a case, it would be open to the defendant to show that nothing was really due to the plaintiff according to the accounts of the partnership as they stood. GUDLAVELLARU VENKATARATNAM *v.* VELLATHAMBI VENKATARATNAM, 11 M. L. T. 188; (1912) 1 M. W. N. 384 **218**

Conversion—Measure of damages **757**

Co-sharer—Adverse possession **292**

———— ————Payment of Government revenue jointly, whether constitutes co-parcenary to give rise to right of pre-emption **659**

———— ————*Possession—Adverse possession—Assertion of hostile title—Disclaimer of title—Mortgage by co-owners—Clandestine redemption and re-mortgage by one owner—Right of the other owner to redeem mortgage.*

The possession of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of a hostile title by the former.

A. and *B.* jointly mortgaged certain property in 1866 to *C.* In 1882, *A.* alone redeemed the mortgage without the knowledge of *B.* and, shortly after, *A.* re-mortgaged the property to *D.*, without *B.*'s knowledge.

D. leased the property to *C.*'s heirs who were already in possession as first mortgagees. No knowledge of exclusion and adverse possession by *A.* could be imputed to *B.*

In 1908, *B.* sued to redeem the mortgage of 1866:

Held, that so long as *A.* took no steps to assert a title against *B.* in such a manner as to challenge his right to redeem his interest from *A.*, the possession of *A.* or his mortgagee *D.* would not be adverse to *B.* except in so far as the mortgagee might set up a limited title under Article 134 of the Limitation Act. BHAIJI SHAMRAO *v.* HAJIMIYA MAHAMAD, 14 BOM. L.R. 314 **500**

Costs—Dismissal of suit against surety **469**

———— ——Dismissal of suit for restitution of conjugal rights **560**

————*Appeal, second—Discretion — Civil Procedure Code (Act V of 1908), s. 35.*

In a second appeal, the Court cannot interfere with an order as to costs unless the order is illegal. The Court cannot examine the reasons and review the exercise of the discretion of the lower Court in the matter of costs.

Even if the discretion is exercised wrongly, that is not a sufficient reason for interfering in second appeal. MA LON MA *v.* MAUNG TUN U, 5 BUR. L. T. 104 **429**

———— ——*Abatement of suit—Death of defendant.*

If a suit abates on the ground that no representative of a deceased defendant has been brought on the record, the Court cannot award costs to the heirs of the deceased defendant against the plaintiff.

Quære:—Whether the representatives of the deceased defendant can institute a separate suit for the purpose of recovering costs? SIVAPRAKASAM *v.* PALANIAPPA MUDALIAR, 11 M. L. T. 202; (1912) 1 M. W. N. 382; 22 M. L. J. 439 **369**

———— ——*Mortgage decree — Execution of decree for costs—Transfer of Property Act (IV of 1882), s. 90—Personal decree for costs.*

A mortgage-decree-holder can realise his decree for costs otherwise than by proceeding under section 90 of the Transfer of Property Act, if the Court has passed a personal decree for costs. MOHUNGA OJHA *v.* RAM BAHADUR SINGH, 16 C. W. N. 731 **23**

Court—Registrar **652**

Court-fee—Declaratory suit—Injunction, whether consequential relief **427**

———— ————Review—Application filed on 90th day—Previous day Sunday **455**

———— ——Set-off **526**

———— ————*Appeal—Suit for possession and mesne profits—Value of suit—Value of land at Rs. 1,020 and mesne profits at Rs. 4,199—Decree—Appeal with Court-fee on Rs. 4,199 mesne profits—Subsequent assessment of mesne profits at only Rs. 2,570—Whether Court-fee is to be paid a second time on memorandum of appeal.*

The plaintiff, in a suit for recovery of land and mesne profits, valued the relief for recovery of land at Rs. 1,020 and for the mesne profits antecedent to the suit at Rs. 4,199. The Courts below made a decree in favour of the plaintiff. The defendants appealed to the High Court and valued their appeal at Rs. 5,291 and paid Court-fees on their memorandum of appeal *ad valorem*. During the pendency of this appeal, mesne profits were assessed at Rs. 2,570 and a decree made in favour of the plaintiff for this amount. The defendants desired to appeal against this decree:

Held, that as the defendants had already paid Court-fees upon the claim for mesne profits valued at Rs. 4,199, they could not be called upon to pay Court-fees a second time, and that this appeal would be filed without any Court-fee being paid on the memorandum of appeal. KANCHAN MANDAR *v.* KAMINI PRASHAD CHOWDHURY **572**

———— ————*Partition suit — Decree in accordance with award—Objections to award not considered—Revision application—Award attacked re mode of partition—Court-fee payable—Court-Fees Act (VII of 1870), Sch. II, Art. 17 (VI).*

In a partition suit, a decree was passed in accordance with an arbitrator's award. *A.*, one of the parties, was directed by that decree to pay a sum of money to the other side in cash. Actual partition of the joint property of the parties was also effected by the decree.

A. filed a petition for revision of the decree. In this petition he sought two reliefs, (*a*) that he was not liable to pay the sum of money, and (*b*) that the Court below accepted the award as valid without considering and disposing of his objections to that award, the main allegation being that the arbitrator did not allow *A.* a reasonable opportunity to put the case before him and that this had resulted in an unfair mode of partition being adopted.

A. paid an *ad valorem* Court-fee as regards the first relief (*a*) and a Court-fee of Rs. 10 as regards relief (*b*).

The right of the other parties to share the joint family property was not disputed; nor did *A.* urge in revision that any particular piece of property of a definite value should have been allotted on partition to him and not to the other parties:

Held, (1) that the petition for revision was properly stamped;

(2) that it was not possible to estimate relief (*b*) at a money value and, consequently, in respect thereof, a Court-fee stamp of Rs. 10 was sufficient. LILA RAM *v.* MUKAND RAI, 229 P. W. R. 1912 **57**

Court-fee—concld.

———— *Probate and Letters of Administration —Fee to be paid—Exemption—Gross value of estate above and net value below one thousand rupees—Whether fee payable on net value—Court Fees Act (VII of 1870), ss. 6, 19 (viii), 19 I, 19 K, Schedule I, No. 11, Schedule III, Form.*

Section 19 (viii) and No. 11 of Schedule I of the Court Fees Act, exempt from liability to fees Probate or Letters of Administration where the amount or value of the property, in respect of which the grant is made, does not exceed one thousand rupees. This exemption, however, applies only in cases where the gross value of the property does not exceed one thousand rupees.

The fee mentioned in No. 11 of Schedule I is to be paid on the valuation mentioned in Schedule III, and is to be paid on the net value of the property.

Where the gross value is above and the net value is below one thousand rupees, a fee of two per cent. is payable on the net value. COLLECTOR OF MALDAH *v.* NIRODE KAMINI DEBYA **621**

———— ———— *Suit by reversioner for possession and also for redemption--Redemption ordered on payment of particular sum— Appeal—Court-fee payable.*

Where a plaintiff sued as a reversioner for possession of property, and in the alternative claimed redemption and the Courts below gave the plaintiff a decree for redemption subject to the payment of a certain sum which the plaintiff disputed in appeal and asked for possession without the payment of any sum:

Held, that the plaintiff must pay *ad valorem* Court-fee on the amount which he was ordered to pay. MATA BADAL SINGH *v* JAI SINGH **746**

Court Fees Act (VII of 1877), s. 6 **621**

———— ———— **s. 7 cl. (x), sub-cl. (c)** **46**

———— ———— ———— **ss. 10 (ii), 12 (ii)**—*Word "suit" in s. 10 (ii) includes 'appeal'—Question of sufficiency of Court-fee on plaint not expressly decided by first Court—Assumption—Consequences—Appeal to the first Appellate Court on insufficient stamp—Power of the Court of second or further appeal to order supply of deficiency—Consequences of non-compliance with such order.*

The word "suit" in section 10 (ii) of the Court Fees Act includes appeal.

When a Court of first instance, whose duty it is to see that the Court-fee stamps affixed to a plaint are correct, proceeds to the trial of the suit, without expressly deciding that the plaint is correctly stamped, it must be assumed that the Court has *tacitly* decided that the amount of Court-fees paid is correct; and acting on that assumption, it would be competent to the first Appellate Court, (though it would not be competent for the parties to the appeal to raise the question—*obiter*) to call upon the party, whose fee was in deficit in the first Court, to make good such deficiency within a reasonable time to be fixed by the Court and to dismiss the claim of the plaintiff, should it have been decreed, if he fails to do so. Similarly, a Court of second or further appeal is competent to call upon a party, who had appealed to the lower Appellate Court on insufficient Court-fee, to make good such deficiency, within a reasonable time to be fixed for that purpose, and, on his failing to do so, to dismiss his appeal to the lower Appellate Court

Court Fees Act—concld.

should it have been decreed; or, in case his appeal to the lower Appellate Court had been dismissed, to refuse to entertain his second or further appeal until the deficiency is made good within the time fixed, and, on his failure to comply with the order, to dismiss his appeal. DYAL SINGH *v.* RAM RAKHA, 136 P. W. R. 1912; 54 P. R. 1912 **463 F. B.**

———— ———— **s. 12 (ii)** **463**

———— ———— **s. 13** **910**

———— ———— **s. 14** **455**

———— ———— ———— **ss. 19 (viii), 19-I, 19 K** **621**

———— ———— **Sch. I, Arts. 4, 5** **455**

———— ———— ———— **No. 11** **621**

———— ———— **Sch. II, Art. 10** **122**

———— ———— ———— **art. 17 (iii)** **427**

———— ———— ———— **art. 17 (vi)** **57**

———— ———— **Sch. III, Form** **621**

Criminal Breach of Trust. *See* PENAL CODE, s. 114 **85**

———— ———— ———. *See* PENAL CODE, s. 406.

Criminal Procedure Code (Act V of 1898), ss. 4 (8), 337 (4)—*Complaint—Tender of pardon—Recording of reasons for the pardon—Penal Code (Act XLV of 1860), ss. 7, 20, 466—Plaint—Proceeding of a Court of Justice—Alteration of plaint after it has been filed.*

In filing a complaint in a Criminal Court, it is not necessary that the complainant should name all the accused persons.

The recording of reasons by the inquiring Magistrate is not a condition precedent to the tender of pardon and its acceptance by the approver.

A plaint is a record or a proceeding of the Court of Justice in which it is filed. It is a document which once filed cannot be altered or amended without the special sanction of the Court. EMPEROR *v.* SHAMA CHARAN, 13 CR. L. J. 588 **1004**

———— ———— ———— ———— **ss. 12, 181 (2), 188**—*Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust committed in Native State—Part of property retained in British India—Jurisdiction—Power of British Court to take cognizance of offence.*

Section 181 (2), Criminal Procedure Code, applies only when the offences referred to therein are committed in British India; it has no application to an offence committed in a Native State.

Where the offence of criminal breach of trust was committed in Jodhpur in a Native State but part of the property was retained by the accused in Hyderabad (Sind):

Held, that the Hyderabad Court could not take cognizance of the offence except on a certificate of the Political Agent under section 188, Criminal Procedure Code. IMPERATOR *v.* TRIBHUN, 5 S L. R. 266; 13 CR. L. J. 530 **802**

———— ———— ———— ———— **s. 35**—*Imprisonment in default of fine—Concurrent sentences.*

Sentences of imprisonment in default of fines im-

Criminal Procedure Code—contd.

posed for two or more offences cannot be directed to run concurrently as not being justified by section 35, Criminal Procedure Code. EMPEROR *v.* AKIDULLAH, 5 S. L. R. 263; 13 CR. L. J. 536 **808**

——————— **ss. 87, 88** **984**

——————— **s. 94**—*Production of document or other thing incriminating accused—Issue of summons to accused for—Whether permissible.*

It is competent to a Magistrate to issue summons to an accused person under section 94, Criminal Procedure Code, to produce a document or other thing, the production of which might tend to incriminate him, SUREY KONDAREDDI *v.* EMPEROR, 13 CR. L. J. 493 **493**

——————— **s. 106**—*Surety, liability of.*

A surety, under section 106 of the Code of Criminal Procedure, cannot be made liable for an amount larger than the one for which the principal has executed the bond. EMPEROR *v.* ELLIS, 5 BUR. L. T. 101; 13 CR. L. J. 482 **482**

——————— **ss. 107 (4), 496**—*Bail—Right to be released.*

The provision in section 107, clause (4), of the Criminal Procedure Code, that a Magistrate before whom a person is sent under that section "may in his discretion detain such person in custody until the completion of inquiry", is not subject to or controlled by section 496 of the Criminal Procedure Code. The latter section does not give an absolute right to bail to any person, who is not charged with a non-bailable offence and should be read along with other provisions of the Code giving a special right of detention to a Court. NARAINASAWMY NAICKEN *v.* EMPEROR, (1912) 1 M. W. N. 169; 11 M. L. T. 253; 22 M. L. J. 357; 13 CR. L. J. 447 **79**

——————— **ss. 107, 145**—*Dispute relating to land likely to cause breach of the peace—Discretion of Magistrate.*

Where a dispute relating to possession of immoveable property is likely to cause a breach of the peace, a Magistrate has a discretion to proceed either under section 107 or under section 145 of the Criminal Procedure Code. THAKUR PANDEY *v.* EMPEROR, 9 A. L. J. 582; 13 CR. L. J. 526; 34 A. 449 **798**

——————— **ss. 107, 145**—*Jurisdiction.*

There is nothing either in section 107 or in section 145 of the Criminal Procedure Code, which would warrant the conclusions that proceedings taken under the former section, would preclude a Magistrate from proceeding under the latter. FAIYAZ ALI *v.* EWAZ ALI, 9 A. L. J. 693; 13 CR. L. J. 566 **982**

——————— **ss. 110, 439**—*Bad livelihood, security for—Proof.*

The following circumstances are not sufficient to place a person on security under section 110 of Act V of 1898, especially where these circumstances are shown to have occurred about a year after dismissal of that person's complaint of bribe-taking against two Police Sub-Inspectors of the *Ilaqa* in which he lives:—

(1) Two successful searches of his house.

(2) His having been seen in the company of some suspected persons none of whom has ever been convicted of theft.

(3) Allegations of some *Sufedposhes* and *Lambardars* to the effect that people of their villages know him to be a *badmash*, while no one has ever suspected him in a theft case. SAMANDA *v.* EMPEROR, 20 P. W. R. 1912 CR; 13 CR. L. J. 550 **966**

——————— **s. 144** **655**

——————— **Chap. XII** **495**

——————— **s. 145** **798, 982**

——————— **s. 145**—*Decree of Civil Court not* inter partes*—Possession under such decree—Jurisdiction of Magistrate to declare opposite party's possession.*

Where the first party was put in possession of disputed property under a decree of a Civil Court, which was not one against the second party: *Held*, that a Magistrate had jurisdiction, in a proceeding under section 145 of the Criminal Procedure Code, to declare the possession of the second party. JOGABANDHU SHAHA *v.* RAJ KUMAR ROY CHOWDHURY, 13 CR. L. J. 583 **999**

——————— **ss. 145, 146**—*Possession—Proceedings—Appointment of Receiver before completing inquiry under section* 145*—Jurisdiction.*

An order by a Magistrate, appointing a Receiver under clause (2) of section 146 of the Criminal Procedure Code, before completing the inquiry under section 145 of the Code, is *ultra vires* and without jurisdiction. LAKSHMINARAYANA REDDI *v.* GNANAPRAKASA, 13 CR. L. J. 536 **808**

——————— **s. 145**—*Possession proceedings—Delivery of possession to one of the parties by the Magistrate—Acquisition of title on unsuccessful party's failure to establish title within 3 years—Limitation Act (IX of* 1908*), s.* 28*, Sch. I, Art.* 47*—Suit for rent by party placed in possession — Previous attornment by tenant to defeated party in possession proceedings—Joinder of parties.*

The effect of an order passed by a Magistrate under section 145, Criminal Procedure Code, putting one of the parties in possession of the property, is that he, on failure by the unsuccessful party to sue to get rid of the order within 3 years under Article 47 of the Limitation Act, acquires a title to the property under section 28 of the Act.

In a suit for rent against a tenant instituted by the party thus put in possession, the unsuccessful party in the possession proceedings should be impleaded as a party defendant, if the tenant had, prior to the institution of the proceedings under section 145, Criminal Procedure Code, attorned to the latter. DEVASIKHAMANI *v.* MUTHIAN CHETTY **24**

——————— **ss. 145, 526**—*Transfer—High Court, power of—Jurisdiction—'Criminal case,' meaning of.*

The expression "Criminal case" in section 526 of the Criminal Procedure Code, includes a proceeding initiated under section 145 of the Code. The High Court has, under section 526, power to transfer such proceeding from one Court to another subject, of course, to all the conditions under which a transfer can be made. JAGGU AHIR *v.* MURLI SHUKUL, 13 CR. L. J. 452; 10 A. L. J. 27 **84**

——————— **s. 146** **808**

——————— s. 146 — *Attachment of disputed property—Order without taking evidence wholly without jurisdiction.*

Where a Magistrate makes an order under section 146 of the Criminal Procedure Code, attaching the disputed property, without taking any evidence, the order is wholly without jurisdiction and should be set aside. SHEOBALAK RAI *v.* BHAGWAT PANDAY, 13 CR L. J. 486; 16 C. W. N. 1052 **486**

——————— s. 177 — *Offence committed at a place in British India—Subsequent transfer to an Independent State—Jurisdiction of Court of the place--Territorial jurisdiction of State.*

A. committed an offence within the local limits of the Sessions Court at Mirzapur. Subsequent to the commission of the offence, the place where the offence had been committed was transferred to the Native State of Benares. *A.* was a British Indian subject and never ceased to be so. Since the commission of the crime, he resided in British territory:

Held, that the Sessions Court of Mirzapur had jurisdiction to try the offence.

The judicial power of every Independent State extends to the punishment of all offences against the Municipal laws of the State by whomsoever committed within the territory, also to the punishment of all such offences by its subjects wheresoever committed.

The jurisdiction of the *Mofussil* Courts depends upon the offence having been committed within their local limits. EMPEROR *v.* GANGA, 9 A. L. J. 696; 34 A. 451; 13 CR. L. J. 575 **991**

——————— s. 179—*"Consequence," meaning of—Penal Code (Act XLV of* 1860*), s.* 408 *—Criminal breach of trust committed at the branch office of a firm—Whether the Court at the Head office of the firm can try—Jurisdiction.*

The word "consequence" in section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offenders as to form no part of that offence.

If an offence under section 408 is committed in a branch of a firm, the Court at the Head office of the firm has no jurisdiction to try it. GANESHI LAL *v.* NAND KISHORE, 13 CR. L. J. 479; 10 A. L. J. 45; 34 A. 487 **319**

——————— ss. 181 (2), 188 **802**

——————— s. 188—*Extradition Act (XV of* 1903*), ss.* 7, 22*—Indian (Foreign Jurisdiction) Order in Council,* 1902*—Extradition Rules, r.* 3*—Political Agent—Warrant issued on requisition of Native State—Accused surrendering of his own accord—Certificate granted by Political Agent for trial of accused in British India—Subsequent recall of certificate—Accused ordered to be tried in Native State—Practice.*

The Authorities of a Native State made a requisition to the Political Agent, who was also the District Magistrate of Bijapur, for the surrender of an accused. The Political Agent issued a warrant under section 7 of the Extradition Act, for the arrest of the accused, who surrendered of his own accord and the warrant was accordingly returned unexecuted. Then, upon the application of the accused, the Political Agent issued in his favour a certificate under section 188, Criminal Procedure Code, to the effect that the accused should be tried in British India. Subsequently, the Authorities of the Native State pressed for the man's surrender and the Political Agent, yielding to that pressure, finally ordered that the accused be tried in the Native State:

Held, that the Political Agent had no power to cancel the certificate already granted and that the subsequent order for the trial of the accused in the Native State must be set aside.

Rule 3 of the Rules under the Indian (Foreign Jurisdiction) Order in Council 1902 and under section 22 of the Extradition Act does not control section 188, Criminal Procedure Code.

The Rule contains a reminder to Political Agents of their duty to consider the admissibility of issuing a certificate prior to issuing any warrant.

A certificate under section 188, Criminal Procedure Code, can be issued even after a warrant has already gone out. VAZIRSAHEB ALLISAHEB JAGIRDAR, *In re*, 14 BOM. L. R. 377; 13 CR. L. J. 537 **809**

——————— s. 190 — *Magistrate—Cognizance—Jurisdiction—Complaint before one Magistrate of offences under Penal Code and Explosive Substances Act without Government sanction—Complaint before another Magistrate with sanction—Cognizance taken by second Magistrate without withdrawing case from first, if legal—Penal Code (Act XLV of* 1860*), s.* 399*—Explosive Substances Act (VI of* 1908*), ss.* 4 *(b)*, 7.

A complaint was made by a Sub-Inspector of Police to a Sub-Divisional Magistrate of the offence of making preparation to commit a dacoity, under section 399 of the Penal Code. The facts stated in the complaint disclosed that the accused was also guilty of having bombs in his possession or control which was a preparation to commit dacoity. No cognizance could be taken of the latter offence under section 4 (*b*) of the Explosive Substances Act till Government sanction had been obtained as required by section 7 of the Act, but the Sub-Divisional Magistrate was informed that an application to Government had been made for the sanction. Subsequently, the Superintendent of Police put in a complaint before the District Magistrate with Government sanction. The District Magistrate then proceeded with the case:

Held, that although the case was not formally withdrawn from the file of the Sub-Divisional Magistrate, the District Magistrate had jurisdiction to take cognizance of the offence under the Explosive Substances Act, as the offence was not and could not be taken cognizance of by the Sub-Divisional Magistrate for want of Government sanction. LALIT CHANDRA *v.* EMPEROR, 39 C. 119; 13 CR. L. J. 433 **65**

——————— ss. 195, 203—*Dismissal of complaint, without recording reasons, bad—Complaint against Police officer—Government Circular that offence should be inquired into by first class Magistrate—Meaning of Circular—If case be made over to another Magistrate, that Magistrate to have jurisdiction to decide case finally and order sanction for prosecution—Penal Code (Act XLV of* 1860*), s.* 211*—Sanction to prosecute.*

It is an imperative provision of law that a

Criminal Procedure Code—contd.

Magistrate shall briefly record his reasons for dismissing a complaint. There can be no question of irregularity where the provisions of the statute are imperative and are directly disobeyed.

Where a Magistrate did not record any reason for dismissing a complaint but directed that the complainant should be prosecuted under section 211, Indian Penal Code:

Held, that the order of dismissal was without jurisdiction and altogether bad, that there must be a further inquiry and that there cannot be any proceeding under section 211, Indian Penal Code, until such further inquiry has been made.

No Circular of the Government can authorize Magistrates to infringe or in any way alter the statute law.

The Government Circular, directing that when a Police officer is charged with a serious offence the offence should be inquired into at once on the spot by a Magistrate of the first class, does not mean that the Sub-Divisional Magistrate may send the case to a Subordinate Magistrate to hold a local investigation under section 202, Criminal Procedure Code, and then afterwards treat it as if the matter was still on his file. What the Circular means is that an experienced first class Magistrate should himself hold the inquiry, and if he is to depute it to another first class Magistrate, the latter officer should from the first have seizin of the case and should investigate it and decide it finally. An order for the prosecution of the complainant for bringing a false case should be given by this latter officer; the former officer who deputes the case to the latter officer has no power to grant the sanction. MANIRUDDIN SARKAR *v.* ABDUL RAUF, 13 CR. L. J. 482 **482**

——— ——— ——— ——— **s. 195**—*Penal Code (Act XLV of* 1860), *ss.* 182, 211—*False charge of theft made to Police—Complaint against informant under sections* 182 *and* 211, *Indian Penal Code—No sanction necessary for proceeding under section* 211, *Indian Penal Code—Duty of Magistrate--Same facts constituting offences under more than one section—Proceeding to be with respect to the more serious offence.*

Where a given set of facts constitutes an offence under more than one section of the Indian Penal Code, proceedings should be taken with respect to the more serious offence.

The offence of making a false charge of theft in an information laid at a Police station falls not only under section 182 but also under section 211, Indian Penal Code, and as sanction is not necessary in order to proceed against the informant under the latter section, a Magistrate should proceed under that section when the complaint is under both sections, *viz.*, under sections 182 and 211, Indian Penal Code.

A person who makes a false charge on more than one occasion is responsible for his act on each occasion. MI NGWE *v.* MI CHIT, U. B. R. (1912) I, 134; 13 CR. L. J. 576 **992**

——— ——— ——— **s. 195**—*Penal Code (Act XLV of* 1860), *s.* 211—*False information given to Police—Order of Magistrate to remove case from Police file—Sanction.*

Where the information given to the Police was reported to be false and the Magistrate, in consequence, ordered the Police to remove the case from their file:

Criminal Procedure Code—contd.

Held, that in order to initiate proceedings under section 211, Indian Penal Code, against the informant, the sanction of the Magistrate was not necessary. BHIMARAJA VENKATESWARULU *v.* MOOVA BAPULA, 13 CR. L. J. 480 **320**

——— ——— ——— **s. 195 (6) (7) (a)**—*Sanction to prosecute—Appeal—Jurisdiction—Sanction granted by Additional District Judge—Power to revoke sanction—Central Provinces Courts Act (II of* 1904*), ss.* 15, 17.

Clause (*a*) of sub-section (7), of section 195, Criminal Procedure Code, defines the word 'ordinarily' for all cases where appeals from a lower Court lie to more than one higher Court.

When a Civil Court in practice tries suits of values so different that appeals from some of its decisions lie to one and appeals from other decisions to another higher Court, then the Court authorized to revoke or grant a sanction under sub-section (6) of section 195, is the Appellate Court of inferior jurisdiction. RAMKRISHNAPURI *v.* MOHANLAL, 8 N. L. R. 57; 13 CR. L. J. 498 **642**

——— ——— ——— **s. 195**—*Sanction to prosecute—False charge made to the Police at a Police station—Penal Code (Act XLV of* 1860), *s.* 211.

No judicial sanction is required in order to prosecute a person for laying a false charge at a Police station. There is no necessity in such a case to hold a preliminary Magisterial inquiry. EMPEROR *v.* SHEIKH AHMED, 5 BUR. L. T. 129; 13 CR. L. J. 578 **994**

——— ——— ——— **s. 195**—*Sanction to prosecute—False complaint made to Police—Subsequent inquiry and discharge of accused by a Magistrate.*

Though, as a rule, no sanction is required to prosecute for making a false charge to the Police, yet where, after the rejection of a complaint by the Police as false, the complainant complains to a Magistrate, who, after full inquiry, discharges the accused, the latter cannot prosecute the complainant merely for the false charge made to the Police but must obtain the Magistrate's sanction before prosecuting. PO HLAING *v.* BA E, 6 L. B. R. 50; 5 BUR. L. T. 111; 13 CR. L. J. 565 **981**

——— ——— ——— **s. 195**—*Sanction to prosecute—False recital in* panchnama—*Case committed to Magistrate—Magistrate finding case to be false—Sanction against Police officer preparing* panchnama *but not appearing as witness in the case—Penal Code (Act XLV of* 1860), *s.* 211.

The test for the necessity of the sanction under section 195, Criminal Procedure Code, is the character of the *offence* and not the character of the offender.

Sanction is necessary under the section when an offence punishable under section 211, Penal Code, is committed in, or in relation to, any proceeding in any Court.

A Police constable, *A.*, prepared a *panchnama* in regard to an offence said to have been committed by a certain *Talukdar* under the Arms Act. The investigation into the alleged offence was not made by *A.* but by the village constable who sent the case up to the Sub-Inspector, by whom in turn it was committed to a Magistrate. The Magistrate found that certain recitals in the *panchnama* were false and that the charge imputed to the *Talukdar* was false,

Criminal Procedure Code—contd.

He discharged the *Talukdar* and directed the prosecution of *A.* under section 211 of the Penal Code. *A.* did not appear before the Magistrate in the case against the *Talukdar*.

A. applied to the Sessions Judge, who found that the order of the Magistrate was an order for sanction under section 195, Criminal Procedure Code, but that no such sanction was necessary in the circumstances of the case before *A.* could be prosecuted:

Held, that *A.* could not be prosecuted without preliminary sanction because

(*a*) the offence imputed to *A.* was the instigation of the false charge against the *Talukdar*, which took the form of a trial;

(*b*) even if the offence of instigation was committed before the proceeding in Court was begun, the instigation was an act committed in relation to the proceeding held by the Magistrate against the *Talukdar*. KHANDERAO YESHAWANT, *In re*, 14 BOM. L. R. 362; 13 CR. L. J. 527 **799**

——— ——— ——— **s. 195**—*Sanction to prosecute—High Court, jurisdiction of—Extension of the period of sanction to prosecute—District Magistrate wishing to take cognizance of offence committed within his jurisdiction can move for extension of period of six months.*

A High Court has jurisdiction to extend the period of six months for which a sanction granted by a Subordinate Court, under section 195 of the Code of Criminal Procedure, may remain in force, even though such extension is granted after the period of six months has expired.

Where sanction to prosecute under section 195, Criminal Procedure Code, for an offence against public justice is granted to a private person and the District Magistrate, within whose jurisdiction the offence has been committed, desires to take cognizance of the offence, the latter can move the Court to extend the prescribed period of six months.

Upon a complaint being filed on the strength of the sanction as it stands, it will be for the prosecution to satisfy the Court that the sanction is not being taken advantage of by the District Magistrate against the wish or without the authority of the person in whose favour it was originally granted. HARI PADO MOZAMDAR *v.* LACHMI NARAIN MARWARI, 15 O. C. 177; 13 CR. L. J. 551 **967**

——— ——— ——— **s. 203** **482, 484**

——— ——— ——— **ss. 222, 234, 239**—*Charges—Misjoinder—Criminal misappropriation or breach of trust—Same parcel of money—More than one accused—Charges how to be framed—Abetment.*

In section 222 of the Criminal Procedure Code, the wording refers to a single accused; and this must be so because it is impossible to hold that two persons can be guilty of misappropriating one and the same parcel of money; section 239, therefore, has no application, because more than one person cannot be charged with the offence of misappropriation.

If two persons are responsible for a misappropriation, the charges against them must be of misappropriation in one case and of abetment in the other.

Criminal Procedure Code—contd.

It is, of course, open to the Court to frame charges in the alternative: *firstly*, that *A.* misappropriated the money, *B.* being the abettor; or, *secondly*, that *B.* misappropriated and *A.* was the abettor. GIRWAR NARAIN *v.* EMPEROR, 16 C. W. N. 600; 13 CR. L. J. 506 **650**

——— ——— ——— **s. 234** **650**

——— ——— ——— **s. 235 (1)**—*Joinder of charges—Same transaction—Criminal breach of trust—Falsification of accounts—Penal Code (Act XLV of 1860), ss. 408, 465.*

A. was tried at one trial on two charges; the first charge was under section 408 of the Penal Code for having committed criminal breach of trust as a servant; the second charge was under section 465 for making false documents for the purpose of committing the offence of criminal breach of trust as a servant. There was only one act of criminal breach of trust charged against *A.* It was contended for *A.* that the whole trial was illegal and void as he was tried at one trial for two distinct offences:

Held, that the case fell under section 235 (1) of the Criminal Procedure Code, as there was only one act of criminal breach of trust charged against *A.*, and the falsification of accounts charged was an offence which formed part of the transaction as to the criminal breach of trust, because the accounts alleged to have been falsified related to the act charged under section 408 of the Penal Code. The offences charged were, therefore, all offences connected with one another and arising out of the same transaction. EMPEROR *v.* LALJI, 14 BOM. L. R. 306; 13 CR. L. J. 501 **645**

——— ——— ——— **ss. 235, 537**—*Misjoinder of charges is an illegality.*

Proximity of time between acts does not necessarily constitute such acts parts of the same transaction.

A joinder of charges under sections 454 and 325 of the Indian Penal Code is not warranted by section 235 of the Code of Criminal Procedure, especially where the offence of house trespass is clearly distinct from a subsequent attack on the complainant while on his way to inform the Police.

Misjoinder of charges is an illegality and not a mere irregularity which is covered by section 537 of the Criminal Procedure Code. NGA THA GYI *v.* EMPEROR, 5 BUR. L. T. 101; 13 CR. L. J. 485 **485**

——— ——— ——— **ss. 236, 237** **85**

——— ——— ——— ——— **s. 239** **650**

——— ——— ——— ——— **s. 242** **488**

——— ——— ——— ——— **ss. 256, 257**—*Warrant case—Practice—Prosecution witnesses re-called for cross-examination—Case postponed to suit convenience of Court—Accused not liable for expenses of witness—Accused when to be called on to enter on his defence.*

Where an accused person seeks to exercise the right given by section 256, Criminal Procedure Code, of re-calling prosecution witnesses for cross-examination, he cannot legally be required to deposit the expenses likely to be incurred by the witnesses who attend for such cross-examination.

Where, in order to suit the convenience of the Court or for reasons connected with the discharge of public business, the witnesses for the prosecution are allowed to leave before a charge is framed or the right

Criminal Procedure Code—contd.

conferred by section 256 exercised, they must be required to attend again and ordinarily any expenses which may be allowed them on this score should be paid by Government in warrant cases.

In warrant-cases, the hearing should be continued from day to day until the prosecution witnesses have been cross-examined by the accused; and the witnesses should not be discharged until the Court has ascertained whether their cross-examination after the charge is desired.

An accused person should not be called on to enter on his defence before he has cross-examined the witnesses for the prosecution who are in attendance. BIRDHICHAND *v.* LAKHMICHAND, 8 N. L. R. 65; 13 CR. L. J. 554 **970**

——— ——— ——— **s. 257** **970**

——— ——— ——— **s. 257**—*Practice—Defence witnesses—Refusal to examine them—Evidence of witnesses considered unnecessary.*

After an accused person was called upon to open his defence, he named thirteen witnesses, eight of whom were examined by the Magistrate and as to the remaining five, the Magistrate recorded: "All these people repeat the defence story; I shall dispense with their evidence as unnecessary":

Held, that the refusal of the Magistrate to examine the remaining witnesses was not justified; unless he had declined to issue process for the attendance of the defence witnesses under section 257, Criminal Procedure Code, he was not competent to decline to examine them on the ground that their evidence was unnecessary. EMPEROR *v.* NANDBASAPPA, 14 BOM. L. R. 360; 13 CR. L. J. 523 **795**

——— ——— ——— ——— **ss. 268, 284, 285** **313**

——— ——— ——— **s. 299**—*Verdict of Jury—Sessions case—Right of Jury to return special verdict—Power of Judge to require a verdict of guilty or not guilty.*

The Code of Criminal Procedure does not permit the recording of what is known in English law as a '*special verdict*', *i. e.*, where the Jury state their findings on the facts themselves, leaving it to the Judge to apply the law to those facts and himself find the prisoner 'guilty' or 'not guilty.'

A Judge is not entitled to ask the Jury the reasons for their verdict. He is not entitled to put questions to them to show that the conclusions at which they arrived were not logical or consistent. Any ambiguity in the Jury's verdict is the only justification for any question by the Judge.

Where the Jury give their findings only on the facts, leaving it to the Judge to apply the law to those facts, the Judge is empowered to require the Jury to return a verdict of "guilty" or "not guilty." ARUNACHELLA THEVAN *v.* EMPEROR, 13 CR. L. J. 586 **1002**

——— ——— ——— ——— **s. 309**—*Assessors, opinions of, how to be taken.*

The intention of section 309 of the Criminal Procedure Code is that the Assessors should state their opinions orally. They should not be allowed to put in written opinions. LALIT CHANDRA *v.* EMPEROR **65**

——— ——— ——— **s. 337 (4)** **1004**

——— ——— ——— ——— **ss. 337, 339 (3)**—*Pardon—Approver—Sanction of High Court for prosecution of approver, how to be obtained—Practice—Motion in open Court.*

Criminal Procedure Code—contd.

Where it is desired to obtain the sanction of the High Court to prosecute an approver for giving false evidence after the grant to him of a pardon, under section 337, Criminal Procedure Code, the proper procedure is for the Crown to move the High Court by motion made in open Court and not by letter of reference. No orders can be passed on a letter of reference. EMPEROR *v.* RAJA, 13 CR. L. J. 451; 30 P. W. R. 1912 CR.; 175 P. L. R. 1912 **83**

——— ——— ——— ——— **s. 339 (3)** **83**

——— ——— ——— ——— **s. 345** **259**

——— ——— ——— ——— **s. 353**—*High Court—Trial—Accused ill—Power to dispense with attendance in Court.*

Under the provisions of section 353 of the Criminal Procedure Code, a High Court has the power to dispense with the attendance of an accused, during his trial before the High Court, on the ground of his ill-health. EMPEROR *v.* KING, 14 BOM. L. R. 236; 13 CR. L. J. 464 **96**

——— ——— ——— ——— **ss. 360, 476**—*Order under section 476, when to be made—Deposition of witnesses how to be read and corrected—Evidence Act (I of 1872), s. 80—Statement not read over and corrected, whether admissible.*

An order under section 476, Criminal Procedure Code, should be made at, or soon after, the conclusion of the judicial proceedings referred to in the section.

It is the duty of a Judge or Magistrate to read or to have read over to witnesses their recorded depositions with a view to correct any errors which may require correction not only in his own presence and hearing but also in the presence of the accused and of his Pleader, so that the latter may have an opportunity of checking their correctness.

A statement not read over and corrected as aforesaid is not taken in accordance with law and, therefore, is not admissible in evidence against the person making it. NGA SAN MYIN *v.* EMPEROR, U. B. R. (1912) I, 123; 13 CR. L. J. 569 **985**

——— ——— ——— ——— **ss. 367, 423**—*What an appellate judgment should contain.*

The provisions of section 367, Criminal Procedure Code, are mandatory and it is no ground for violating these imperative provisions that no serious inconvenience, harm or injustice has resulted from such violation.

No judgment of a Court, other than a High Court, which purports to dispose of an appeal under section 423, Criminal Procedure Code, is a legal judgment unless it contains at least,—

(1) the point or points for determination raised by the memorandum of appeal;

(2) the decision thereon; and

(3) the reasons for the decision.

Therefore, the following judgment of an Appellate Court was held to be no judgment in law:

"There appears no sufficient reason to doubt the evidence for the prosecution. The sentence is not too heavy. The appeal is dismissed." JAIRAM *v.* EMPEROR, 8 N. L. R. 84; 13 CR. L. J. 559 **975**

——— ——— ——— ——— **s. 397** **306**

——— ——— ——— ——— **s. 403**—Discharge of accused by High Court **488**

Criminal Procedure Code—contd.

——— ——— ——— ——— **ss. 403, 423**—*Conviction set aside—Re-trial.*

When a conviction is set aside and a re-trial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed. Having regard to the provisions of section 423 of the Criminal Procedure Code, the provisions of section 403, in that respect, cannot apply. NAZIMUDDI *v.* EMPEROR, 13 CR. L. J. 497 **641**

——— ——— ——— ——— **s. 423** **641, 972, 975**

——— ——— ——— ——— **ss. 423 (b) (2), 439**—*Appeal—Power of Appellate Court—Accused convicted of one offence and acquitted of another—Conviction and acquittal based on same evidence—Power of Appellate Court to alter conviction—Revision—High Court's power to interfere with acquittal.*

The accused was prosecuted under section 497 of the Penal Code. The trying Magistrate held that adultery was not proved but he found the accused guilty of insult likely to provoke a breach of peace under section 504 of the Code. On appeal, the Sessions Judge held that no offence under section 504 had been committed but he was of opinion that the charge under section 497 was sustainable. The Sessions Judge, however, held that he had no power to interfere with the acquittal of the accused under section 497:

Held, that the Sessions Judge had power under section 423, Criminal Procedure Code, to interfere in the case.

If he was of opinion that accused had committed adultery, the Sessions Judge could alter the conviction to section 497 of the Penal Code, as the conviction under section 504 and the acquittal under section 497 were based on the same evidence.

If the acquittal on the one charge and the conviction on the other are based on identically the same facts, the Appellate Court has power to change the section and convict the accused of the right offence.

As a general rule, the High Court will not, in revision, interfere with an order of acquittal but it has the power to do so and this power may be properly exercised in certain circumstances. ALIMUDDIN *v.* MEAH JAN, U. B. R. (1912) I, 100; 13 CR L. J. 457 **89**

——— ——— ——— ——— **ss. 423 (1) (d), 439, 476 (1) and (2)**—*Revision—High Court's power to make consequential order.*

Under section 439 of the Criminal Procedure Code, a High Court has power to revise an order made under section 476 (1) and to direct that the proceedings started under section 476 (2) should cease.

Section 423, clause (1) (*d*) gives a High Court power to make any consequential order that may be just and proper. Where an order under section 476 (1) is set aside, the proceedings under section 476 (2) should also cease. NGA SAN TIN *v.* EMPEROR, 5 BUR. L. T. 107; 6 L. B. R. 49; 13 CR. L. J. 492 **492**

——— ——— ——— ——— **s. 437**—Further inquiry **488**

——— ——— ——— ——— **ss. 437, 439**—*Revision (Criminal)—Interference discretionary—Belated application not to be entertained—Sind Judicial Commissioner's Court Rules, R. 3 Ch. XV.*

Criminal Procedure Code—contd.

Interference by revision in criminal cases is purely discretionary. Rule 3, Chapter XV, of the Court Rules, which requires that revision applications are not to be admitted unless presented within sixty days of the decision under objection, indicates that the Court will refuse to interfere in the case of a belated application.

The object of the rule is to prevent stale applications being made and to obviate the hardship that would ensue to accused persons if the finality of a criminal order were left in doubt for a long time. TINDOOMAL *v.* SADHURAM, 5 S. L. R. 265; 13 CR L. J. 531 **803**

——— ——— ——— ——— **ss. 438, 439** **313**

——— ——— ——— ——— **s. 439** **88. 316, 492, 803**

——— ——— ——— ——— **s. 439**—Defective identity of stolen property **971**

——— ——— ——— ——— **s. 439**—High Court's power to interfere with acquittal **89**

——— ——— ——— ——— **s. 439**—Security for bad livelihood **966**

——— ——— ——— ——— **s. 439**—*Revision—Serious discrepancy in evidence for the prosecutin—Failure of both Courts to take notice thereof—Power of High Court to set aside conviction on revision.*

A conviction based on evidence containing a serious discrepancy of which no notice was taken by the lower Courts may be set aside on revision. SADDA SINGH *v.* EMPEROR, 8 P. W. R. 1912 CR.; 13 CR. L. J. 463; 113 P. L. R. 1912 **95**

——— ——— ——— ——— **s. 476** **484**

——— ——— ——— ——— **s. 476**—Order when to be made **985**

——— ——— ——— ——— **s. 476 (1) (2)** **492**

——— ——— ——— ——— **ss. 480, 481, 482, 483, 484** **983**

——— ——— ——— ——— **s. 488 (9)**—*Residence of accused—Settled abode of mistress—Mistress not shown to have permanent residence anywhere.*

For the purposes of section 488 (9) of the Criminal Procedure Code, a man may be said to reside with the mother of his illegitimate children at the place of her settled abode, if he visits her there occasionally, so long as he has the intention of continuing to so visit her.

Where a mother of illegtimate children is not shown to have a permanent residence anywhere, her stay for two months at a place where she is occasionally visited by the father of the children, is sufficient to constitute that place as her residence for the purposes of the section. HIDAYAT KHATUN *v.* MAHOMED HAYAT, 5 S. L. R. 220; 13 CR. L. J. 522 **794**

——— ——— ——— ——— **s. 496** **79**

——— ——— ——— ——— **s. 526** **84, 314**

——— ——— ——— ——— **s. 526**—*Transfer of case—Adjournment—Accused—Proper place for.*

Though section 526 (8) only makes it obligatory to postpone a case when notification is made to the Court before commencement of the hearing, yet when it appears that a *bona fide* application for transfer is about to be made, it would usually be well for the Magistrate, at any stage, to grant a reasonable time to enable it to be made.

Criminal Procedure Code—concld.

Dock is the accommodation provided in Courts for persons accused of criminal offences and it is entirely an act of indulgence on the part of a Court to allow an accused person to remain outside it. ALLAM SINGH *v.* BRINDABAN, 5 BUR. L. T. 137; 13 CR. L. J. 584 **1000**

———— **s. 526**—*Transfer of case —Discharge of cross-case.*

The fact that a Magistrate has discharged a cross-case between the same parties is not *per se* a sufficient ground for transferring a case from his Court.

When the Magistrate has heard evidence in both cases, which he is not keeping distinct in his own mind, and has discharged the one case on the evidence that he has heard in both cases, that is not a sufficient reason for transferring the other case from his Court. EMPEROR *v.* MAHRAM DHANIBUX, 5 S. L. R. 264; 13 CR. L. J. 532 **804**

———— **s. 529** **484**

———— **ss. 529 (e), 530 (k) 531** **65**

———— **s. 537**—Misjoinder of charges **485**

———— **s. 562** **316**

Cruelty. *See* DIVORCE.

Culpable homicide—*Wife detected in act of adultery and killed—Sentence.*

Wife-murder is so common an offence in Sind that deterrent sentences should be passed in all such cases, even where the husband has killed his wife in the provocation that he detected her in the act of committing adultery. EMPEROR *v.* KADIRBUX, 5 S. L. R. 256; 13 CR. L. J. 535 **807**

Custom, *elements necessary to establish—Reversioners, right of, to sue for declaration—Daughter's son alive, effect of.*

A custom to be valid must be ancient, continuous, reasonable and definite and all these elements must be established by clear and unambiguous evidence.

Where the evidence established the custom to be only 16 years old and where the instances proved were so few in number that they could not establish the continuity of the custom, it could not be held to have been established in law.

Where the custom as to the exclusion of daughters is not established and the reversioners sue to set aside a deed of gift executed by the widow, their suit is not maintainable in the presence of a daughter and especially a daughter's son. SUBHADRA *v.* TRIBHUAN DAT. **247**

———— Chamars—*Right to skins of carcases in lieu of services—Services not performed—Appointment of another person for performance of services—Jurisdiction of Civil Court—Right to sue*—Wajib-ul-arz, *how far binding on non-proprietors.*

Plaintiffs, certain *Chamars* of a village, were by custom allowed the skins of animals dying in a privately managed institution known as a *Go-Shala*, in return for services rendered. The manager of the institution found that the plaintiffs were not performing those services satisfactorily; he, accordingly, appointed the defendant, a *Chamar* of a neighbouring village, in their place.

Plaintiffs, who admittedly had performed no services for over a year, sued defendant for the value of hides of carcases removed during the period:

Custom—contd.

Held, (1) that the Civil Courts had no jurisdiction to interfere in any way with the appointment of the defendant by the manager;

(2) that if the plaintiffs had been improperly ousted from the *Go Shala*, their remedy was to get the proprietors of the institution to bring pressure on the manager to re-instate them or to appoint a fresh manager to carry out their instructions;

(3) that the non-proprietary residents of the village were not bound by the provisions of the *Wajib-ul-arz* in respect of an institution which they managed for themselves as regards their own cattle;

(4) that the suit ought to be dismissed. KANHIYA *v.* SEWA, 226 P. W. R. 1912 **108**

———— Mahars *in Berar—Right to carcases and hides of dead animals disposed of by owners—Unreasonable custom.*

It is the duty of working village *mahars* in Berar to remove and bury the bodies of dead animals not disposed of by the owners.

Where the *mahars* dispose of a carcase, they are ordinarily allowed by custom to appropriate the hides and flesh as remuneration for their service.

The *mahars* have no right by custom to appropriate the carcases and hides of animals whose owners dispose of the carcases in a sanitary manner without calling in the services of *mahars*.

The *mahars* cannot claim the carcases and hides of dead cattle which the owner has not abandoned and which he himself disposes of.

One of the principal requisites to the validity of a custom is that it shall not be unreasonable. Nothing can be more unreasonable than an invasion of the rights of property without any benefit to the common weal. NIWA *v.* RAGHO, 8 N. L. R. 53 **567**

———— **Adoption**—*Right of collateral six degrees removed to contest adoption*—Laddu Rajputs *of Una* Tahsil, *District Hoshiarpur.*

Among *Laddu Rajputs* of the Una *Tahsil*, a collateral six degrees removed from the adopter, has *locus standi* to contest an adoption. TULSI *v.* KIRPA RAM, 179 P. L. R. 1912; 214 P. W. R. 1912 **555**

———— Agreement in contravention of custom —Consideration—*Onus* of proof of custom **942**

———— **Alienation** by widow—Suit by reversioners—Daughter's son alive **247**

———— Kassars *of* Tahsil *Chakwal, Disrtict Jhelum—Childless proprietor—Will in favour of sister—Collaterals of 6th degree whether can contest the alienation.*

Among *Kassars* of *tahsil* Chakwal in the Jhelum District, a childless proprietor can devise the whole of his ancestral property to his sister in the presence of his collaterals in the 6th degree. RAHMTAN *v.* FATEH MUHAMMAD, 233 P. W. R. 1912 **106**

———— *Muhammadan Law—Will*—Kashmiris *of Jhelum town—Succession—Pleadings—Suit by widow—Presumption.*

In matters of succession, Muhammadan *Kashmiris* of the Jhelum town in general and the family of the parties in particular do not follow Muhammadan Law.

A bequest by a male proprietor of the whole of his self-acquired property in favour of his daughter or

Custom—contd.

her issue, to the exclusion of his widow and brother, is valid by custom.

By custom among these *Kashmiris*, widows do ordinarily succeed to a life-interest, daughters are excluded by sons, sisters by brothers and a right of representation is allowed.

Where among a Muhammadan tribe, large inroads are made into the provisions of Muhammadan Law relating to inheritance, there is a very strong presumption that Muhammadan Law is not followed by them.

Where a widow sues for possession of the entire property left by her husband on the allegation that the parties are governed by custom and it is proved that the property was the self-acquired property of her husband and was left by him by Will to his daughter, the widow is not entitled to a share of her husband's property according to Muhammadan Law. MEHTAB BIBI *v.* HUSAIN BIBI, 124 P. W. R. 1912 **556**

——— ——**Alienation**—*Suit to contest validity of mortgage brought by one son and grandson—Effect of other descendants admitting alienation—Holding unable to support alienor's large family.*

In a suit to contest an alienation of ancestral land by a *Jat*, brought by one of his sons and a grandson, the facts that they delayed for nine years in bringing the suit, that other sons and grandsons had not joined and had admitted the validity of the alienation, and that the holding was unable to support the large family of the alienor, constitute strong evidence in support of the alienation. GURMUKH SINGH *v.* PUNJAB SINGH, 95 P. W. R. 1912 **877**

———— **Gift**—Reversion to donor's heir **266**

———————*When gifted property reverts to the collaterals of the donor.*

Gifted property does not revert to the collaterals of the donor so long as there are any descendants, male or female, of the donee in existence. KAMAN *v.* SUMAND KHAN, 228 P. W. R. 1912 **99**

———— **Pre-emption.** *See* PRE-EMPTION.

———— **Succession** — Decree obtained against widow, how far binding on reversioners—Representative of judgment-debtor **25**

———————Degraded woman — Undegraded relation—Power to inherit **137**

———————*Jats* of Sardhana—Exclusion of daughters and daughters' son **607**

———————*Agnate — Person belonging to same* gôt*—Cognate—Village proprietary body—Gift—Reversion to donor's heir.*

A village was founded some three hundred years ago by a *Daiya Jat*, who called in other *Jats* and some *Brahmins* to help him. Some of the proprietors in the village were *Bugla Jats*:

Held, that there could be no presumption that *Bugla Jats* in the village were related to each other. The mere fact that two persons belong to the same *gôt* or sub-caste is insufficient to prove that they are related to each other as agnates.

In the absence of all agnates of a propositus, any cognate can claim to succeed to his property.

The rights of the proprietary body cannot as a rule be regarded as superior to the claim of persons who are related by blood to the last male owner.

Custom—concld.

Land gifted by the founders of a villge would not revert to the village proprietary body or the heirs of the original donor, unless there are left no descendants, male or female, of the donee, JHINDU *v.* GOPALA, 135 P. W. R. 1912, **266**

———— ——**Succession**—*Applicability of custom or of Muhammadan Law to Bara Mohmands of Chamkani, Peshawar District.*

Bara Mohmands of the village of Chamkani in the Peshawar District are governed in matters of inheritance by custom and not by Muhammadan Law. SHAKURULLAH KHAN *v.* ABDULLAH KHAN **939**

———————*Escheat—Proprietor of land dying without heirs by relationship—Right of proprietors of* thulla *and* patti *of different tribes and* gôts.

In a suit for a declaration that the plaintiffs are owners in possession of lands, having succeeded as owners of *thulla* or *patti* left by a proprietor who died without heirs by relationship, and that the defendants had no right to the land, the Court must determine whether the plaintiffs have any right of succession by custom; the weakness of defendants' case should not be accepted as a proof of plaintiffs' title.

As a general rule the *pattidars* do not succeed and the land escheats, when among the *pattidars* are proprietors of different tribes or *gôts* of the same tribe and the deceased has left no heirs by relationship. BADAMAN *v.* NET RAM, 90 P. L. R. 1912, 57 P. R. 1912; 161 P. W. R. 1912 **507**

———— ——**Widow** re-marrying, whether entitled to retain her husband's estate **602**

Cutchi Memons—Maintenance—English Law—Hindu Law—Muhammadan Law **520**

Damages—Cause of action—Execution of decree—Obstruction by third person **541**

———— ——Dismissal of servant—Conversion **757**

———— ——Infringement of trade-mark—Actual damage not necessary to be proved **116**

———— ——Land, use of, in ordinary manner—Damage to neighbour—Lowering level of land to make land culturable—Tank water coming upon land and overflowing into neighbour's land—No wilfulness or negligence **543**

———— ——*Breach of contract—Mortgagee failing to discharge prior incumbrances with money left in his hands, effect of.*

Where a mortgagor, at the time of the execution of the mortgage, left money in the hands of the mortgagee to pay off a prior incumbrance, which the mortgagee did not pay off, the mortgagor is entitled in law to recover from the mortgagee the damages resulting from his failure. MUHAMMAD RAZA *v.* KUBRA BIBI **526**

Damdupat, rule of **824**

Deadman, decree against **832**

Debtor and Creditor—Liability of goldsmith **431**

Declaration, suit for, by reversioners—Daughter's son alive **247**

Declaration—concld.

——— *Relief as to declaration of title ancillary to main relief—Limitation Act (IX of 1908), Sch. I, Art. 120.*

Where a claim for a declaration is merely ancillary to the claim for some other relief put forward in the same suit and where the granting of such declaration appears to the Court clearly necessary in order to give the plaintiff suitable and adequate relief upon his main claim, the suit will be governed, as regards limitation, merely by the Article of the first Schedule of the Indian Limitation Act applicable in respect of the main relief claimed. DHANUK SINGH *v.* TULSI RAM **545**

Declaratory suit. *See* SPECIFIC RELIEF ACT, s. 42.

Decree. *See* CIVIL PROCEDURE CODE, 1908, s. 2 (2), (3) **563**

——— for joint possession—Suit for possession—Finding that property belongs to plaintiff and another—Whether can be passed **665**

——— Suit to set aside decree on ground of perjured evidence **893**

——— *Amendment—Suit dismissed on preliminary point—Appeal—Judgment of first Court set aside and appeal allowed "with costs"—Meaning of "costs"—Costs of appeal only—Court Fees Act (VII of 1870), s. 13—Court-fee on memorandum of appeal to be refunded to appellant and not charged upon respondent.*

A suit was dismissed on a preliminary ground by the first Court. Upon appeal, the High Court, in 1903, reversed that decision with costs. In the decree which was prepared in the High Court it was directed that the respondents in the appeal do pay the costs of the appeal and the costs incurred in the first Court, and in the schedule of costs, incurred in the High Court by the appellant, an item of Rs. 285, on account of Court-fee on the memorandum of appeal, was entered. On an application made in 1910 for amendment of the decree:

Held, that an order ought to have been made under section 13 of the Court Fees Act for refund of the fee paid on the memorandum of appeal, and that the amount ought not to have been entered in the decree so as to throw an unnecessary burden upon the unsuccessful respondent, and that such an order should now be made:

Held, also, that allowing an appeal with costs means the costs of the High Court only, and that that portion of the decree which directed the then respondents, to pay the costs of the then appellants in the Court of first instance should be omitted. SURENDRA NATH ROY *v.* GIRIJA NATH ROY, 15 C. L. J. 658 **910**

——— *, construction of—Declaratory decree—Civil Procedure Code (Act V of 1908), s. 47—Mortgage of* Nankar *rights—Mortgagee's right to enforce payment against* Talukdar.

One *B.* was the owner of a village in the *Nawabi* time. He got the village included in a *Taluka* and was granted in exchange a cash allowance of Rs. 240 per annum as *malikana* in perpetuity. In 1870 *M.*, the son of *B.*, obtained against the husband of the defendant-respondent, *Talukdar*, a decree from the Settlement Court by which Rs. 240 per annum was decreed to him as *nankar*. In 1896 and 1898, *M.* executed deeds of mortgage in respect of portions of the *nankar* in

Decree—concld.

favour of the predecessors-in-title of the plaintiffs-appellants, who obtained a decree for possession on the basis of the mortgage-deed in 1901. The plaintiffs brought the present suit against the defendant *Talukdar* for recovery of the amount of *nankar* for six years on the basis of the mortgages. The representative of the mortgagor was not impleaded as defendant in the case.

The relevant part of judgment of the Settlement Court was as follows:—"Ordered that the claim of the plaintiff for the receipt of Rs. 240 per annum against the defendant be decreed. Order communicated to the parties. A note should accordingly be made in the papers. The plaintiff will recover Rs. 240 per annum in execution of the decree:"

Held, (1) that, on a proper construction, it must be held that the decree was merely declaratory and that the suit was not barred by section 47, Civil Procedure Code. The operative part ended with the words "be decreed". What followed appeared to be directions to the office. The decree fixed no date for the payment of the *nankar*. The mere addition of the direction that the *nankar* was to be realized on the execution side would not alter its character as a declaratory decree;

(2) that the fact of the defendant-respondent being no party to the deed of mortgage was no bar to the plaintiffs enforcing payment against the defendant. KASHI RAM *v.* SAHIB-UN-NISSA, 15 O. C. 99 **389**

——— *Decree for rent obtained before Bengal Tenancy Act—Execution after Act came into force—Rights of parties to be determined under what law—Purchase by* zemindar *of tenure—No annulment of under-tenure—Right of under-tenure holder—Bengal Tenancy Act (VIII of 1885), s. 167.*

The legal effect of a transaction cannot be determined in all cases with reference to the law as understood or misunderstood at the time the transaction takes place.

A rent-decree was obtained before the Bengal Tenancy Act came into force; but the execution sale under the decree took place after the Act had come into operation:

Held, that the rights of the parties have to be determined with reference to the provisions of the Bengal Tenancy Act, and not to those of the Bengal Rent Act VIII of 1869 B. C.

Therefore, where the *zemindar* in the execution sale purchased a tenure but did not annul an under-tenure in the manner prescribed by section 167 of the Bengal Tenancy Act, which procedure it was obligatory on him to follow:

Held, that the *zemindar* did not acquire any valid title as against the under-tenure holder. BIRENDRA KISHORE *v.* AHMED ALI **479**

Deed, construction of. *See* CONSTRUCTION OF DEED.

——— *construction of—Grant of* inam *village, "besides* poramboke"*—Meaning of "besides* poramboke"*—Right of grantee to channels and tanks in the village.*

Where an *inam* title-deed contained the following recital, "I acknowledge your title to a personal *inam* consisting of the right to the Government Revenue of land claimed to be * * * * acres situated in the village of *L.*" and the words *'besides poramboke'* were inserted in the margin:

Held, (1) that the insertion of the words 'besides *poramboke*' need not necessarily be taken to be an act knowledgment by the Government of the *inamdar's*

Deed—concld.

title to all kinds of *poramboke* and that the effect to be given to those words must depend on the evidence in each case and the circumstances attending the grant.

(2) that where the channels or tanks in the village grant had no connection with a Government source of irrigation and were not controlled by the Government to any appreciable extent, the effect of the said words was to invest the property in the channels and tanks in the *inamdar*. SECRETARY OF STATE *v.* KANNAPALLI; 23 M. L. J. 109; (1912) 1 M. W. N. 771 **594**

Defamation. *See* PENAL CODE, ss. 499, 500.

———— ———Discharge of accused—Magistrate thinking there may be ground for making defamatory remarks **488**

———— ———Liability of witness **494**

———— ———*Penal Code (Act XLV of 1860), s. 500—Receiver—Charge of defamation against Receiver—Sanction of Court, whether necessary—Defamation arising out of matter of repairs of estate under charge of Receiver.*

It is not a general rule of law that in all criminal proceedings, the leave of the Court is not necessary to prosecute a Receiver.

Sanction is required to proceed against a Receiver when he acts for the protection of the estate in his hands.

Therefore, where the alleged act of defamation arises out of a matter of repairs of the estate in the possession of the Receiver and is based upon a letter in which he claims that he is acting on behalf of the estate, a charge of defamation aganist the Receiver is incompetent without the leave of the Court.

As the Receiver in this case was appointed by the original side of the High Court, the case was sent to that Court for disposal of the question whether leave of the Court is required. ANATH NATH DEY *v.* MOHENDRA NATH, 13 CR. L. J. 489 **489**

Degraded woman—*Undegraded relation—Power to inherit—Divergence of judicial opinion.*

There is some divergence of judicial opinion upon the point whether an undegraded relation of a degraded woman is not her heir-at-law. HARI LAL *v.* RUP MANJORI BURMONI **137**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2 (2)—*Agriculturist—Minor son of agriculturist—Earning livelihood by agriculture.*

The minor son of an agriculturist is not an agriculturist within the meaning of the definition in section 2 clause (2) of the Dekkhan Agriculturists' Relief Act.

Dependence for livelihood upon another who is an agriculturist is not the same thing as *earning livelihood* for oneself by agriculture. To earn livelihood by agriculture is to obtain the means of livelihood by it. DAGDU ANANDRAM *v.* MIRASAHEB TANHAJI, 14 BOM. L. R. 385 **827**

Digwari tenure—*Nature and character of tenure—Title to mineral rights—Zemindar presumed to possess such rights—Suit by zemindar for declaration of right—Party—Government, whether necessary party.*

A Digwari tenure is similar to a Ghatwali tenure. It was originally granted in consideration of the performance of military service, to which Police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government and is liable to dismissal by it for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

Where a *zemindar* does not part with his mineral rights to the Digwar, it must be presumed that those rights remain in the *zemindar*.

The Government is not a necessary or a proper party to a suit brought by a *zemindar* against the Digwar for a declaration of his mineral rights, as the Government does not claim them under permanently settled estates. DURGA PRASHAD SINGH *v.* BROJO NATH BOSE, 16 C. W. N. 482; (1912) 1 M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 C. 696 **219 P. C.**

Dismissal of complaint without recording reasons **482**

———— ———**in default**—Application for assessment of mesne profits—Restoration **709**

Divorce—Jewess—Intended marriage with Christian **398**

————*Adultery, incestuous, by husband—Condonation by wife—Subsequent conduct of husband—Treatment of wife with silent indifference—Injury to wife's health—Cruelty—Revival of condoned adultery.*

A wife condoned her husband's incestuous adultery with her sister. Subsequently, he treated his wife with silent indifference and in consequence her health suffered:

Held, that the conduct of the husband was such as to revive the condoned incestuous adultery of the husband and the wife was entitled to a divorce. FLORENCE AMELIA THOMPSON *v.* GEORGE S. THOMPSON, 39 C. 395 **886**

Divorce Act (IV of 1869), s. 7—*Desertion need not always be against the actively expressed wish of the party—Living in separate house on account of husband's adultery.*

Desertion implies an abandonment against the wish of the person charging it. Such an abandonment need not be one against the actively expressed wish of the party and notwithstanding the resistance and opposition of such party.

Where owing to her husband's adultery, a wife went to live at her mother's house and agreed to receive a certain sum monthly as maintenance and where subsequently the husband got his wife to execute a deed relinquishing all her claims against him:

Held, (1) that the husband had a clear intention to abandon the wife;

(2) that such abandonment was against her wish, although she kept away from him and did not seek a return to cohabitation as long as he continued his *liaison* with his mistress and had her living in the house with him. MA YIN ZA *v.* C. NASH, 5 BUR. L. T. 85; 6 L. B. R. 53 **353**

Document—*Alteration of date to secure registration—Mortgage-deed—Consent of mortgagee—Subsequent lessee of mortgagor—Suit upon mortgage—Mortgagor and his lessee whether competent to object to mortgage on ground of alteration—Estoppel—Fraud.*

Document—concld.

A mortgage-deed was presented for registration more than four months after its execution, and to enable it to be registered, the date was altered by the mortgagor. The mortgagee consented to the alteration. In a suit by the mortgagee on the mortgage:

Held, (1) that the mortgagor was estopped from setting up the alteration as an answer to the claim of the mortgagee; the mortgagor's lessee who took the lease subsequent to the alteration being equally estopped;

(2) that the matter would have been different if the lessee had been defrauded. GOPAL CHANDRA CHAKRAVARTI *v.* SURENDRA KUMAR ROY, 16 C. W. N. 585 **460**

——— ——— *Recital—Evidence against stranger.*

A recital in a document is not evidence as against a stranger to it. RAHIMJAN BIBI *v.* IMANJAN BIBI **698**

Dower. *See* MUHAMMADAN LAW—DOWER.

Drunkenness—Question of intent or motive **311**

Dying declaration—*Deposition of witnesses who heard it—Written statement by deceased—Incomplete record of deposition—Re-trial—Evidence Act (I of 1872), ss. 32, 33.*

It is of the utmost importance that evidence as to a dying declaration should be as exact and full as possible. Where such a declaration was heard by witnesses who spoke to it but was apparently much fuller than what the record of their depositions showed,—the Sessions Judge not having recorded all they said on the point: *Held*, that there must be a re-trial.

When what is sought to be proved is the verbal statement of a dying person, the proper and legal mode of proving it is by eliciting from the person who heard the deceased make the statement, what the deceased said. If the statement was taken down in writing by the witness or by some one in presence of the witness, the witness would be entitled to refresh his memory by referring to it; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused.

Where the deceased dictated his statement and it was taken down and he signed the writing after being satisfied as to its accuracy, such writing may be regarded as a statement of the deceased in writing and would be admissible under section 32 of the Evidence Act. But even if what was stated was taken down by some one in writing and signed by the deceased, that would not debar a witness who heard the statement from proving it independently of the writing. And, ordinarily, it would be desirable to have on record what the witness is able to reproduce from memory, in addition to the writing. PUBLIC PROSECUTOR *v.* BALA NAGI REDDI, 11 M. L. T. 214; (1912) 1 M. W. N. 405; 22 M. L. J. 453; 13 CR. L. J. 468 **308**

Easement—*Obstruction of ancient lights, when actionable.*

To constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before: there must be a substantial privation of light, enough to render the occupation uncomfortable according to the ordinary notions of mankind. HAJI AHMAD MOOLA DAWOOD *v.* POKER MULL, 5 BUR L. T. 116 **945**

Easement—concld.

——— ——— *Privacy, right of.*

A plaintiff cannot ask the defendant to close his windows on the ground of the invasion of his right of privacy when it is proved that the said windows do not look out upon the plaintiff's house but upon certain plots of land acquired by him less than 20 years before the construction of the windows and in respect of which no right of privacy by custom or otherwise has been established. MUHAMMAD SHABBIR *v.* MUHAMMAD JAWAD **270**

——— ——— *Right of support—Temporary structure, whether entitled to right of support—Injunction to restrain interference with right of support—Actual damage, proof of—Whether necessary.*

To entitle a person to the right of support of a building, all that has to be proved is that the person claiming the right has acquired it for more than the period prescribed in section 15 of the Easements Act. It is immaterial whether the structure for which the right is claimed is temporary or permanent.

In order to entitle a person to obtain an injunction restraining his neighbour from interfering with his right of support, it is not necessary to show actual damage. RAMAKRISHNA AIYAR *v.* SEETHARAMA IYER **294**

——— ——— *Right of way—Indivisibility—Passage common to two houses—Partition of houses—Presumption of law—Hindu Law*—Mitakshara—Mayukha—*Easements Act (V of 1882)—Appellate Court bound to decide points raised.*

Both according to the *Mitakshara* and the *Mayukha*, rights of way and rights to well and water belonging to a joint family are indivisible. If there is no evidence that at partition of the family estate, such rights were divided, the law will hold that they continued to retain their indivisible character having regard to the nature of the rights in question.

In the absence of anything to show that on the partition of a joint estate, a certain passage was allotted to either one party or the other exclusively, the presumption is that it continued to be joint and undivided even after the partition. This is a presumption of Hindu Law and can only be rebutted by clear proof that the passage was not reserved as joint but was divided and allotted to one of the parties exclusively as his share.

If two houses were common and a certain right of way belonged to the parties, the passage being common then, under the Easements Act, it must be presumed, in the absence of any express agreement between the parties, that at partition, the passage was reserved for common enjoyment.

An Appellate Court is bound to consider and dispose of a point distinctly raised by the parties and dealt with by the Court of first instance and not abandoned at the hearing before the Appellate Court. NATHUBAI *v.* BAI HANSGAVRI, 14 BOM. L. R. 418; 36 B. 379 **818**

Easements Act (V of 1882) **818**

——— ——— **s. 4** **278**

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Ejectment—Tenancy denied—Jurisdiction **303**

——— **of tenant**—Excavation of tank **497**

——— **suit.** *See* LANDLORD AND TENANT.

——— Dispossession of tenant by stranger—Tenancy from year to year—Abandonment by tenant—Ejectment suit by landlord against trespasser **146**

——— ———Notice to quit—Denial of landlord's title—Purchase by mortgagee in Court sale—Attornment and payment of rent by lessee to lessor's assignee, whether amounts to denial of the title of the purchaser in Court sale **52**

——— ——— ———*Possessory title of plaintiff good against all but the true owner.*

In an ejectment suit, the plaintiff's possessory title, in the absence of a better title proved by the defendant, holds good against all the world except the true owner. ADINARAYANA IYER *v.* KRISHNAN, (1912) 1 M. W. N. 707 **97**

Enhancement of rent. *See* LANDLORD AND TENANT.

——— ——— ———*Bengal Tenancy Act (VIII of* 1885), *ss.* 3 (9), 30—*Undivided share of* howla—*Holding*—Res judicata—*Civil Procedure Code (Act XIV of* 1882), *s.* 13—*Suit for enhancement of rent—Decision that suit maintainable but suit dismissed on merits—Decision that suit maintainable, whether* res judicata *in subsequent suit.*

The plaintiff, the owner of a share of a tenure, brought a suit for enhancement against the defendant, a tenant, who had taken a lease from the plaintiff of his share of the property. In that suit, it was decided that the plaintiff had the right to enhance the rent of the defendant, but the suit was dismissed on the ground that the rent paid by the defendant was not lower than that paid by tenants of adjoining lands. The plaintiff subsequently brought another suit for enhancement of the defendant's rent: *Held*, that the rule of *res judicata* was not applicable and the defendant was not debarred from questioning the soundness of the decision in the first suit that the plaintiff was entitled to bring the suit:

An undivided share of a *howla* does not come within the definition of 'holding', nor does it fall within section 30 of the Bengal Tenancy Act. The landlord of such a share is not entitled to maintain a suit for enhancement. PARBATTY DEBYA *v.* MATHURA NATH BANERJEE, 16 C. W. N. 877; 16 C. L. J. 9 **453**

——— ——— ——— Raiyat *under separated shares of tenure—Purchase of one share by plaintiff—Suit for enhancement of rent by plaintiff without joining owners of other shares of tenure, whether maintainable—Bengal Tenancy Act (VIII of* 1885), *ss.* 3 *cl.* (9), 30, 188—*Joint landlords—Holding.*

The purchaser of one of two separated shares of a tenure is not entitled to bring a suit for enhancement of his share of rent against a *raiyat* who holds under the owners of the two separated shares, without joining the owner of the other separated share as a plaintiff.

A purchaser is not the landlord of a holding within the meaning of section 30, and the owners of the separated shares of the tenure are still joint landlords within the meaning of section 1. HEMANTA KUMARI DEBI *v.* KULSUMANNESSA BIBI **847**

Equity of redemption not a security **425**

Estoppel—Admission of relationship of landlord and tenant **830**

——— ———Alteration of date of mortgage-deed to secure registration—Mortgagor and his lessee not competent to object to mortgage **460**

——— ———Landlord taking mortgage of non-transferable occupancy-holding—Subsequent assignment of holding—Whether landlord estopped from denying assignee's right **171**

——— ——Mortgagor and mortgagee **196**

——— ———Oral evidence varying terms of evidence **326**

——— ——— against plea of invalid adoption **299**

——— ———Pre-emption suit dismissed as premature—Plea of limitation in subsequent suit **890**

——— ———Representative in interest of judgment-debtor bound by same estoppel as judgment-debtor—Purchaser at rent decree sale—Whether question of transferability can be raised **718**

——— ———Whether tenant can dispute landlord's possession **844**

——— ———Widow making adoption, whether competent to question validity of adoption **673**

——— ———*Occupancy-holdiny mortgaged as a fixed-rate tenure—No objection by the judgment-debtor tenant at the time of suit or sale by the mortgagor.*

An occupancy-tenant mortgaged his holding to the *zemindar* describing the holding as a fixed-rate tenure. Subsequently in execution of a decree, obtained on the foot of this mortgage, the holding was sold and purchased by a stranger. No objection was raised either in the suit or in the execution proceeding that the holding was an occupaney-holding and not a fixed-rate tenure:

Held, that subsequently it did not lay in the mouth of the judgment-debtor tenant to say that it was an occupancy-holding and as such not transferable. ASGHAR HUSAIN *v.* PAL AHIR, 10 A. L. J. 66 **227**

Evidence — Admission of defendant — *Mulki* papers filed by *elakadars* **691**

——— ——— to explain decree—Admissibility **360**

——— ——— Document—Recital—Evidence against third party **698**

——— ——— Judgment—Point not in issue **357**

——— ——— *Thakbust* map **341**

——— ———, record of—Small Cause Court **938**

——— ——— ———*Admissibility—Decree for rent obtained by co-sharer landlord—When admissible in another suit for rent by another co-sharer—Tenancy under one contract—Proportionate share of entire rent payable to each co-sharer—Co-sharer made* pro forma *defendant in first suit.*

When a tenant holds on one contract of tenancy under the entire body of landlords, each co-sharer landlord claiming to collect rent proportionately to his share of the entire rent, a decree in a suit for rent against the tenant obtained by one co sharer landlord, in which the other co-sharers were made *pro forma* defendants, is relevant to prove the entire rent and is thus admissible in evidence in proof of the rate of rent in a suit for rent by another co-sharer against the tenant. RAMADHIN ROY *v.* DHANWANTRI KOER **624**

Evidence—concld.

——— ——— *Statements made by witness in course of departmental inquiry, whether privileged—Evidence Act (I of 1872), ss. 123, 124, 125, 155, 162, 163—Court bound to call for statements—Allowing accused to cross-examine witnesses on them.*

The statements made by witnesses in the course of a departmental inquiry into the conduct of Police officers are not privileged under sections 123, 124 or 125 of the Evidence Act, when those witnesses are subsequently examined in a Criminal Court on a charge against the Police officers of taking illegal gratification and they fall within the ordinary rules of evidence as laid down in sections 155 and 162 of the Evidence Act.

The Magistrate is bound to call for them under section 162 of the Evidence Act and to allow the accused to cross-examine the witnesses under section 155 on the statements made whether they are in favour of the accused or against them.

The provisions of section 163 entitle the prosecution to make use of them if they turn out to be not in favour of the defence. HARBANS SAHAI *v.* EMPEROR, 16 C. W. N. 431; 13 CR. L. J. 445 **77**

Evidence Act (I of 1872), s. 21 **284**

——— ——— ——— ——— **s. 21**—*Statement in writ of attachment as to rent payable—Admission—Whether statement admissible in favour of maker of statement.*

A recital in a writ of attachment is not admissible in evidence in favour of the maker of the statement and as against persons who claim under an independent title. MOHURRUDDIN KHAN *v.* SUMERA GIRI **540**

——— ——— ——— **s. 25**—Confession to foreign Police officer **800**

——— ——— ——— ——— **s. 25**—*Confession to Police Officers—Admission amounting to confession—Admissibility—Admissions made by a person before he was accused of an offence—Admissibility against co-accused.*

A. was convicted on the evidence of two Excise Sub-Inspectors, who stated that he offered them Rs. 10 per ball of opium as a bribe to let him land unmolested a large quantity of illicit opium from the steamer *Katoria*. These Excise Officers had been also enrolled as Police Officers:

Held, that the alleged offer by the accused amounted to an admission that he had a large quantity of contraband opium in his possession and, being an admission of an offence under the Opium Act amounted to a confession and was thus inadmissible under section 25 of the Evidence Act.

The test which has to be applied in deciding whether section 25, Evidence Act, applies is the position of the person at the time when it is proposed to prove the admission, not his position at the time when he is alleged to have made it.

A confession, therefore, made to a Police Officer by a person when he is not accused of any offence is inadmissble in evidence against him when he is accused of an offence.

A confession made by an accused person to a Police Officer might be admissible *in favour of* a co-accused but not *against* him. SAN PAW AUNG *v.* EMPEROR, 5 BUR. L. T. 92; 13 CR. L. J. 465 **305**

——— ——— ——— ——— **s. 26**—Confession to foreign Police officer **800**

Evidence Act—contd.

——— ——— ——— ——— **s. 27**—*Statement made after discovery of property—Evidence—Pointing out property—Evidentiary value.*

A statement by accused, not leading to discovery of property and made after discovery and production of the property, is irrelevant under section 27 of the Evidence Act. That section has reference only to statements made prior to the discovery of property and in consequence of which such property was discovered.

It is a question of fact whether the pointing out or production of property by a person does or does not raise a presumption of guilt. The production or the pointing out may indicate that the accused was in possession or that he had innocent knowledge that the articles had been left there by some one else. EMPEROR *v.* PHOTO, 5 S. L. R. 257; 13 CR. L. J. 529 **801**

——— ——— ——— ——— **s. 32**—Dying declaration **308**

——— ——— ——— ——— **s. 32**—*Entry of family relationship in Panda's book—Admissibility of secondary evidence—Rejection in appeal.*

Entries in Panda's register or note-books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication.

Secondary evidence of a document should not be rejected on appeal merely on the contention, that the loss of the original has not been satisfactorily proved. COLLECTOR OF FARRUKHABAD *v.* GAJRAJ SINGH **625**

——— ——— ——— ——— **s. 33**—Incomplete record of deposition **308**

——— ——— ——— ——— **ss. 35, 36**—*Map prepared by Kanungo—Proceeding before Collector—Question whether land belongs to* zemindar *or to Government—Use of map—Map whether admissible—Public Record.*

In a certain proceeding before a Collector, the question was raised whether certiain land, the subject-matter of the proceeding, was the property of the owners of certain *mouzah* or whether it was land which formed part of no settled estate and to which the Government were, therefore, entitled. In that proceeding, a map prepared by a Kanungo was used:

Held, that the map did not fall within section 35 or 36 of the Evidence Act and was inadmissible. TARINI CHARAN SARKAR *v.* FAKRANNISSA **459**

——— ——— ——— ——— **s. 36** **459**

——— ——— ——— **s. 45** **979**

——— ——— ——— ——— **s. 47**—Evidence of person acquainted with handwriting **979**

——— ——— ——— ——— **s. 73**—"*Purports*", *meaning of—Handwriting—Comparison—Anonymous document.*

The word "purports" in section 73 of the Evidence Act means "alleged". It is not necessary under the section that the writing, which is in dispute, must itself in terms express or indicate that it was written by the person to whom it is attributed.

When an anonymous writing is produced and ascribed by the prosecution to a particular person, then the case for the prosecution must be taken to be that, having regard to the admitted documents, and the comparison between them and the disputed writ-

Evidence Act—concld.

ing, the prosecution alleges that the disputed document *purports* to have been written or made by the accused.

An anonymous writing ascribed to a particular person may, therefore, be compared under section 73 of the Evidence Act. EMPEROR *v.* GANPAT BALKRISHNA RODE, 14 BOM. L. R. 310; 13 CR. L. J. 505 **649**

——————— **s. 80** **985**

——————— **s. 92** **223**

——————— **s. 92**—Rescission of sale-deed by mutual consent—Parol evidence, admissibility of **282**

——————— **ss. 92, 115**—*Oral evidence—Varying terms of document—Estoppel.*

Section 92 of the Indian Evidence Act should not be read subject to section 115 of the Act.

Where, in a suit for possession of property on the basis of a sale-deed, the defendant pleaded an oral agreement whereby plaintiff had agreed to return the sale-deed to defendant and to relinquish his claim to the property:

Held, (1) that evidence of the oral agreement was inadmissible under section 92 of the Evidence Act;

(2) that, as the oral evidence itself was inadmissible, there was no question of the plaintiff being estopped from prosecuting his suit by reason of such agreement. PICHAMMAL *v.* PONNAMBALA BHATTER **326**

——————— **s. 92**—*Oral evidence to the effect that more money was paid for sale than is entered in the sale-deed, whether admissible.*

Oral evidence is inadmissible to prove that a higher price was paid for a sale than is evidenced by the sale-deed itself. MI SHAW MYIN *v.* MI SHWE THIN, U. B. R. (1912) I, 125 **919**

——————— **s. 114**—Presumption in favour of validity of registration **881**

——————— **s. 115** **326, 844**

——————— **ss. 123, 124, 125** **77**

——————— **s. 133** **987**

——————— **ss. 155, 162, 163** **77**

Exchange—Price—Sale **343**

Execution of decree. *See* CIVIL PROCEDURE CODE, 1908, s. 38 **738**

——————— Attachment—Mortgages effected during the course of attachment, validity of, in insolvency proceedings—Procedure to be followed in the case of secured creditor—Assets, realized by sale, right of secured creditors to proceed against **860**

——————— Cause of action—Obstruction by third person—Damages **541**

——————— Whether decree can be challenged in execution proceedings **436**

——————— Decree for permanent injunction—Limitation **945**

——————— Decree to be self-contained—Execution as decree stands **735**

——————— One of two execution creditors minor—Whether other can grant valid discharge—Limitation for petition of execution—Execution—Limitation **664**

Execution of decree—contd.

——————— Power of execution Court to decline to execute decree passed without jurisdiction—Power to consider question of jurisdiction **832**

——————— Private alienation—Subsequent application for rateable distribution by other creditors—Attachment of same property by other creditor—First attaching creditor paid off—Rights of subsequent creditors **950**

——————— *Attachment—Claim, dismissal of, for claimant's default—Purchase by decree-holder at execution-sale—Delivery of possession—Obstruction by claimant—Claimant not entitled to resist—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63, 97, 99.*

The decree-holder attached his judgment-debtor's house. Thereupon the mother of the judgment-debtor preferred a claim under Order XXI, rule 58 of the Civil Procedure Code. She did not prosecute her claim which was dismissed for default. The decree-holder then purchased the house at the execution sale and applied for delivery of actual possession. The peon who went to execute the writ was obstructed and the claimant put in an application under Order XXI, rule 97 of the Code:

Held, that the order of dismissal of the claim was, under Order XXI, rule 63, final till a regular suit was instituted and successfully prosecuted; and that consequently the claimant could not now be allowed to practically re-iterate the claim which she had preferred and which was dismissed without investigation by reason of her own default. JUGAL KISHORE MARWARI *v.* BEJOY KRISHNA MUKHERJEE, 16 C. W. N. 882 **683**

——————— *Amendment of decree by executing Court, if to be allowed—Where Judge executing decree is same who made it—Whether such Judge can amend decree in execution proceedings.*

An execution Court must execute the decree as it stands; it cannot alter, vary, or add to the terms of the decree; the propriety or validity of the decree cannot be discussed in execution proceedings.

Even if the Judge who has to deal with an application for execution of a decree be the Judge who made the decree, he is not competent to amend it in execution proceedings. MADAN MOHAN NATH *v.* BHIKHAR SHAHU **719**

——————— *Ancestral property—Liability for personal decree—Property in the hands of legal representatives—Civil Procedure Code (Act V of 1908), ss. 47, 50.*

The ancestral landed property of a male proprietor, governed by customary rules, is not liable in the hands of the next holder for any debt, even if a just debt, contracted by his predecessor. The creditor cannot by obtaining a simple money-decree either against the debtor himself in his life-time or after his death against the persons who are legal representatives *pro tanto* of the deceased execute his decree, after the death of the debtor, by attaching the landed ancestral property, which at one time was in the possession of the deceased. JAGDIP SINGH *v.* NARAIN SINGH **866**

——————— *Application for execution of a decree by sale—Sale stayed by High Court—Warrant fees not paid—Application 'struck off'—Effect of such order—Civil Procedure Code (Act XIV of 1882), s. 295—Realisation of assets.*

Execution of decree—contd.

An order passed on an execution petition ending with the words "Petition struck off" is an order not known to the law and its effect has to be determined by a consideration of the circumstances of the case and the terms of the order itself.

Where, therefore, an application was made for the execution of a decree by sale of a debt, but the applicants failed to pay certain warrant fees, as the sale had been stayed by an order of the High Court, and the petition was, consequently, "struck off," the order simply amounts to an adjournment *sine die*. Even if the warrant fees had been paid, the Court could not have proceeded with the application at that stage.

Where moneys are realised on a personal decree and in execution, they are assets realised under section 295, Civil Procedure Code. SEETHARAMA CHETTIAR *v.* KRISTNA ROW, (1912) 1 M. W. N. 407 **406**

———————*Attachment—Execution application dismissed on objection—Review of the dismissal order—Attachment, whether subsists pending the review—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 57.

Certain property was attached in execution of a decree. The judgment-debtor objected and the application for execution was dismissed. The decree-holder then applied for review. During the pendency of the application for review the judgment-debtor sold the attached property tc a third person. Subsequently, the application for review was granted and the order dismissing the application for execution set aside:

Held, that Order XXI, rule 57 of the Code of Civil Procedure did not apply, and that the attachment subsisted during the pendency of the application for review. AZIZ BUX *v.* KANIZ FATIMA BIBI, 10 A. L. J. 48; 34 A. 490 **49**

———————*Attachment—Effect of want of proper attachment—Sanction, effect of absence of—Sale, validity of.*

The law requires that after every attachment of a share in a *mauza*, there should be a fresh sanction from Government to the sale of the property attached.

Where a certain share in a *mauza* is attached but a larger share is put up to sale and sold, the sale is invalid and must be set aside. It cannot be upheld to the extent of the share actually attached. GAYA PRASAD SINGH *v.* MISRA SINGH **780**

———————*Interlocutory order—Appeal—Civil Procedure Code (Act V of* 1908), *s.* 47.

An order of the Court disallowing an objection of a judgment-debtor that a fresh attachment was necessary, is an interlocutory order from which no appeal lies. MUKHTAR AHMAD *v.* MUQARRAB HUSSAIN, 10 A. L. J. 56 **50**

———————, *questions to be decided in—Representative of deceased judgment-debtor—Suit for declaration—Maintainability.*

All questions arising between the judgment-creditor and the legal representative of the judgment-debtor must be decided in execution. A suit for a declaration that the suit properties belong to the plaintiff's judgment-debtor is not, therefore, maintainable where the execution petition has been dismissed on the ground that the defendant is not the legal representative of the deceased judgment-debtor. Such a suit can lie only if a declaration that the defendant is such legal representative has been prayed for. PANATHIL PARKUM MANKOOTTIL *v.* KALATH CHANDU KUTTI NAIR, (1912) 1 M. W. N. 401 **224**

Execution of decree—concld.

———————*Sale—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 22—*Sale without notice—Whether sale void—Substantial injury.*

Omission to serve a notice, under the provisions of Order XXI, rule 22 of the Civil Procedure Code, is not by itself sufficient to render a sale, which has subsequently been held, void.

Such omission would constitute a serious irregularity entitling the judgment-debtor to vacate the sale by proving that substantial injury has been the result of it. RASARAJ KUNAI *v.* PROSONNA KUMAR ROY **506**

——— **sale.** *See* SALE IN EXECUTION.

Ex parte decree—Application to set aside—Prevented by sufficient cause from appearing—Review **554**

———————Application to set aside—Limitation **551**

———————*Application to set aside—Decree against contesting defendants—Whether suit to be re-opened entirely—Decree executed against contesting defendants—Contesting defendants not made parties to application to set aside* ex parte *decree—Civil Procedure Code (Act V of* 1908), *O. IX, r.* 13 *proviso and r.* 14.

The plaintiff brought a suit against four defendants for redemption and recovery of arrears of rent due to the plaintiffs under a *zur-i-peshgi* lease. The suit was decreed *ex parte* against defendants Nos. 2 and 3, and the decree directed that defendants Nos. 1 and 4 should merely yield up possession of two villages. The plaintiffs did not appeal against the decree so far as defendants Nos. 1 and 4 were concerned, but executed it and recovered possession of the two villages.

Defendants Nos. 2 and 3 applied to have the *ex parte* decree against them set aside. In that application defendants Nos. 1 and 4 were not made parties. The Court set aside the *ex parte* decree against defendants Nos. 2 and 3, but declined to re-open the whole suit even as against the other defendants. The plaintiffs moved the High Court:

Held, (1) that there was really no question of jurisdiction or irregular exercise of it within the meaning of section 115 of the Civil Procedure Code, (2) that having regard to the fact that the plaintiffs were satisfied with their decree against defendants Nos. 1 and 4, the decree should not be set aside in so far as those defendants were concerned, (3) that the case was not covered by the proviso to rule 13 of Order IX of the Civil Procedure Code, and (4) that as defendants Nos. 1 and 4 were not parties to the application to set aside the *ex parte* decree, the Court below should not have passed an order prejudicial to them behind their backs. ALI AHMAD KHAN *v.* BROWN **260**

———————*Supersession by appellate decree—Jurisdiction of original Court to set aside decree—Application made before appeal preferred—Practice—Power of High Court to transfer application to itself—Civil Procedure Code (Act V of* 1908), *s.* 24 (1) (*b*), *O. IX, r.* 13.

Ex parte decree—concld.

Where an *ex parte* decree has been superseded by an appellate decree, the Court of first instance has no jurisdiction to set aside the *ex parte* decree, even though the application to set it aside was made before the appeal was preferred.

Where, in such a case, the appellate decree is passed by the High Court, that Court can withdraw to itself, under section 24 of the Civil Procedure Code, the application made to the lower Court to set aside the *ex parte* decree. VASUDEO *v.* CHIMBA, 8 N. L. R. 51 **565**

Expert in handwriting—Value of evidence **979**

Explosives Act (IV of 1884), rules, under, r. 32 (1) (b) **65**

Explosive Substances Act (VI of 1908), ss. 4 (b), 7 **65**

Ex-proprietary tenant—Liability to pay rent fixed by Revenue Court **189**

Extension of time after decree **941**

Extradition Act (XV of 1903), ss. 7, 22 **809**

Extradition Rules, r. 3 **809**

Family arrangement acted upon for a very long time, whether binding on family **297**

Family settlement, binding nature of **723**

Finder, rights of—Finder producing property on Police requisition **647**

Fixtures—*English law of fixtures, whether applicable in this country—Purchase of land by plaintiff in execution of decree against defendant No. 2—Growing of crops by defendant No. 2 after plaintiff's purchase—Removal of crops by defendant No. 1—Plaintiff's title to crops—Suit for value of crops, whether sustainable.*

The English law of fixtures cannot be applied in this country as based on equitable grounds.

The plaintiff, in execution of a decree for rent against the 2nd defendant, purchased a holding on May 19, 1911. He obtained delivery of possession through Court on August 19. Crops had then been grown by the second defendant and they remained on the land till December 25, when they were cut and taken away by the first defendant. The plaintiff brought this suit on the ground that as the crops were grown after his purchase by the second defendant on land, the title whereto had vested in him, the crops became his property:

Held, that the suit was not sustainable. PRIYA NATH PAL *v.* RAJANI KANTA PAL, 16 C. W. N. 1101 **619**

Forest Act (VIII of 1878), s. 32 (a), (b) and (c)—*Penal Code (Act XLV of 1860), ss. 40, 79, 114—Quarrying metal in Reserved Forest under orders of Public Works Department—Permission of Forest Department not obtained.*

A., a contractor engaged by the Public Works Department, quarried metal in a place pointed out to him by that Department. The place was within the area of a Reserved Forest and the permission of the Forest Department had not been obtained to the quarrying. *A.* was convicted of an offence under section 32 (*a*), (*b*) and (*c*) of the Forest Act, read with sections 40 and 114 of the Penal Code:

Forest Act—concld.

Held, that the principle of section 79 of the Penal Code applied to the case. The conviction and sentence were accordingly set aside. EMPEROR *v.* KASSIM ISUB SAB, 14 BOM. L. R. 265; 13 CR. L. J. 530 **802**

Forfeiture of tenancy—Excavation of tanks by tenant **497**

Forgery—Abetment—Conspiracy—Fellow conspirator acquitted—Conviction of other conspirator **814**

———— Alteration of plaint after filing **1004**

———— *Using forged document—Presumption—Guilty knowledge—Interest in establishing contents of document—Conduct—Filing of document, if user—Penal Code (Act XLV of 1860), ss. 471, 474—Convictions under both sections, whether legal—Charge under ss. 465, 471—Conviction under ss. 466, 471, if legal.*

The fact that a man who files a document is interested in establishing its contents, does not raise a presumption that he filed it knowing it to be forged.

Conduct is the principal criterion of guilty knowledge.

Where a man filed a document upon which he relied but when it was discovered that the document had been forged, he fled away:

Held, that his conduct was in no way consistent with his innocence.

The filing of a document as the basis of a plaint or as a necessary sequel to the pleas in the plaint is itself an user; and it then becomes incumbent on the person using it to show that he filed the document in all good faith believing it to be genuine.

Convictions under sections 471 and 474 of the Indian Penal Code cannot stand together.

Where a charge is laid against an accused under section 465 read with section 471, Indian Penal Code, he cannot be convicted and sentenced under section 466 read with section 471. MOBARAK ALI *v.* EMPEROR, 13 CR. L. J. 449 **81**

———— *Evidence—Handwriting expert—Expert evidence alone insufficient for conviction—Evidence of expert how far reliable—Penal Code (Act XLV of 1860), ss. 467, 477—Evidence Act (I of 1872), ss. 45, 47.*

It is very unsafe, as a general rule, to base a conviction simply upon the opinion of an expert.

The evidence of a person supposed to be acquainted with the handwriting of another is not admissible under section 47, Indian Evidence Act of 1872, if he does not state facts which, according to the explanation to the section, would make his opinion relevant. Similarly, the evidence of a witness who is not positive as to identity of handwriting is of no value. JALAL-UD-DIN *v.* EMPEROR, 18 P. W. R. 1912 CR.; 147 P. L. R. 1912; 13 CR. L. J. 563 **979**

Fraud—Alteration of date of mortgage-deed to secure registration—Mortgagor and his lessee not competent to object to mortgage **460**

———— or dishonesty of arbitrator, effect of **819**

———— Suit to set aside decree on ground of purjured evidence **893**

———— vitiates all judicial acts **433**

Fraudulent transfer. *See* TRANSFER OF PROPERTY ACT, s. 53.

———— ———— ———— ————Assignment of debt—Fraud on creditors—Creditor entitled to impeach such assignment and attach the debt—Purchaser of debt at Court-auction entitled to the same rights—Whether debtor entitled to say that he is bound to pay one claimant and not another **193**

Further inquiry—*Process issued and trial held under section* 506, *Indian Penal Code—Discharge of accused for offence under section* 500, *if legal—Defamation—Discharge of accused—Magistrate thinking there may be grounds for making defamatory remarks—Penal Code (Act XLV of* 1860), *ss.* 500, 506 *—Criminal Procedure Code (Act V of* 1898), *ss.* 242, 437.

Process was issued against the accused under section 506, Indian Penal Code, and he was tried under that section. He was discharged of an offence under section 500, Indian Penal Code, and his plea to the charge under section 506 was not recorded.

Held, that the proceedings were irregular; that the plea of the accused ought to have been taken under section 506, as the law provides that in summons cases the first thing to be done is to ask the accused what he has got to say; and that the discharge of the accused under section 500, when he was charged under section 506, was without jurisdiction.

The accused cannot be discharged of an offence under section 500, Indian Penal Code, because the Magistrate thinks that there may be some substance in the defamatory remarks made by the accused. ANATH NATH DEY *v.* MOHENDRA NATH, 13 CR L. J. 488 **488**

General Clauses Act (X of 1897), s. 6 **551, 725**

———— ———— ———— ———— **s. 10** **439, 455**

Gift—*Deed of gift—Validity—Burden of proof—Absence of power of revocation—Suit for setting aside deed—Grounds for setting aside—Conditional gift—Transfer of Property Act (IV of* 1882), *s.* 126.

The burden of proving that a deed of voluntary gift, executed by an old and infirm woman, was executed with the full knowledge of its contents and that she did so willingly and without any pressure or solicitations which might amount to the exercise of undue influence, lies heavily on the donee. It should be proved that the donor thoroughly understood the contents of the document she executed, that all the material clauses were explained to her, that she appreciated the effect the execution of the deed would have on her with respect to her property and that the deed carried out her intentions at that time. If these facts are proved, it would then be for the other side to show that some substantial reason exists why the deed should be set aside.

Any person of full age and sound mind, who has executed a voluntary deed of gift by which he has denuded himself of his property, is bound by his act; and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside.

A voluntary deed of gift is not voidable by the donor merely because it does not contain a power of revocation.

The absence of the power of revocation in a deed of gift is one of the circumstances to be taken into consideration when the Court has to consider whether a deed of gift shall stand or be set aside.

The donor and the donee may agree that on the happening of a specified event which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be.

An old, infirm and illiterate woman executed a deed of gift by which she conveyed all her property to one of her nephews. She executed the deed of gift voluntarily while in possession of all her senses and without the exercise of any fraud, misrepresentation or undue influence on her. When she executed the deed of gift, she fully understood its contents and the effect it would have of divesting her of her property. The gift was her "free determined act" and she intended the gift to be irrevocable. Subsequently, she herself sued to have the gift set aside:

Held, that the deed of gift was binding on her and could not be set aside. The mere fact that the donor's feelings towards the donee subsequently underwent a change was not sufficient to set aside the gift. RAJARAM *v.* KHANDU BALU, 14 BOM. L. R. 340 **529**

———— *of mere propietary rights or usufruct for maintenance—Restraint on alienation by donee, condition as to—Sale* in invitum—*Voluntary transfer.*

The predecessor-in-title of the plaintiffs-appellants executed a deed in 1873 in favour of the ancestors of the defendants-respondents by which certain land was granted to them for their maintenance without any power to transfer.

The deed authorized the grantees to cultivate the land and to appropriate the usufruct thereof, but enjoined that if they wanted to transfer their rights, they must do so to the grantor or his descendants. It also provided that if the donee at any time died childless the land was to revert to the donor or to his heirs:

Held, (1) that the deed was not a gift of full proprietary rights but only of usufruct of the land for the purposes of maintenance;

(2) that the deed not being a gift of proprietary rights, the conditions in restraint of alienation were valid, as they formed an essential portion of the grant itself;

(3) that the sale in execution of a decree based on the mortgage of the said lands could not be considered as a sale '*in invitum*', which could override the provisions of the deed of grant but must be treated as a voluntary transfer, the decree and sale being the necessary consequences of such transfer and as proceeding directly out of the same. JAGDEO BAKHSH SINGH *v.* JWALA PRASHAD. **244**

Government of India Act (21 & 22 Vic. C. 106), s. 65 **955**

Grant of land Revenue—Jurisdiction of Civil Court—Resumption by Government—Claim for declaration as to invalidity of resumption **871**

————, *construction of—Grant of occupancy by Government—Reservation of rights to resume for Government purposes—Government remaining full proprietor—Subsequent sale by Government to private individual.*

Under a *kabuliyat*, the occupancy of certain land had been granted to *A.* by the Collector subject only

Grant—contd.

to the condition that it should be competent to Government to resume the land whenever it should be required by Government for Railway or other purposes.

Subsequently, the Government resumed the land and sold it to *B.*, a descendant of the person from whom the Government had acquired the land.

A., thereupon, sued the Government and *B.* for recovery of the land on the ground that the land was not resumed for Government purposes:

Held, (1) that the Government remained the proprietors of the land and could deal with the land in any way they pleased like any private owner;

(2) that the Government as proprietors of the land could resume it when they required it for their proprietary purposes.

Government purposes must be construed as meaning that they were purposes of Government as the State proprietor, purposes which Government alone were entitled to prescribe in the exercise of their discretionary power. SAPURLO SABSHETTI *v.* SECRETARY OF STATE, 14 BOM. L. R. 414; 36 B. 438 **782**

———*Construction of deed—Whether grant of land or of land revenue only—Resumption by Government—Claim for declaration as to invalidity of resumption—Jurisdiction of Civil Court - Pensions Act (XXIII of 1871), s. 4.*

A grant by a Mahratta Raja was in the following terms:—"Total of 60 *velies* of land, including wet and dry lands, water, trees, stones, *sidha*, *sadhya* (whatever is and may be brought into existence), present and future *patti*; all *banb* and all *kana* with all *Samudavams* with water poured from the hand. * *

* * * * *"

Held, (1) that this was a grant only of the land revenue, and

(2) that a suit for a declaration that the resumption of same by Government was illegal was barred by section 4 of the Pensions Act.

Government may grant the *kudivaram* to one person and the *melvaram* to another; similarly, though both the *kudivaram* and *melvaram* may be combined in the hands of the Government, there is nothing to prevent it from treating them as distinct interests and granting them to the same person.

Land revenue is not a servitude attaching to the land. The *kudivaram* and *melvaram* are distinct interests constituting the totality of ownership in the land. The revenue is not a servitude on property which belongs to the *kudivaram* holder.

Section 4 of Act XXIII of 1871 does not require that the grant should be of the land revenue alone in order to shut out the jurisdiction of the Civil Court to entertain a suit relating to a grant of land revenue.

Even where land revenue is granted along with the land itself, a Civil Court has no jurisdiction to determine a suit which relates to the land revenue alone.

Freedom from liability to land revenue is not identical with holding a grant of land revenue. The land revenue arising from a man's own holding, when it is remitted and the land pays nothing, is rather extinguished than granted.

The Pensions Act (XXIII of 1871) contemplates money payments to be received through the Collector or recovered from persons bound to pay revenue.

Quære:—Whether, when there is a grant of the land revenue only to a person already owning the *kudivaram* right, there is anything in section 4 of Act XXIII of 1871, construed in the light of Regulation IV of 1832 and Act IV of 1862, to take away the jurisdiction of a Civil Court with respect to a claim to the *kudivaram* right? MUTHU SRI JIEJAMBA RAI SAHIB *v.* SECRETARY OF STATE **871**

Grant—concld.

Grove-holder of long standing, position of **181**

———————Mortgage—Re-entry—*Wajib-ul-arz* **277**

———————, *position of—Proprietor a licensor—Licensor and licensee, position of, governed by the same general principles of law as that of lessor and lessee—Sale, lease or mortgage, transfer by way of, difference between.*

The plaintiff, who was the proprietor of a village, sued the defendants Nos. 1 and 2, who were the holders of a grove, and the defendant No. 3, a mortgagee in possession of the right of defendants Nos. 1 and 2 in the grove, for possession on the ground that defendants Nos. 1 and 2 had forfeited their rights by transferring possession to defendant No. 3. The *wajib-ul-arz* of the village provided that ".....without the permission of the proprietor the holder of a grove has no right to sell or mortgage the trees; and if the said grove-holder abandons his residence within the limits of the proprietor's estate he forfeits his entire rights in respect of the grove":

Held, that the position of a grove-holder in a case like the present was that of a licensee entitled to use for certain purposes, land belonging to the proprietor who was the licensor

According to the general principles of law applicable to leases, the forfeiture of a lease is not involved in the case of the breach of any condition for which forfeiture is not prescribed as the proper penalty under the terms of the lease or agreement under which the lessee holds. There is no reason why a similar principle should not apply to the case of a licensor and licensee generally.

There is an essential distinction between a transfer by way of lease or mortgage and a transfer by way of sale in which case different considerations would apply. ALI MUHAMMAD KHAN *v.* CHHEDAN, 15 O. C. 91 **385**

Guardian, appointment of. *See* LUNACY ACT, s. 9.

———————Hindu joint family — Certificate of guardianship whether valid—One member of age—Whether certificate of guardianship of minor members, valid **424**

Guardian and Ward—*Appointment of guardian supported by mother of minor—Appointment of joint guardian—Joint guardian appointed sole guardian for other guardian's inability to give security—Appointment without mother's approval—Order injudicious.*

A guardian who was supported by the mother of a minor was appointed along with another person as joint guardian. As he was unable to furnish security, the joint guardian was appointed the sole manager of the minor's property. No opportunity was given to the mother to state her views before this appointment was made:

Guardian and Ward—concld.

Held, that the order was injudicious and made without due consideration and ought to be set aside. MAHABBAT ALI *v.* SHAMSHER ALI **703**

Guardians and Wards Act (VIII of 1890), s. 13—*Husband claiming to be guardian of his minor wife—Absence of proper inquiry.*

A husband may in many cases be a suitable guardian of his minor wife but the question must be settled, one way or the other, after proper inquiry as contemplated by section 13 of Act VIII of 1890.

An order made without proper inquiry is bad and ought to be set aside. TIRHU *v.* LACHHMAN, 71 P. W. R. 1912; 109 P. L. R. 1912 **195**

——————— **s. 39 (h)**—*Civil Procedure Code (Act V of 1908), s. 114—Guardian appointed residing outside jurisdiction—Removal—Review.*

Where a person, who, at the time, was residing outside the jurisdiction of the Court, is appointed the guardian of a minor, he cannot be removed from such guardianship subsequently, under section 39 (*h*) of the Guardians and Wards Act, on the ground that he does not live within the jurisdiction of the Court.

The provisions of section 114, Civil Procedure Code, do not apply to orders passed under the Guardians and Wards Act. RALLA *v.* MANGLAN, 174 P. L. R. 1912; 211 P. W. R. 1912 **559**

Guardianship. *See* MUHAMMADAN LAW—GUARDIANSHIP.

Handwriting—Comparison—Anonymous document **649**

——— ——— ——— **expert**—Value of evidence **979**

Hat—*Holding* hat *on one's own property, if unlawful—Whether injunction may issue not to hold* hat—*Duty of Magistrate in case of establishment of rival* hat—*Breach of peace—Order not to molest people attending other* hat—*Criminal Procedure Code (Act V of 1898), s. 144.*

The holding of a *hat* on a man's own property is not in itself a wrongful act and, therefore, any ulterior consequences which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace, unless those ulterior consequences are made the basis of the proceedings.

An injunction cannot be issued to a person restraining him from doing a lawful act upon his own property.

Therefore, an order directing a man not to use his property in a lawful manner, for instance, not to establish a *hat* on his own land, does not come within the purview of section 144 of the Criminal Procedure Code.

What the Magistrate in this case ought to have ordered the parties to do was not to obstruct or allow their servants to obstruct any person from attending the other market if he wished to do so. RAKHAL DAS SINGH *v.* EMPEROR, 13 CR. L. J. 511 **655**

Hiba-bil-iwaz—Proof of payment of consideration **698**

High Court. *See* JURISDICTION **955**

——— ——— ——— Direction to solemnise marriage **398**

High Court—concld.

——— ——— ——— power to issue mandamus on public officer **441**

——— ——— ——— Trial—Accused ill—Powers to dispense with attendance in Court **96**

Hindu Law—Agreement for sale by manager of family—Contract whether enforceable **623**

——— ——— *Cutchi Memons*—Maintenance **520**

——— ——— ——— Daughter's estate—Joint owners, effect of one suing for his share—Cause of action—Representation of estate **833**

——— ——— ——— *Ceremonial Law—Usage—Right to receive honours in a temple—Right to determine precedence in the distribution of honours—Injunction—Jurisdiction of Civil Courts—Usage, whether can override texts of* Shastras.

Civil Courts have jurisdiction to determine the order of precedence in the distribution of honours in a temple and to protect, by an injunction, persons having a right to the first honours from such right being infringed by others who are entitled to the same honours subsequently.

Where a long established usage in a tempie has determined the rights of particular persons to receive the first *thirthams*, such usage will be followed by Civil Courts, even though it may be an innovation on any prescribed rule of the Hindu *Shastras*, unless the text of the latter is of such coercive authority that it cannot be disobeyed. SOMA BALLACHARIAR *v.* THIRUVENKATACHARIAR **409**

——— ——— *Daughter capable of child-bearing—Capacity of bearing children, when ceases—Woman of 63, living with husband for 43 years without having child, whether to be regarded capable of child-bearing.*

It may be difficult to lay down any general rule as to when a woman's capacity for bearing children can be said to cease. But a woman of 63, who has been living with her husband for 43 years without having a child, cannot be regarded as capable of bearing children. ICHHAMOYI DEBI *v.* NIL MONI MUKHERJI **169**

——— ——— *Family settlements, binding nature of—Inquiry into antecedent rights of parties, whether permissible.*

In judging of the validity of a compromise, Courts are not entitled to inquire into the rights of parties as they stood before the compromise to see whether the compromise has recognized them; the inquiry should be restricted to the question whether the claims advanced by either side were *bona fide* and whether the compromise really is in settlement of such claims. Every compromise may involve the giving up of certain claims to which a party may be rightly entitled, and the acquisition of interests to which he may have no claim. But if such compromise is a settlement of disputes advanced *bona fide*, then, *prima facie*, it ought to be upheld. This reason applies with greater force in cases of family settlements where the peace of the family is involved, more especially when the settlements were effected long prior to the date of the dispute between the parties. AUTHI LAKSHMI *v.* ANNASAWMY IYER, (1912) 1 M. W. N. 696 12 M. L. T. 140; 23 M. L. J. 104 **723**

——— **Adoption**—Suit by a widow for declaring adoption invalid—Death of plaintiff—Abatement of suit—Reversioners of last male holder, whether legal representatives of plaintiff **461**

——————— *Invalid adoption, effect of—Right of adoptee in natural family—Adoption af orphan whether valid—Presumption--Estoppel.*

An invalid adoption does not, under Hindu Law, *per se* destroy the adoptee's rights in his natural family.

As no one but the parents of a child can give him away in adoption, an orphan cannot be given away in adoption either by himself or by any one else.

There is no presumption in law that an apparent adoption, which had taken place long ago and was throughout acquiesced in by all concerned, was made in pursuance of an authority given by some persons competent to give away the son in adoption.

The adoption of an orphan would be valid, if there was evidence to show that the adoptee's natural parents had given the boy away to a person who made the adoption years afterwards and even after the death of the natural father.

There is no estoppel against the plea of invalid adoption, even though the adoption was acquiesced in by the family, so as to debar the adoptee being restored to his natural family, unless the position of those contesting such right has, in consequence of the adoption, been changed to their disadvantage. VAITHILINGA MUDALI *v.* MUNGAN, 23 M. L. J. 189 **299**

——————— *Widow—Authority to adopt—Power "to adopt another boy should the one adopted under authority die," meaning of—Widow making adoption, whether competent to question validity—Estoppel.*

After the death of her husband, the plaintiff adopted a boy in 1877 declaring by deed that she did so in accordance with the Will of her husband. The boy died and in 1883, she adopted another boy still purporting to act in accordance with her husband's Will. This boy also died, so in 1899 she adopted the defendant. At that time she executed a deed with full appreciation of its contents. In the deed she said: "My husband made this Will—'I strictly order you to adopt some boy to me. * * If the son who might be adopted should die, you will have power to adopt another boy.'"

In the following year, one *B.*, claiming as reversionary heir, instituted a suit against the plaintiff and the defendant for a declaration that the adoption of the defendant was invalid. In her defence, the plaintiff informed the Court that she had full oral authority from her husband, and that he had not limited her to one, two, three, or four sons. That suit failed.

The plaintiff and the defendant having since quarrelled, the present suit was brought in order to get rid of the adoption altogether:

Held, on a consideration of all the facts, that the defendant was duly adopted.

Held, also, that, as the plaintiff asserted her authority in the most solemn manner, she could not now be allowed to change her story without causing grave injustice to those who have acted in reliance upon her representations, and that she must, therefore, be held

to her word and to the results of her conduct. DUARAM KUNWAR *v.* BALWANT SINGH, 16 C. W. N. 675; 9 A. L. J. 730; 14 BOM. L. R. 485; (1912) 1 M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 34 A. 398; 23 M. L. J. 200 **673 P. C.**

——————— **Alienation** *of share in part—Coparcenary broken up—Subsequent death—Survivorship or inheritance.*

When a co-parcener alienates his interest in a coparcenary property, the joint tenancy in respect thereof is thereby put an end to, and the other coparceners become tenants-in-common.

Quære.—Whether a co-parcener alienating his interest in part of the co-parcenary property takes by survivorship or inheritance the share of another coparcener, who dies subsequent to the alienation? SRINIVASA SUNDARA THATHACHARIAR *v.* KRISHNASAMY IYENGAR, (1912) 1 M. W. N. 379; 11 M. L. T. 312 **354**

——————— **Dayabhaga**—Liability of manager **616**

——————— *Stridhan—Succession—Half-sister's son—Daughter's son of great-grandson of great-grandfather of woman's husband—Probate--Citation, issue of, whether gives right to oppose grant of Probate.*

Under the *Dayabhaga* law, a woman's half-sister's son is entitled to succeed to her *stridhan* in preference to the daughter's son of the great-grandson of the great-grandfather of the woman's husband.

The mere fact that it was stated in an application for Probate that a certain party had applied for Letters of Administration to the estate of the testatrix, and that the Court had issued a citation upon him, would not entitle him to come in and oppose the grant of Probate, if it was found that he had no interest in the estate of the deceased. SHASHI BHUSHAN LAHIRI *v.* RAJENDRA NATH JOARDAR, 16 C. W. N. 1094 **225**

——————— **Inheritance**—*Female heir—Suit for rent accrued due after death of full owner—Decree against female heir—Sale of property—Purchaser, what passes to—Suit for contribution against female heir—Decree and sale—Title of purchaser, absolute or not.*

Where a suit for rent in respect of a tenure against a Hindu female heir is brought in respect of arrears, which have accrued due after the death of the last full owner and while she was in enjoyment of the tenure, the liability for rent should be regarded as her personal liability, and ought not to be held to attach to the reversion, unless and until the landlord proceed to bring the tenure itself to sale under the special provisions of the Rent Law.

Although the original liability is one for arrears of rent, to liquidate which the entire tenure might have been sold, yet a decree for contribution against a Hindu female heir arising directly therefrom cannot be held to have had the same effect and the sale under it passes the limited interest of the female and not the tenure. MAHOMED SADUT ALI *v.* HARA SUNDARI DEBYA, 16 C W. N. 1070 **351**

——————— *Illegitimate son born of one's concubine who was previously married to another—Right to inherit.*

Hindu Law—contd.

In order that an illegitimate son may be entitled to succeed his father, he must have been born of a woman who was never married to any one before she came under the keeping of the person whose son the claimant is. PADALA KRISHNA RAO *v.* PADALA KUMARAJAMMA **340**

——— **Inheritance**—Jats—*Custom—Exclusion of daughters and daughter's sons.*

There is no custom among *Jats* of Sardhana *Tahsil*, Meerut District, excluding daughters and daughter's sons from inheritance. NAULI *v.* KHERI **607**

——— **Interpretation**—Silence of Nilkant **774**

——— **Joint family**—*Family necessity—Sale—Discharge of family debts—Provision for adjusting shares in partition.*

Where a sale of family property is effected mostly for raising money to discharge family debts, a comparatively small balance being required to conveniently adjust the shares in a contemplated family partition, the latter object also comes under family necessity and the sale is valid. SHANMUGAM PILLAY *v.* SURYANARAYANA PILLAI, 11 M. L. T. 407; (1912) 1 M. W. N. 546 **688**

———*Father's debt—Liability of ancestral property.*

It being the pious duty of a Hindu son to pay his father's debt, not tainted with immorality, a sale for payment of such debt would bind the son and his interests in the ancestral property and would confer a complete title on the purchaser. POKHPAL SINGH *v.* CHHIDU SINGH **903**

———*Presumption that the family has capital for money-lending—Presumption that business carried on by a co-parcener is a family business.*

There is no presumption that a joint family has capital for money-lending and no presumption that a business carried on by a co-parcener is a family business. VITHAL *v.* SIWA, 8 N. L. R. 82 **933**

———*property—Survivorship—Allotment of deceased's share to brother's widow—Nature of estate taken by widow—Widow's estate—Succession—Devolution to husband's heirs—Accretions by income of the properties—Whether descendible to husband's heirs.*

Under the Hindu Law, a woman's estate can be created in favour of a Hindu female quite as much by contract of parties or by a grant as it can be obtained by her by inheritance.

It is competent in an undivided Hindu family for a member to grant to his deceased brother's widow the share of her husband which the latter would have got on partition.

Such an estate would be held by the grantee as the ordinary widow's estate, which would be deemed to have been given her in lieu of maintenance, and, on her death, the property would pass to her husband's heirs.

P. and *C.* were members of an undivided family. On *P.*'s death, the property passed to *C.* by survivorship, *L.*, the junior widow of *P.*, and *C.* entered into an agreement, whereby, *inter alia*, he agreed to give her his deceased brother's half share in the properties. After *C.*'s death, the properties were equally divided between *L.* and *B.*, *C.*'s widow, at the instance of arbitrators. In a suit by plaintiff, the step-daughter of *L.* against her father's reversioner:

Held, that the effect of the agreement between *L.* and her brother-in-law as well as between *L.* and her co-widow *B.* was to give *L.* only a life-estate in the properties which were allotted to her and that, on her death, the life-interest descended to the plaintiff:

Held, also, that any property purchased by *L.* out of the income of the estate would not descend to her husband's heir unless she incorporated it with the property held by her as heiress of her husband. MEDA VENGAMMA *v.* MITTA CHELAMIAH, 23 M. L. J. 168; 12 M. L. T. 293 **17**

——— **Joint family**—*Suit on a mortgage by manager of the family—Parties—Non-joinder—Suit, maintainability of.*

A suit on a mortgage brought by some of the members of a joint Hindu family in their capacity as managers, does not fail because the other members of the family are not impleaded as parties. CHAJJUMAL *v.* NATHAN **876**

——— **Mitakshara**—*Mayukha*—Easement—Presumption of law **818**

———*Joint family—All members minors—Certificate of guardianship whether valid—One member of age—Whether certificate of guardianship of minor members, valid.*

When all the members of a joint *Mitakshara* family are minors, an order appointing a guardian of the minors, is a good one. But when one of them comes of age, the guardianship ceases *ipso facto* as regards him, and as there cannot be a guardian of minors in a joint *Mitakshara* family in which there are also adults, the guardianship ceases also as regards the other minors, and the member who attains majority is competent to bring rent suits on behalf of himself and the minor members. SAMDANI *v.* KAMALAKANT JHA **424**

——— *School*—Dayabhaga *school—Manager, liability of, in a joint family to account—Member of an undivided joint family, right of, to sue for his share of profits.*

Although a member of a joint family has a right to ask for a statement of account from the manager yet he is not entitled to sue the manager for any money relief on account of his share.

On this point, there is no difference between the *Mitakshara* and *Dayabhaga* schools of law. SARAT KUMARI DEBI *v.* BHOLA NATH BANERJI, 15 O. C. 244 **616**

——— Mayukha—Stridhan—*Sons inheriting from mother—Tenancy-in-common—Joint Tenancy—Basic principle of co-parcenary—Obstructed and unobstructed succession—Interpretation—Silence of* Nilkanth—*Self-acquired property—Joint property.*

Under the law of the *Vyavahara Mayukha* as also under that of *Mitakshara*, property inherited by sons from their mother descends to them, not as a joint tenancy, but as a tenancy-in-common.

The basic principle of joint tenancy as distinguished from tenancy-in-common under Hindu Law explained.

A joint tenancy is created where property is inherited by unobstructed succession called *rikhta*. In such a case, heirs take the property as co-parceners.

Hindu Law—contd.

A tenancy-in-common is created where property is inherited by obstructed succession. In this case, the idea of inheritance and the idea of partition go together; one is a necessary complement of the other, so that, at the very moment the inheritance falls in, the heirs take by partition, that is, as owners of defined shares and, therefore, as tenants in-common.

Heritage in the case of *stridhan* is obstructed succession.

Where *Nilkanth* is silent on any point, his silence must be regarded as assent to the proposition laid down in the *Mitakshara*.

Self-acquired property is that which is acquired by a member of a joint family by his own exertions without detriment to the joint property and not thrown into the common stock.

Property, originally self-acquired, becomes joint when it is thrown into the common stock and is mixed up with the joint estate. BAI PARSON *v.* BAI SOMLI, 14 BOM. L. R. 40); 36 B. 424 **774**

——— ———**Mitakshara**—*Partition, suit for—Defence that plaintiff's father had got his share and was expelled from family—Re-appearance of plaintiff in village—Limitation.*

A suit was brought for partition of plaintiff's share in family property. The defence was that plaintiff's father was expelled from the family for some scandalous conduct and that he had received his share of the property. The evidence established that the plaintiff re-appeared in the village where the family resided, that he took up his abode there, that he was recognized as a member of the family and that no case of exclusion from the joint property could be made out against him till five or six years before suit:

Held, that the suit should be decreed. JEOLAL MAHTON *v.* LOKE NARAYAN MAHTON, 16 C. W. N. 466 **184**

———— **Stridhan.** *See* HINDU LAW—*Dayabhaga.*

———— ———— Sons inheriting from mother —Tenancy-in-common—Joint tenancy **774**

———— ———— ———— Adverse possession — Presumption **403**

———— **Succession**—Widow's estate **17**

———— ———— ———— *Impartible estate — Maintenance—Remoteness of relationship.*

The right of a family member to claim maintenance from the holder of an impartible estate must be decided on the footing of the estate being joint and must depend on the question whether, if the estate were partible, the person claiming the maintenance would be entitled to maintain a suit for partition.

The question of succession to an impartible estate discussed.

The degree of relationship for determining the right to maintenance out of an impartible estate must b taken to be the same as for determining the right to partition in the case of a partible estate.

The right to maintenance is not lost by reason of the fact that the person claiming maintenance is only an adopted and not an *aurasa* son of his father.

The fact that a member is removed more than three degrees from the common ancestor is not a bar to his succession by survivorship and, therefore, is not a bar to his right to maintenance. ABHINANA PURNA PRIYA *v.* ARNI RANGASAWMI, 23 M. L. J. 79; (1912) 1 M. W. N. 790; 12 M. L. T. 245 **412**

Hindu Law—concld.

——— ———**Widow** re-marrying, whether entitled to retain husband's estate—Custom **602**

———— ———— ———— *Sale by widow to next reversioner—Legal necessity.*

A sale by a Hindu widow to the nearest reversioner, living at the time of the sale, is equivalent to a sale with the consent of the said reversioner and is, therefore, sufficient to pass a good title independently of any direct evidence in support of the plea that the sale was for legal necessity. SHEO DAS DUBE *v.* DALGANJAN DUBE **637**

——— ———*Woman's estate — Adverse possession—Prescription*—Stridhanam—*Pleading.*

When the possession of a Hindu woman is adverse the question must be decided as to what was her *animus possidendi:*—Did she assert an absolute title in herself or did she claim to hold as the heiress of any person? The latter would be the ordinary presumption, and the heirs to her *stridhanam* must specially plead that by prescription she had acquired a title which would descend to the heirs as *stridhanam*. PRATTIPATI SESHAYYA, *In re*, 11 M. L. T. 261; (1912) 1 M. W. N. 515 **403**

Hindu Widows' Re-marriage Act (XV of 1856)—*Hindu Law—Widow re-marrying, whether entitled to retain husband's estate—Custom.*

A Hindu Widow's right to retain property inherited from her husband ceases on her re-marriage, and the reversioners are entitled to immediate possession of the properties on her re-marriage.

Quære:—Whether, if a custom were proved according to which a re-marrying widow is entitled to retain property inherited from her husband notwithstanding her re-marriage, such a custom could not be given effect to? DORAISAWMY THEVAN, *In re*, 12 M. L. T. 158 **602**

Howrah Station—Accused found in possession of cement—Reasonable suspicion **492**

Husband and wife—*Maintenance—Criminal Procedure Code (Act V of 1858), s. 488—Order by Magistrate for maintenance of wife—Whether bars civil suit for further order—Jurisdiction of Civil Court to entertain suit for additional maintenance.*

Although there is an order by a Magistrate directing a husband to pay his wife's maintenance at a certain monthly rate, the Civil Court has power to make a further order in the matter in a suit by the wife.

The Civil Court may pass a separate order for additional maintenance if it thinks that the amount awarded by the Magistrate is not sufficient. TRINAYANI DASEE *v.* SRICHANDAN BHUIYAH **603**

Hypothecation - *Instalments—"Due," meaning of—Failure of instalment—Right to claim whole debt.*

An instalment hypothecation bond executed by the defendant to the plaintiff contained the following stipulation:—

"I agree that if I fail to pay the said balance of purchase-money with interest thereon.....according to the terms hereinbefore contained, it shall be lawful for the said Collector on behalf of the Secretary of State to sell the said lands and apply the proceeds

Hypothecation—concld.

of such sale in or towards the payment and satisfaction in the first place of the expenses of such sale and then of the amount due or owing by me on account of the said balance of purchase-money, etc., etc.

Held, that the word '*due*' in the said bond meant *payable*, and that the creditor could in default of any instalment claim only the overdue instalments and not the entire balance due on the bond. ANNAVARAPU NANCHARAMMA *v.* SECRETARY OF STATE **231**

Inam village—Grant besides *Poramboke* **594**

Incumberance. *See* BENGAL TENANCY ACT.

————————, annulment of. *See* BENGAL TENANCY ACT.

———— ————Adverse possession when incumberance **869**

Indian (Foreign Jurisdiction) Order in Council 1902 **809**

Inherent power of Court- Consolidation of suits **897**

———— ————, doctrine of **53**

Injunction—Application for enforcement of permanent injunction granted by decree **945**

———— ————Right of support—Temporary structure, whether entitled to right of support—Injunction to restrain interference with right of support—Actual damage, proof of—Whether necessary **294**

———— ————Suit for declaration that a revenue decree is bad **614**

———— ————, whether may be issued, not to hold *hut* in one's own property **655**

Insolvency—Decree for rent of coal land—Judgment-debtor declared insolvent—Official Assignee made party in execution proceedings—Lease-hold property sold in execution—Subsequent sale by Official Assignee—Superiority of title—Official Assignee bound by execution sale—Purchaser in execution to have better title—Decree for rent of coal lands, whether can give first charge on property in arrears **288**

———— ————Effect of vesting order—Attachment after vesting order **950**

————————, *right to benefits of—Insolvent's accounts—Effect of failure to keep proper accounts—Reckless contracting of debts.*

The benefit of Insolvency Acts is intended for traders who act honestly and straightforwardly and according to the recognized proper mode essential to knowing their position but who through misfortune incur loss. The benefit should not be extended to those traders who fail to keep proper accounts or who deal extravagantly and contract debts recklessly without any reasonable prospect of being able to pay them. S. R. M. C. T. CHETTY *v.* KO AUNG GYI, 5 BUR. L. T. 80 **276**

———— ————*Hypothecation—Stock-in-trade, possession, order and disposition—Presidency Towns Insolvency Act (III of* 1909), *s.* 52.

The petitioner, one of the creditors of an insolvent claimed to rank as a secured creditor against the sale-proceeds of the stock in trade of the insolvent. He

Insolvency—concld.

had obtained a letter of hypothecation in which one term was:—"I agree to deliver to you the keys of the said business premises and to take from you every morning the said keys and return them to you every evening. For breach of any stipulation contained herein or failure to pay the money due when demanded, it shall be lawful for you without my consent to retain the keys and seize the goods or otherwise take possession of them." The agreement was carried out and when the insolvent subsequently absconded, the petitioner took possession of the stock-in-trade and had it sold:

Held, (1) that on the day of the bankruptcy, which related back to the day of absconding, the stock-in-trade was in the possession, order and disposition of the insolvent so as to make him the reputed owner thereof under section 52 of the Presidency Towns Insolvency Act;

(2) that the possession which the petitioner had under the agreement was not real possession;

(3) that a deliberate arrangement, such as the agreement, contemplated to deceive the public was a fraud upon the Act;

(4) that, in any event, under the agreement, the goods were absolutely in the possession, order and disposition of the insolvent during the working hours of the day;

(5) that the petitioner was not entitled to rank as a secured creditor. GULAM ALI, *In the matter of*, 11 M. L. T. 203; 22 M. L. J. 441 **371**

Instalments—Failure of instalments—Right to claim whole debt **231**

Institution of suit. *See* SUIT.

Intangible property—Interest of simple mortgagee **853**

Interest—Damdupat, *rule of—Applicable to mortgages and interest after decree—Transfer of Property Act (IV of* 1882), *ss.* 86, 87—*Civil Procedure Code (Act V of* 1908), *O. XXXIV, rr.* 2, 4—"*Interest on the mortgage.*"

The rule of *damdupat*, which is nothing more than a rule of limitation having a religious origin, is not abrogated by the Transfer of Property Act or by Civil Procedure Code, Order XXIV, rules 2 and 4. A mortgagor is, therefore, entitled to the benefit of the rule.

The words "interest on mortgage" refer to the rate of interest provided by the mortgage, if it be a rate to which no valid legal objection can be taken.

The rule of *damdupat* applies to interest after decree. ASANAND JEYRAMDAS *v.* TULSANBAI, 5 S. L. R. 245 **824**

Interpretation of statutes—Amending Act—Retrospective effect **705**

———— ———— ————Technical and popular meaning of words **122**

Jewess—Divorce—Intended marriage with Christian—Registrar, refusal by, to solemnise marriage—High Court—Direction to solemnize marriage **398**

Joinder of parties. *See* PARTIES.

Joint sale to two persons—Consideration paid by one vendee—Right of other vendee to recover his share of property **173**

Joint tenants—*Relinquishment by one tenant of his share to landlord—Whether extinguishes the tenancy.*

Where one of two joint tenants relinquishes his share in the demised property to the landlord, the latter is entitled to possession of the share of the releaser, the relinquishment being operative at least as to a moiety of the lands.

Quære:—Whether the relinquishment of one puts an end to the tenancy of both tenants? VELUCHOORI PRASANNA *v.* VELUCHARI SOMU NAIDU **330**

Judgment—Contents of Appellate Criminal Court's judgment **975**

———— ——, Court's power to pronounce, when written statement not filed—Revision—Material irregularity **212**

—— ———Evidence—Point not in issue **357**

———— ——Small Cause Court **937**

———— ——*Court adopting reasons in previous judgment between same parties where evidence was almost the same—Such a judgment, whether in accordance with law.*

Where a Court, in its judgment, states that it adopts the reasons given by it in a judgment in a previous suit between the same parties, the evidence being almost the same, this does not amount to using the previous judgment as evidence in the case, and the judgment is one in accordance with law. AKKU *v.* RAMAPPA RAJU, (1912) 1 M. W. N. 900 **434**

———— ——*Judgment based on decision of question not in issue, bad.*

A judgment based upon the decision of a question which was neither raised in the written statement, nor is covered by any of the issues, is bad. SAJJAD HOSSEIN *v.* RAM LAL SHAHU **159**

Jurisdiction. *See* CIVIL PROCEDURE CODE 1908, s. 20.

———— ——. *See* CRIMINAL PROCEDURE CODE, s. 190 **65**

———— ——. *See* VALUATION OF SUIT.

———— ——Adjustment—Agreement to abide by decision in another suit **378**

———— ——Complaint against Police officer —Case made over to another Magistrate **482, 484**

———— ——Criminal breach of trust committed in Native State—Part of property retained in British India—Power of British Court to take cognizance of offence **802**

———— ——*Ex parte* decree—Supersession by appellate decree—Jurisdiction of original Court to set aside decree — Application made before appeal preferred—Practice—Power of High Court to transfer application to itself **565**

———— ——Offence committed at a place in British India—Subsequent transfer to an Independent State—Jurisdiction of Court of the place —Territorial jurisdiction of State **991**

———— ——Pre-emption suit—Appeal **407**

———— ——Place of trial—Contract made where goods delivered for transit **12**

———— ——Remission of issues to the lower Court by Court of Appeal—Transfer of case by the Appellate Court to another Court of Appeal before findings were returned **863**

Jurisdiction—contd.

———— ——*Decree against dead man—Void—Exception—Civil Procedure Code (Act V of 1908), O. XX, r. 6—Defendant dying after close of hearing but before judgment—Execution of decree — Power of execution Court to decline to execute decree passed without jurisdiction—Power to consider question of jurisdiction.*

A Court has no jurisdiction to make a decree against or in favour of a person deceased. Such a decree is void and incapable of execution.

The only exception to the rule is the case of a defendant dying between the conclusion of the hearing and the pronouncement of judgment; in such an event, the Court may deliver judgment *nunc pro tunc*.

A decree passed without jurisdiction is incapable of execution and the Court to which such decree is transferred for execution is competent to decline to execute it.

The Court charged with the execution of a decree can consider the question whether the Court which passed the decree had jurisdiction to pass it unless the decree itself precludes that question. TOPANRAM *v.* TEKCHAND, 5 S. L. R. 260 **832**

———— ——*Decree for possession and mesne profits in Munsif's Court—Mesne profits more than Rs.* 1,000 *but less than Rs.* 5,000*—Whether Munsif can award amount.*

A decree for recovery of possession of land was obtained in a Munsif's Court, and it was directed that the amount of mesne profits would be determined in the execution proceedings. The amount of mesne profits so ascertained was more than Rs. 1,000 but less than Rs. 5,000:

Held, that the Munsif's Court had jurisdiction to award the sum as mesne profits. PANCHORAM THEKADAR *v.* KINU HALDAR **252**

———— ——*Discharge of accused by High Court at Criminal Sessions—Re-trial of accused—Whether order of discharge any bar to re-trial—Criminal Procedure Code (Act V of 1898), ss. 403, 437.*

An order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under section 190 (*c*), Criminal Procedure Code.

Therefore, a Magistrate has jurisdiction and is bound to adjudicate on any criminal information properly laid before him against an accused person, who had been discharged by the High Court in the exercise of its original criminal jurisdiction, without the order of discharge being set aside. EMPEROR *v.* IDOO, 13 CR. L. J. 488; 16 C. W. N. 983 **488**

———— ——*High Court—Cause of action arising wholly outside jurisdiction—Letters Patent, clause* 12*—Leave of Court obtained when plaint filed—Defendant's right to question propriety of leave—Secretary of State, whether mere name or body corporate and person—Suit for damages for malicious prosecution against Secretary of State in High Court, whether maintainable—Government of India Act* (21 & 22 *Vict. C.* 106), *s.* 65.

Leave under clause 12 of the Letters Patent cannot be granted where the whole cause of action in a suit for damages for malicious prosecution has arisen outside the local limits of the ordinary original jurisdiction of the High Court. If such leave is granto

Jurisdiction—contd.

in the absence of the defendant, he is not bound thereby and can object to it at the hearing of the suit.

Held, following *Doya Narain Tewari* v. *Secretary of State*, 14 C. 256, that the Secretary of State cannot be held to dwell or carry on business or personally work for gain at the capital or head-quarters of a Government, and that section 65 of the Government of India Act does not constitute the Secretary of State a body corporate.

Obiter dicta—(1) The Secretary of State is not a mere name but a body corporate and a *person* within the meaning of clause 12 of the Letters Patent, and for purposes of suit, represents the Government.

(2) The Secretary of State, namely, the Government, is to be deemed to dwell and carry on business at the capital of the Government, and is, therefore, amenable to the High Court whose original jurisdiction embraces the capital. RODRICKS *v.* SECRETARY OF STATE, 16 C. W. N. 747 **955**

——————— **of Civil Court.** *See* VALUATION OF SUIT.

———————*Chamars*—Right to skins of carcases in lieu of services—Services not performed—Appointment of another person for performance of services **108**

———————Declaration that Municipal assessment illegal **548**

———————Order by Magistrate for maintenance of wife—Suit for additional maintenance **603**

———————Right to receive honours in a temple—Right to determine precedence in the distribution of honours—Injunction **409**

———————Rival claimants to occupancy tenancy, disputes between **33**

———————Suit for rent regarding owner's private land **124**

———————*Vatandar*—Suit for declaration that plaintiff was head of *Vatan* family and entitled to certain share **840**

———————*Stay of proceedings—Execution proceedings—Decree of Revenue Court—Suit for declaration that decree bad—Temporary injunction, if may be issued—No prayer for permanent injunction—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Injunction.*

Although a decree may have been passed by a Revenue Court, when it is under execution in a Civil Court, proceedings may be stayed by the Civil Court if a suit has been brought for a declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction to restrain the decree-holder from executing the decree.

But if the suit is brought simply for the declaration and there is no prayer for a perpetual injunction, then a temporary injunction under Order XXXIX, rule 2 of the Civil Procedure Code cannot be issued. JITAL SINGH *v.* KAMALESWARI PRASAD **614**

——————— **of Civil or Revenue Court**—Suit for ejectment of tenant from pasture land **743**

Jurisdiction—concld.

——————— **of Civil or Revenue Court**—Suit for possession against usufructuary mortgagee—Exproprietary tenancy **438**

———————Tenancy denied—Ejectment **303**

——————— **of Magistrate.** *See* CRIMINAL PROCEDURE CODE, s. 179.

——————— **of Revenue Court**—Suit for recovery of money equivalent of half the produce of fruit trees in a grove occupied by tenant **27**

——————— **of Small Cause Court.** *See* SMALL CAUSE SUIT.

Jury, verdict of. *See* CRIMINAL PROCEDURE CODE, s. 299 **1002**

Kumaki rights, *nature of—Transferability of the right—Easements Act (V of 1882), s. 4—Transfer of Property Act (IV of 1882), s. 6 (c).*

Kumaki lands or waste lands adjoining *warg* lands, and a *Kumaki* privilege is the right which the *ryot*, holding the *warg* land, has to collect leaves for manure and to pasture his cattle as an assistance to the cultivation of the *warg* land.

These *Kumaki* privileges are extinguishable by Government, which may assign the land over which they are exercised to another person than the holder.

The *Kumaki* right is essentially in the nature of a right by way of easement as defined in section 4 of the Easements Act and is governed by the principle of section 6 *(c)* of the Transfer of Property Act. The *Kumaki* rights are not rights "in gross" but only rights "appendant" and are not transferable apart from the lands, for the benefits of which they are allowed. MATILDA FERNANDEZ BAI *v.* ALEX PINTO **278**

Lambardari—Succession to office—Adopted son cannot succeed **925**

Land Acquisition Act (I of 1894), ss. 3 (b), 11, 31—*"Person interested", meaning of—Duty of Collector—Court's duty—Apportionment—Poundage and fees—Liability of Government.*

Under section 3 (*b*) of the Land Acquisition Act, the expression "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of the land.

A person may be interested in the compensation money without having an interest in the land in the legal sense of the term.

The Collector has, under section 11, to inquire into the value of the land and into the respective interests of the persons claiming the compensation, and after awarding a sum for compensation, he has to apportion the compensation among all the persons known or believed to be interested in the land of whom or whose claims he has information.

What the Collector and the Court have to do is to apportion the sum awarded amongst the persons interested as far as possible in proportion to the value of their interests. It is impossible to lay down any general rule which can be followed. The market-value of an interest, if ascertainable, may afford some guide towards ascertaining the amount to be apportioned in respect of that interest, but that can only be considered in relation to the total sum awarded as compensation.

Land Acquisition Act—contd.

It is the duty of Government, under section 31, to deposit in Court the whole of the compensation money which it may be required to deposit by the Act, free from any deduction. When a demand is made by Court Officials under Court Rules for poundage and fees in respect of such deposit, Government has to pay such poundage and fees in addition to the compensation money. The Court has no power to direct that a portion of the compensation money deposited should be refunded to Government as representing the poundage and fees paid by it when the money was deposited in Court. As the money is compensation in respect of land acquired under the Act, the Court has power only to direct payment of such money, without any deduction, to the person or persons interested.

When land is acquired for a Company, the poundage and fees, which may become payable during the course of proceedings, may be recovered by Government from the Company as costs of acquisition. PESTONJI JEHANGIR, *In re*, 14 BOM. L. R. 507 **771**

——— ——— ——— **s. 11** **771**

——— ——— ——— **s. 16**—Acquisition for a Municipality—Transferee of Municipality—*Inam* land—Exemption from revenue **376**

——— ——— ——— **s. 23**—*Market-value*—*Award based on speculations as to future development of the land.*

An award of compensation under the Land Acquisition Act cannot be made on speculations and hypothetical schemes of the future development of the land.

Where a Land Acquisition Judge took the market-value of the land at Rs. 1-8-0 per square yard, but on the ground that the plot was a large one and the claimant could not dispose of it in 9 years, made a deduction of 25 per cent. and made further deductions on account of roads which would have to be made to sell the land as a building site:

Held, that this method of awarding compensation was improper. BASAVARAJU KRISHNA ROW *v* HEAD ASSISTANT COLLECTOR BEZWADA **672**

——— ——— ——— **s. 31** **771**

——— ——— ——— **ss. 53, 54**—*Award—Decree—Suit—Appeal—Second Appeal—Decision by Assistant Judge—Forum of appeal—Civil Procedure Code (Act V of 1908), ss. 2 (2), 93, 96, 100.*

No second appeal lies to the High Court from an award by a District Court on appeal from an award made by an Assistant Judge's Court under the Land Acquisition Act.

Reading sections 53 and 54 of the Land Acquisition Act with section 96 of the Code of Civil Procedure, it must be taken to have been the intention of the Legislature to place an award under the Land Acquisition Act on the footing of a decree.

Section 53 of the Land Acquisition Act has the operation of putting proceedings before the Court on the same footing as proceedings in a suit.

Where the amount in dispute is less than Rs. 5,000, an appeal against the decision of a Subordinate Judge or an Assistant Judge on an award lies to the District Judge and not to the High Court. NATHUBHAI *v.* MANORDAS, 14 BOM. L. R. 325; 36 B. 360 **512**

Land Acquisition Act—concld.

——— ——— ——— **s. 54** **512**

——— ——— ——— **s. 54**—*Award or part of award—Decree* ex parte—*Default of claimant—Application for restoration, refusal of—Appeal against order refusing to restore case, whether competent.*

Under section 54 of the Land Acquisition Act, an appeal lies only from an award or part of an award.

A claim was decided by the Land Acquisition Judge *ex parte*, as the claimant was not present when the case was called. An application to set aside the *ex parte* decree was refused and the claimant filed an appeal against the order of refusal:

Held, that no appeal lay, as the order was not an award. HASUN MOLLA *v.* TASIRUDDIN, 39 C. 393 **925**

Landlord and Tenant. *See* AGRA TENANCY ACT; BENGAL TENANCY ACT; CHHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT; PUNJAB TENANCY ACT; TRANSFER OF PROPERTY ACT, s. 107.

——— ——— ———Lease—Right of landlord to possession—Tenant, whether can dispute landlord's possession—Estoppel **844**

——— ——— ———Permanent tenure, heritable and non-enhanceable—Tenancy created 50 years ago—Residential purposes—Improvements permanent—Rent unchanged—Transfers by sale—Inheritance—No attempt to eject—Recognition of transferees as tenants **110**

——— ——— ———*Poramboke* land in a *zemindari*—No presumption that it is cultivable *poramboke*—*Onus* on *zemindar* to make out his right to cultivate or let out to tenants **359**

——— ——— ———Amalnamah—*Stipulation that tenant will not claim deduction of rent*—Pattah—Onus *of proof*—*Claim of abatement by tenant.*

In a rent suit, the tenants claimed abatement of rent. In an *amalnamah* granted by the landlord, the term fixed was five years with a stipulation that after that period there would be measurement of the *jote* and a fresh settlement entered into. The tenants asserted an interchange of *patta* and *kabulyat* but no *patta* was produced:

Held, that it was incumbent on the tenants to produce their *patta* and to make out the plea of abatement on the ground of dilluvion, and as they did not do so, they were not entitled to any abatement. MANINDRA CHANDRA NANDI *v.* KASHI CHANDRA BAKSHI, 15 C. L. J. 507 **458**

——— ——— ———*Ejectment—Tenancy denied—Jurisdiction of Civil or Revenue Court.*

Plaintiff sued for ejectment of defendant in a Revenue Court alleging that he was a tenant from year to year. The defendant replied that he had bought the property from one *H.* whose house stood on the plot.

The Assistant Collector, not being sure that the defendant had become plaintiff's tenant, dismissed the suit. The plaintiff then sued in a Civil Court for ejectment:

Held, that the suit was maintainable. CHAUHRAJA SINGH *v.* SARABJIT, 10 A. L. J. 85 **303**

Landlord and Tenant—contd.

——— ——— ———*Grant of permanent occupancy-rights to community - Express or implied surrender of the right—Burden of proof—Sub-division of lands by grantees—Variation in extent—Presumption.*

Where permanent occupancy-rights have been granted to certain individuals for the benefit of a community to which they belong, the *onus* of proving an express or implied surrender of such rights lies on the party affirming it.

The sub-division of the lands and even the surrender of a portion thereof by the grantees will not be inconsistent with the latter continuing to hold the lands in their occupation on the terms of the original grant, *i.e.*, by right of permanent occupancy, although community of interest may have ceased as between themselves.

If the same lands had been held by different persons in different years, this would be *prima facie* evidence of the tenure being inconsistent with the continuance of the rights under the original grant.

Material variation in the extent of the lands held in each year might lead to the same inference, though it might also be explicable on the ground that the *pattas* for each year were only for the extent cultivated during the year. VELUSAMI TEVAR *v.* AROKYA UDAYAN **119**

——— ——— ———*Lease — Forcible re-entry, right of landlord to—Oudh Rent Act (XXII of 1886), s. 138— Bona fide payment of rent—Inquiry, scope of —Parties—Lessor when to be impleaded in lessee's suit against tenants—Appeal, second—Question of law—Determination of legal right.*

A *talukdar* leased the collection of rents of a certain village to the plaintiff for a certain period and it was provided in the lease that in case of breach of certain terms of the lease or of the expiry of the term fixed, the *talukdar* would have a right of re-entry.

Before the expiry of the term, the *talukdar* took forcible possession of the village and began to collect rent from the tenants. The lessee then sued the tenants for the rent:

Held, (1) that the lessee was entitled to obtain decrees, inasmuch as the relation of landlord and tenant had not ceased between the lessee and the tenants inasmuch as the lessee had not been, in due course of law, ejected and the lease only provided for re-entry in case the lessee agreed to give up the possession and not for re-entry by force;

(2) that section 138 of the Oudh Rent Act had no application to the facts of the case, and the *talukdar* had no right to be joined as a defendant in the plaintiff's suit.

The inquiry contemplated by section 138 of the Rent Act is an inquiry relating to a period prior to that for which rent is claimed.

The question whether a legal right had determined is a question of law and not of fact and a decision on such point is open to second appeal.

If a lease reserves to the lessor the right of entry in case of a breach of a covenant, the result of the breach is at best to confer upon the lessor the right of re-entry, and not to entitle the lessor to make a forcible entry. If the lessee resists the exercise of the right to re-enter, the lessor's only remedy is to enforce his right to re-enter by a suit in ejectment.

Landlord and Tenant—contd.

A license by a tenant to a landlord to eject him without process of law is void and can be no answer to a charge of forcible entry. HABIBULLAH SHAH *v.* SURJI **857**

——— ——— ———*Lease—Landlord's obstruction to tenant's peaceful enjoyment—Right of tenant to withhold rent—Right of defendant to plead as set-off damages sustained in action for rent—Apportionment—Constructive eviction—Abandonment by tenant —Transfer of Property Act (IV of 1882), ss. 108 (b) and (c), 111, 114.*

The Transfer of Property Act, (IV of 1882), does not deal with the question of the lessee's right to withhold payment of the whole or part of the rent, where his possession of the premises has been seriously obstructed by the landlord. Section 108 does not deal with the defence to an action for rent. It enacts that the lessor is bound, on the lessee's request, to put him in possession of property, but does not say that, if he does not do so, the lessee is not bound to pay the rent.

The Transfer of Property Act has made no change in the rule that non-delivery of possession of the premises is a good answer to a suit for rent.

Under clause (*c*) of section 108 of the Transfer of Property Act, the actual prior payment of rent is not a condition for the lessee's right to enjoyment without interruption. The clause does not purport to confer any right or cast any liability on the lessor or lessee as a matter of law, but to state that a certain contract shall be taken to have been entered into between the parties. If the clause is to be read as importing a condition, it can only be so read in cases where the lessee claims actually to enforce his right to damages for breach of the covenant for quiet enjoyment.

The method of obstructing the tenant's enjoyment without actually evicting or turning him out is known as constructive eviction, *i.e.*, where the landlord commits wrongful and unlawful acts which deprive the tenant of the beneficial use and enjoyment of the property. In such cases of constructive eviction, the tenant enjoys immunity from the payment of rent until the landlord again permits him to have quiet enjoyment.

The tenant, however, is not entitled to withhold payment of the entire rent due to the landlord, where the obstruction caused by the latter has entailed on the tenant damages in a lesser amount than the amount of rent due by him.

If the landlord does not put the lessee in possession of the whole of the premises leased, the latter is not bound to pay any portion of the rent. If the landlord is unable to do so, the tenant may be entitled to rescind the lease, but he cannot insist on keeping possession of a part of the premises and yet refuse to pay rent for that part. If, after putting the tenant in possession of the property leased, the landlord obstructs his enjoyment of a portion thereof, it is open to the tenant to say that he is not willing to enjoy a portion of the premises, paying proportionate rent, but would treat the whole lease as rescinded during the period of such obstruction, but, in that case, it is his duty to restore to the landlord the part of the premises still remaining in his occupation and not retain possession of it until he is again put in possession of the whole of the leased property.

Landlord and Tenant—contd.

Where a tenant remains in a portion of the premises leased after obstruction by the landlord, the landlord is entitled to rent for that portion either on the contract of lease or as compensation for use and occupation and in such cases the tenant is estopped from pleading that he is not liable for the rent of that portion. His right in law is to damages, while he is liable to pay the rent and it is only a rule of convenience that he should be allowed to enforce his right for damages by setting them off in the landlord's action for rent. MEENAKSHI SUNDARA NACHIAR *v.* CHIDAMBARAM CHETTY, 12 M. L. T. 124; 23 M. L. J. 119; (1912) 1 M. W. N. 813 **711**

———— ———— ————*Non-transferable occupancy-holding—Landlord taking mortgage of holding—Whether evidence of transferability—Purchaser of holding—Taking assignment of mortgage from landlord—Knowledge of landlord of previous purchase of assignee from tenant—Estoppel—Whether landlord estopped from denying assignee's right—Fraud upon assignee.*

The fact that the landlord himself took a mortgage of a certain non-transferable occupancy-holding under him, would, by itself, be no evidence of transferability of *jotes*, because a landlord himself can purchase or take a mortgage of a holding though non-transferable.

The defendant purchased a non-transferable occupancy-holding in execution of his own mortgage decree. The plaintiff-landlord held a mortgage of the same holding, and the defendant took an assignment of the mortgage for consideration. The plaintiff had full knowledge of the purchase of the holding by the defendant and of the fact that he was taking the assignment in order to perfect his title. The plaintiff subsequently sued the defendant for recovery of possession, on the ground that as the holding was non-transferable, the defendant got no title from his purchase:

Held, that the plaintiff-landlord was estopped from denying that the defendant had acquired a right to the *jote*. To allow the landlord to succeed would be to encourage a fraud upon the defendant. MOHESH NARAIN ROY *v.* MAHARAJ BAHADUR SINGH **171**

———— ———— ————*Notice to quit—Notice that tenant shall have to pay enhanced rent if he keeps premises in occupation, whether sufficient.*

The plaintiff in this case let out a shop to the defendant on an oral lease from month to month at a monthly rent of Rs. 18-8. On September 4, 1910, the plaintiff served the defendant with a notice in the following terms: "In respect of the shop, some persons offer Rs. 27 a month; you are, therefore, informed by this notice that if from the 1st *Aswin* 1318, you want to keep the shop in lease, you shall have to pay Rs. 27 a month." The defendant continued in occupation but refused to pay the enhanced rent. Subsequently, on the 2nd December 1910, the plaintiff served the defendant with a notice calling upon him to pay rent at the enhanced rate for three months and at the same time requiring him to quit on the 16th December 1910:

Held, that the first notice was not sufficient to terminate the tenancy or to enhance the rent. SHAKHI CHAND *v.* RAM CHANDRA MARWARI **906**

Landlord and Tenant—contd.

———— ———— ————*One of several tenants registered in landlord's books—Suit for rent against him—Disclaimer by him—Forfeiture—Suit for ejectment against all tenants, not maintainable—Act of disclaimer not within scope of authority—Partial forfeiture.*

Defendant No. 1 alone was registered as tenant in respect of a holding in the books of the landlord, the plaintiff, though defendants Nos. 2 and 3 also were jointly interested in the tenancy. The plaintiff sued defendant No. 1 for rent. The defendant No. 1 denied the title of the plaintiff and the suit was dismissed. The plaintiff then sued to eject all the defendants on the ground that the tenancy was forfeited by disclaimer:

Held, that when defendant No. 1 repudiated the tenancy, he acted beyond the scope of his authority; that, therefore, his disclaimer could not operate as a forfeiture of the tenancy, in so far as the second and third defendants were concerned, that there could not be a forfeiture of a tenancy in part, and that the claim for possession was not maintainable. BIRENDRA KISHORE MANIKYA BAHADUR *v.* BHUBANESWARI **620**

———— ———— ————Patni *lease—Construction—Annual rent fixed at certain amount—Payment of Government dues to be made by tenant out of rent—Remission of portion of Government dues—Who is to get benefit.*

Under a *patni* lease, the annual rent was fixed at Rs. 1,580-8-7, out of which Rs 1,080-8-7 was to be paid into the Collectorate by the tenant on account of Government dues payable by the landlord and the balance Rs. 500 was to be paid to the landlord as *malikana*. The lease provided that if any new imposts be levied by the Government in the future over and above the amount stated in the *kabulyat*, the tenant would be liable for the same but it did not provide that the tenant would be entitled to the benefit of any remission. The lease also provided that save and except *malikana*, the landlord will have no right and interest whatever. Subsequently the Government demand was reduced by Rs. 48-7-3 a year:

Held, that the landlord was entitled to the benefit of this sum, that is, he may realise it from the tenant in addition to the *malikana* Rs. 500. JANAKI BALLAV SEN *v.* GOPAL LAL ROY **301**

———— ———— ————*Permanent lease—Condition that if lessor in future take up cultivation, lessee will have to give up land—Whether condition valid—Bengal Tenancy Act (VIII of 1885), s. 178.*

A lease, which embodied a permanent settlement for agricultural purposes, contained a clause to the effect that if the lessor took up cultivation in future, that is, after twelve years, then the lessee would have to give up the land:

Held, that the clause was inconsistent with the interest created in the lessee, was bad for remoteness and because it contravened the provisions of section 178 of the Bengal Tenancy Act, as it tended to bar the acquisition of a right of occupancy by the lessee. BANAMALI CHOWDHURY *v.* RAM KINKAR **575**

———— ———— ————*Permanent lease—Stipulation for payment of Government revenue—Increase in Government revenue on re-settlement—Whether tenant liable to pay the increase.*

Landlord and Tenant—contd.

Where, under the terms of a permanent lease, the lessee agreed to pay a fixed annual rent and a certain sum which was the Government revenue:

Held, that the lessee was not liable for any increase in the revenue imposed by Government on a subsequent re-settlement. KOLAKKOT KUNTAMBI VYDIAR *v.* PUDIKAKANDYIL PARKUM, (1912) 1 M. W. N. 934 **574**

———————— *Permissive occupation—Agreement to execute a lease not carried into effect—Claim for use and occupation — Madras Rent Recovery Act (VIII of 1865)—Compromise in prior suit, effect of.*

Where a person gets into possession of another's land on an oral agreement to execute a lease in the latter's favour and continues in such possession without executing the lease, no tenancy is created, and the person who is in such permissible occupation is liable in a suit by the owner for damages for use and occupation.

The fact that a prior suit by the owner for use and occupation was compromised by the plaintiff accepting a certain amount from the defendant should not alter the previous relation of permissive occupation and create a legal tenancy between the parties. KAYA RAMAKRISHNA, *In re* **432**

———————— *Receipt of rent from transferee of holding—Receipt not as from transferee but agent of old tenant, effect of—Pleader, authority of—Receipt of claim from transferee and making it over to plaintiff—Whether amounts to recognition of validity of transfer—Pleader—Admission of question of fact, when binds client.*

When rent has been received from the transferee of a holding not as a transferee but only as the agent or representative of the original tenant, there is no recognition of the validity of the transfer.

In a suit for rent, the tenant alleged that he had transferred the holding, and the transferee was added as a defendant. The latter then made a payment of the amount claimed to the plaintiff's Pleader who certified the payment to the Court and made over the amount to the plaintiff:

Held, that the acceptance of the sum paid by the transferee did not amount in law to a recognition of the validity of the transfer.

A Pleader can bind his client by an admission upon a question of fact, provided that such question falls within the scope of the suit in which he has been retained.

Therefore, where there is no question as to the liability of a transferee-defendant in a suit against the transferor-tenant, much less is there any question as to the validity of the alleged transfer, it would be beyond the scope of the authority of the Pleader to bind his client by an admission of the validity of the transfer. DIGBIJOY ROY *v.* ATA RAHMAN **156**

———————— *Registered tenant—Surrender by registered tenant—Collusion with landlord—Prejudicing right of unregistered co-sharer tenant—Validity of surrender—Bengal Tenancy Act (VIII of 1885), s. 86.*

It is not open to a registered tenant of an occupancy-holding to surrender, in collusion with the landlord, a part of the holding in favour of the latter, with the express object of destroying the right of his co-sharers

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or their transferees and thus prejudice their title and possession; and the surrender cannot be accepted as a good foundation for an action in ejectment by the landlord. GOBINDA CHANDRA ROY *v.* UDAY CHANDRA SUT **264**

———————— *Rent stated in kabulyat—Partition kept in abeyance or hajat for certain years—Landlord suing for full amount—Enhancement—Bengal Tenancy Act (VIII of 1885), s. 29.*

In a *kabulyat*, it was stated that the rent of the holding was Rs. 23 odd, that Rs. 14 odd was to be kept in abeyance and that for three years, the tenant would be liable to pay Rs. 8 odd. At the end of that time, he was to take a fresh settlement and execute a fresh *kabulyat* and if he did not do so, he was to be liable for rent at the rate of Rs. 23 odd. After the expiry of the period, no fresh settlement having been taken by the tenant, the landlord sued for rent at the higher amount:

Held, that rent being defined as what was lawfully payable in money, the amount payable during the first three years of the tenancy was Rs. 8 odd; that if at the end of that time the landlord desired to realise rent at Rs. 23, that was enhancement of the rent; that the stipulations in the *kabulyat* were a mere device to defeat the provisions of section 29 of the Bengal Tenancy Act, and that the landlord was entitled to a decree for rent at Rs. 8 odd only. KHITISH CHANDRA LAHIRI *v.* GERPA HAZRA **878**

———————— *Suit to eject tenant—Denial of landlord's title—Absence of notice to quit.*

In a suit to eject a tenant, the latter denied plaintiff's title and the allegation in the plaint that the title was denied before suit was not traversed in the written statement. Nor did the defendant raise the plea in his statement of the want or inadequacy of notice, but took it only in the grounds of appeal:

Held, that the defendant was not entitled to rely on the plea of want of notice in bar of plaintiff's claim. ARMUGAM PILLAY, *In re* **584**

———————— *Trees planted in zemindar's land with permission—Non-payment of rent—No denial of title—Zemindar's title not extinguished.*

Defendants planted trees in the plaintiff's land with his permission. They, however, paid no rent or customary dues to the plaintiff for a very long time. Non-payment was not coupled with denial of title of the plaintiff:

Held, that non-payment of rent was not sufficient to extinguish the plaintiff's right as *zemindar*. ANROOP MISIR *v.* KEDAR PANDE **338**

Land revenue—*Land Acquisition Act (I of 1894), s. 16—Acquisition for a Municipality—Transferee of Municipality*—Inam *land—Exemption from revenue—Madras District Municipalities Act (IV of 1884), s. 279.*

Certain *inam* land was acquired for a Municipal Council under the Land Acquisition Act and by successive sales the plaintiff became the owner of it. He contended that the Government was entitled only to quit-rent as from the *inamdar* and not ground rent:

Held, that when the land vested in the Government, it became ordinary Government property liable to assessment in the hands of any person who might

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afterwards become its occupier. If the plaintiff claimed to hold the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of the ordinary assessment. The Government order conferring an absolute property on all transferees from a Municipality simply removed all the objections to the transfer on the ground that the transferor is a Municipal Council and did not grant to such transferees an exemption from payment of land revenue. CHALLAPALLI HANUMANULU PANTULU *v.* SECRETARY OF STATE, 11 M. L. T. 207; 22 M. L. J. 445 **376**

Lease. *See* LANDLORD AND TENANT; PATNI LEASE.

———Forfeiture condition—Election by landlord to avail himself of forfeiture, whether revocable—Subsequent agreement to revive the tenancy—Lessee again put in possession—Compensation for use and occupation **445**

——— for more than a year—Registration **830**

——— Sale and mortgage, difference between **385**

——— of salt-pan legal without Collector's sanction **830**

———*Indefinite term—Heritability—Inference from circumstances—Lease for building and residential purposes.*

A lease for an indefinite term is not necessarily heritable.

But it is open to a Court to hold from the circumstances of a particular case that the lease-hold interest was intended to be heritable.

Where there is a lease for building and residential purposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenancy, the lease-hold interest is heritable. HARI LAL *v.* RUP MANJORI BURMONI **137**

Legal Practitioners Act (XVIII of 1879), s. 36 **307**

——— **s. 36**—*Tout—Inquiry to be made by Magistrate himself—Power not to be delegated—Evidence to be recorded—Opportunity of cross-examination of witnesses to be given to alleged tout.*

An inquiry, under section 36 of the Legal Practitioners Act, must be made by the District Magistrate himself, and he cannot delegate his powers to any subordinate officer.

The decision of a Court determining that a person is a tout must be based on substantial legal evidence.

The person against whom the evidence is directed must have an opportunity of cross-examining the witnesses. HARI PADA MUKHERJI, *In re*, 13 CR. L. J. 510 **654**

Letters of Administration. *See* PROBATE AND ADMINISTRATION ACT, s. 82.

———Court-fee **621**

——— not to be granted when proper remedy of petitioner is to file regular suit to recover property **425**

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Lien—Agreement to mortgage **206**

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Limitation—Action in ejectment by purchaser at *patni* sale **869**

———Application for execution of mortgage-decree—Starting point **732**

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———Claim for damages for wrongful detention of money **911**

———Claim for rent—Accrual of right **393**

———Decree obtained by person under no disability—Minor heir—Effect of subsequent disability on the running of limitation **829**

———Dispossession of tenant by stranger—Tenancy from year to year—Abandonment by tenant—Ejectment suit by landlord against trespasser **146**

——— Execution of decree—Decree for permanent injunction—Limitation **945**

———Execution of decree—Twelve years' period to commence from the date when decree is capable of execution **822**

———Hindu Law—*Mitakshara*—Partition suit—Defence that plaintiff's father had got his share and was expelled from family—Re-appearance of plaintiff in village **184**

———Instalment bond—Default in payment **856**

———Joint family property passing to a stranger by sale **394**

———Mortgage by conditional sale—Foreclosure **240**

———Suit for arrears of revenue payable or paid by *lambardar* **733**

———Suit for pre-emption—Purchase property—Lease to vendee **890**

———Suit for redemption of mortgage—Plea of purchase of mortgaged property by defendant—*Onus* of proving absolute conveyance **609**

——— Suit for refund of *tervajasti* **328**

———Suit to set aside award **819**

———Suit to set aside *ultra vires* order **517**

———Transmission of decree for execution—Simultaneous or concurrent execution by Court which passed decree and to which it is sent for execution—Application to latter Court for execution—Dismissal of petition—Subsequent application to Court which passed decree—Application to 'proper Court' **738**

———*Alienation by mother as guardian—Suit by son to declare it invalid—Limitation Act (XV of 1877), Sch. II, Arts. 44, 144.*

The period of limitation for a suit for a declaration that a sale of the plaintiff's property by his mother as his guardian is not binding on him is three years from the date of the plaintiff's majority under Article 44 of the Limitation Act. SIVAVADIVELU PILLAY *v.* PONNAMMAL, 11 M. L. T. 198; (1912) 1 M. W. N. 383; 22 M. L. J. 404. **365**

———*Mortgage by conditional sale—Mortgagee entitled to but not obtaining possession—Foreclosure proceedings taken after 12 years—Suit for possession barred—Regulation XVII of 1806—Limitation Act (XV of 1877), Sch. II, Arts. 135, 144,*

Limitation—contd.

In a mortgage by conditional sale, the mortgagee was entitled to immediate possession but he never took possession under the mortgage. He did not take foreclosure proceedings under Regulation XVII of 1806 within 12 years of the date fixed in the deed of mortgage for payment of mortgage-money.

After the expiry of 12 years, he took foreclosure proceedings and then sued for possession as owner:

Held, that the suit was barred by limitation either under Article 135, or Article 144, of Schedule II, Limitation Act, 1877. NAND LAL *v.* GOOJAR, 178 P. W. R. 1912 **275**

——————*Sale in execution—Deposit of money by auction-purchaser—Application by judgment-debtor to set aside sale—Success in first Court—Surplus sale-proceeds taken away by another decree-holder of judgment-debtor—Subsequent reversal of sale—Suit by auction-purchaser for refund of money against second decree-holder—Limitation Act (XV of 1877), Sch. II, Arts.* 62, 97, 120.

A suit brought by an auction-purchaser to recover money from the defendant who had, after the sale and the deposit of the money in Court and before the sale was set aside on appeal, attached that sum in execution of his decree against the judgment-debtor as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, is governed by Article 120 of the second Schedule to the old Limitation Act, 1877, that is to say, the period of limitation is six years from the date when the sale was set aside by the Appellate Court.

Articles 62 and 97 contemplate a suit brought by one of the contracting parties against the other to recover the money which has been paid at the sale which owing to the default on part of the vendor has become infructuous. AMRITA LAL BAGCHI *v.* JOGENDRA LAL CHOWDHURY **707**

——————*Suit to remove encroachment on public way—Continuing cause of action—Suit to oust defendant from* shamilat—*Limitation Act (XV of* 1877), *s.* 23, *Sch. II, Arts.* 32, 120, 142, 144, 146*A*.

A suit for ejectment of a person from a specific field is not brought within section 23 of the Limitation Act by the fact that the field has been recorded as part of a thoroughfare and *shamilat deh*.

Where in spite of an encroachment on a road, the road left is sufficiently broad for the use of the public, the encroachment cannot be treated as an interruption of easement giving a recurring cause of action *de die in diem* under section 23 of the Limitation Act.

A suit to oust the defendant from a specific portion of the *shamilat deh* occupied by him adversely to the rest of the proprietors or to remove an obstruction to the enjoyment of the *shamilat* is governed by Article 120 of the Limitation Act. ACHAR SINGH *v.* BADHAWA SINGH, 132 P. W. R. 1912 **285**

——————*Suit for possession by auction-purchaser—Plaintiff to prove his title within time—Burden of proof.*

In a suit the defendant cannot be put to the defence of his title at all unless the plaintiff claims from the Court the relief to which he is entitled within what the Legislature has laid down to be a suitable time with reference to the facts of each particular case. BHOLE SINGH *v.* BHAGWANT SINGH, 10 A. L. J. 13 **10**

Limitation—concld.

——————*Suit by* zemindar *for declaration of title and possession or alternatively for assessment of rent—Record-of-rights—Publication, date of—Commencement of period of limitation.*

On February 11th, 1895, the defendant set up a title before the Settlement Officer claiming to hold certain lands rent-free. No actual decision by the Settlement Officer was come to, but the Record of Rights, which was finally published on July 9th, 1906, contained entries to the effect that the defendant was a settled *raiyat*, and that no rent had been assessed in respect of those lands. A suit was subsequently brought within 12 years from the date of the publication of the Record of Rights, by the *zemindar* for a declaration of his title and for *khas* possession of the lands or in the alternative for assessment of rent:

Held, that the suit was not barred, as on the publication of the Record of Rights, it was open to the plaintiff to rely upon the entries therein as a tacit recognition of his right to have rent assessed at any rate within 12 years of this date. AMAN GAZI *v.* BIRENDRA KISHORE MANIKYA BAHADUR, 16 C. W. N. 929 **64**

Limitation Act (XIV of 1859), s. 1 (12) **240**

——————**(XV of 1877), s. 5** **455**

——————**ss. 7, 8**—*Execution creditor—One of two execution creditors minor—Whether other can grant valid discharge—Limitation for petition of execution—Execution—Limitation.*

A joint execution creditor is a joint creditor within the meaning of section 8 of the Limitation Act of 1877.

Where one of two joint execution creditors is a minor, the other execution creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minor. JAGARNATH SINGH *v.* MOHABIR DAS **664**

——————**s. 8** **664**

——————**s. 23** **285**

——————**Sch. II, Art. 10**—*Pre-emption—Property leased to vendee—"Capable of physical possession"—Limitation—Merger* – Res judicata—*Estoppel—Suit for pre-emption—Plea of bar by limitation—Suit dismissed as premature—Plea of limitation in subsequent suit.*

When property sold is in the possession of another person as lessee, it is not capable of being taken into physical possession by the vendee, and the limitation for a pre-emption claim runs from the date of the registration of the deed of sale.

By a sale-deed executed and registered on the 26th June 1897, *A.* purchased certain land. The land conveyed by the sale had already been leased to *A.* for nine years by a lease executed on the 9th April 1895 and expiring on the 5th June 1904. The sale-deed purported to take effect from the expiry of the lease but did not reserve any rent to the vendor.

On 1st July 1903, *B.* filed a suit for pre-emption against *A.*, who pleaded that the suit was time-barred. *B.*, then, urged that the sale only took effect from the date of the expiry of the lease. It was then pleaded on *A*'s. behalf that in that case the suit was premature, and on that view, it was dismissed.

On the expiry of the lease, *B.* again sued *A.* for pre-emption:

Limitation Act—(1877)—contd.

Held, (1) that there was no *res judicata* against *A.* as the decision in the previous suit merely amounted to this that on *B.*'s own contention, the claim then made was premature; there was no decision of the plea that the claim was even then time-barred or not;

(2) that there was no estoppel by *A.*'s plea in the former case as *B.*'s position had in no way been affected by it, for if limitation ran from the date of sale, the claim was then already barred ;

(3) that if the lease did not merge in the sale, the present suit was barred under the 2nd part of the third column of Article 10 of the Limitation Act;

(4) that if the lease merged in the sale, the possession of *A.* was under the sale from the date of sale and on this view too, the suit was time-barred. RAMJI *v.* SHEIKH MANSUR, 8 N. L. R. 68 **890**

——————— **Sch. II, Art. 14**—*Suit to set aside* ultra vires *order*—*Bombay Land Revenue Code (Act V of* 1879), *ss.* 73, 135—*Collector's power to interfere with private property.*

If a Collector purports to deal with land which is *prima facie* the property of an individual who has been in peaceful occupation thereof and not of the Government, he is not dealing with that land in his official capacity but is acting *ultra vires.*

Article 14 of the Limitation Act, 1877, does not apply to a suit to set aside an order which is *ultra vires* of the officer passing the order. MALKAJEPPA *v.* SECRETARY OF STATE, 14 BOM. L. R. 332; 36 B. 325 **517**

——————— **art. 16**—Suit for refund of *tirvajasti* **328**

——————— **art. 32** **285**

——————— **art. 44** **365**

——————— **art. 62** **707**

——————— **art. 91** **820**

——————— **art. 97** **707**

——————— **art. 115** **911**

——————— **art. 120** **285, 707**

——————— **art. 135** **240, 275**

——————— **art. 142** **285**

——————— **art. 142** — *Plaintiff's possession—Form of issue.*

In a suit for possession falling under Article 142 of the Limitation Act, 1877, the issue should properly be "whether the plaintiff was in possession within 12 years prior to the suit." RANGACHARIAR, *In re*, (1912) 1 M. W. N. 175 **190**

——————— **art. 144** **240, 275, 285, 365**

——————— **art. 146A** **285**

——————— **art. 147** **240**

——————— **art. 164** — *Limitation Act (IX of* 1908), *Sch. I, Art.* 164—*General Clauses Act (X of* 1897), *s.* 6—*Limitation*—Ex parte *decree, application to set aside.*

If the right of a defendant to make an application to set aside an *ex parte* decree, on the ground of non-service of summons on him, was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before the passing of Act IX of 1908, the provisions of Article 164 of Schedule I of the Limitation Act of 1908 cannot revive the right, for section 6 of the General Clauses Act, 1897, distinctly provides that the repeal of an Act would not have the effect of reviving any right not in force or existing at the time the repeal was made. NEPAL CHANDRA ROY CHOWDHURY *v.* NIRODA SUNDARI GHOSE, 39 C. 506 **551**

Limitation Act (IX of 1908), ss. 4, 31 (1)—*"Prescribed" meaning of, in s.* 4—*General Clauses Act (IX of* 1897), *s.* 10.

Where a suit, to which the two years' period of grace provided for by section 31 (1) was appealable, was instituted on the 8th August 1910, the 7th August 1910 being a Sunday, the suit was not barred by limitation.

Although in such a case the limitation would not be saved under section 4 of the Limitation Act, yet it would be so under the provisions of section 10 of the General Clauses Act. RAHMATUL FATIMA *v.* ASHRAF ALI **439**

——————— **s. 5** **562**

——————— **s. 5**—*Appeal—Decision of two cross-appeals—Two decrees framed—Appellant believing in the existence of only one decree—Appeal filed against one decree only—Sufficient cause.*

Two cross-appeals were decided by an Appellate Court and two separate decrees were framed, one in respect of each appeal. A second appeal was filed in respect of only one decree

The framing of two separate decrees in the lower Appellate Court was quite unnecessary and the appellant in the second appeal was naturally misled into thinking that only one decree had been drawn up and he consequently appealed from one decree:

Held, that the appellant had sufficient cause, within the meaning of section 5 of the Limitation Act, for not filing the appeal as to the other decree within the prescribed period of limitation and should be allowed to file a copy of the other decree. DHAN SINGH *v.* KAHN SINGH, 191 P. W. R. 1912 **140**

——————— **ss. 5, 12**—*Privy Council Appeal—Application for leave—Allowance of period occupied in obtaining copy of decree—Date of signing decree—Delay for which applicant not responsible—Application for copy made after period of limitation had expired—Misled by Full Bench ruling—Sufficient cause for delay in filing application.*

Section 12 of the Limitation Act, 1908, has been made applicable to applications for leave to appeal to His Majesty in Council. Therefore, allowance must now be made for the period occupied in obtaining a copy of the decree.

There is no rule in the High Court providing that the Judges shall, at the time of signing decrees, note the date on which they sign so that in fact there is no definite record from which the date when a decree is signed can be accurately ascertained.

The principle underlying section 12 is that the applicant is only entitled to be excused for a delay for which he was not himself responsible.

Limitation Act—(1908)—contd.

A judgment of the High Court against which the applicant sought to appeal to His Majesty in Council was delivered on July 7, 1911. The applicant stated on affirmation in an affidavit that the decree was signed by the Judges about a month after the date of the judgment and received by the Peshkar from the Bench Clerk on August 8, 1911, and it was not till then that the decree was available for copying. Application for a copy of the judgment and decree of the High Court was not made till January 26th, 1912, that is to say, more than 6 months after the date of the judgment, and the copy was delivered on the same day. Application for leave to appeal to His Majesty in Council was then made on January 30th, 1912:

Held, that the applicant, having failed to apply for a copy of the judgment and decree within the period of limitation, cannot be allowed to say that he was prevented from filing the application in time by reason of the fact that the decree was not signed and that, therefore, he was not entitled to a deduction of the period which expired between the signing of the judgment and the signing of the decree.

But as there were grounds to support the contention of the applicant that he was misled by the Full Bench ruling in *Bani Madhub Mitter* v. *Matungini Dasi*, 13 C. 104, the High Court, under section 5 of the Limitation Act, 1908, admitted the application. HARISH CHANDRA TEWARI *v.* CHANDPUR CO. LD., 39 C. 766 **59**

——————— **ss. 5, 14** — *Probate—Receiver, appointment of—Appeal to Divisional Court—Subsequent appeal to High Court—Sufficient cause—Exclusion of time—Minority of appellant, effect of.*

In an application for grant of Probate of a Will, a Receiver of the property of the deceased was appointed by the District Judge. Against this order, an appeal was preferred to the Divisional Court which returned the appeal for presentation to the High Court. When the appeal was presented to the High Court, the period of limitation had expired but the appellant, who was a minor, sought the benefit of section 5 of the Limitation Act:

Held, (1) that as section 86 of the Probate and Administration Act clearly specified the High Court as the Appellate Court, the appeal was filed in the Divisional Court by carelessness and not by mistake of law;

(2) that there was no sufficient cause for not filing the appeal in the High Court within the time prescribed;

(3) that the time taken up in the Divisional Court could not be excluded;

(4) that the fact that the appellant was a minor did not justify extension of the period of limitation. HARNAM KAUR *v.* SOHAN SINGH, 205 P. W. R. 1912 **170**

——————— **s. 6**—*Minors' application asking to be brought on the record as legal representatives—Civil Procedure Code (Act V of 1908), O. XXII, r. 3—All the legal representatives need not apply jointly.*

Order XXII, rule 3 should not be construed to mean that no application should be entertained unless it is made by all the legal representatives of the deceased, as this would sometimes be impossible, especially within the prescribed time. Where possible, all the legal representatives should so apply, but an application by a legal representative is sufficient for him to be made a party.

By virtue of section 6 (1) of the Limitation Act, an application by a minor to be substituted as legal representative of a deceased party is valid if made during the period of his minority. MA SEIN HNYIN *v.* LUTCHMAN CHETTY, 5 BUR. L. T. 77, 6 L. B. R. 52 **366**

Limitation Act—(1908)—contd.

——— ——— ——— **s. 9** **829**

——— ——— ——— **s. 12** **59**

——— ——— ——— **s. 12, cl. (2), Sch. I, art. 179**—*Civil Procedure Code (Act V of 1908), O. XLV—Privy Council—Application for leave to appeal—Time for obtaining copies of judgment and decree, whether to be excluded.*

Clause (2) of section 12 of the Limitation Act of 1908 applies to an application for a certificate under Order XLV of the Civil Procedure Code, that is, the time spent in obtaining copies of the judgment and decree of the High Court is to be excluded in computing the period of six months within which an application for leave to appeal to the Privy Council must be presented. EASTERN MORTGAGE CO. LD. *v.* PURNA CHANDRA SARBAGNA, 39 C. 510 **497**

——— ——— ——— **s. 14** **170**

——— ——— ——— **s. 19**—*Acknowledgment, essentials of.*

For section 19 of the Limitation Act to apply, there must be a distinct acknowledgment of an existing liability or jural relation. A. P. S. V. FIRM *v.* SHREE SAFATULLA, 5 BUR. L. T. 81 **363**

——— ——— ——— **s. 23**—Continuing wrong—Infringement of trade-mark **116**

——— ——— ——— **s. 28** **24**

——— ——— ——— **s. 30** **240**

——— ——— ——— **s. 31** **222, 851**

——— ——— ——— **s. 31 (1)** **439**

——— ——— ——— **Sch. I, Art. 35** **240**

——— ——— ——— **art. 47** **24**

——— ——— ——— **art. 75** — *Instalment bond—Default of payment—Waiver—Limitation.*

An instalment bond provided that in case of default in payment of any instalment, the whole amount of the bond should be paid at once. None of the instalments were paid. The creditors, after the lapse of more than 3 years from the date of the first default, brought a suit to recover some of the instalments:

Held, that, in the absence of waiver, the suit was barred by limitation. CHANDAN SINGH *v.* BIDYA DHAR **856**

——— ——— ——— **art. 85**—*Mutual open and current account.*

There was a contract between plaintiffs and defendants that the former should purchase grain for the latter and store it in their godown, that the defendants should pay interest on the outlay, make a deposit to cover losses and that the defendants should be entitled to any profits that were made upon the re-sale of the grain by the plaintiffs:

Limitation Act—(1908)—contd.

Held, that the transaction was a mutual open and current account and the limitation began to run at the close of the year in which the last item was entered in the account. SHEO PARTAB SINGH *v.* BRIJ KISHORE **336**

——— **Sch. I, Art. 120**—Declaration of title merely ancillary to main relief **545**

——— **arts. 127, 144**—*"Share", use of, in Art. 127—Joint family property passing to a stranger by sale.*

One *S.* owned a 4-anna share in a village. He died leaving a widow, *P.*, and three sons, *G.*, *D.* and *B. G.* died leaving a son *T.* who also died leaving no issue. On 5th January 1893, *D.* and *P.* as guardian of her minor son *B.* executed a deed of sale in respect of the 4-anna share in favour of the defendant-appellant. The vendee had been in possession of the share ever since. On 11th September 1909, *B.* instituted this suit to recover possession of the whole share conveyed by the sale-deed of 1893 on the allegation that the sale was made for a fictitious price without any legal necessity during his minority.

It was found as a fact by the Courts below that the plaintiff had failed to prove that he came of age within three years before the institution of the suit:

Held, that the case was governed by Article 144 and not Article 127 of Schedule I of the Limitation Act.

The word "share" in Article 127 is used as a verb and not a noun. The suit contemplated by Article 127 is a suit by a member of a joint family against other members of the joint family to be restored to joint enjoyment on the allegation of having been unlawfully excluded from it. The Article does not apply to a suit where the alleged joint family property has passed by sale to a stranger. BISHESHAR TEWARI *v.* BISHESHAR DAYAL, 15 O. C. 111 **394**

——— **art. 132** **851**

——— **art. 134**—*Suit for redemption of mortgage—Plea of purchase of mortgaged property by defendant*—Onus *of proving absolute conveyance—Limitation.*

In a suit for redemption of a mortgage, where the defendant pleads that he purchased not the mortgage interest but the property absolutely from the mortgagee and claims the benefit of Article 134 of the Limitation Act, the *onus* is on the defendant to prove an absolute purchase affirmatively and not on the plaintiff to prove that the mortgagee did not purport to transfer more than his mortgage interest. VEERABADRA TEVAN *v.* VEERAPPA TEVAN **609**

——— **arts. 139, 140, 142, 144**—*Landlord and tenant—Dispossession of tenant by stranger—Tenancy from year to year—Abandonment by tenant—Ejectment suit by landlord against trespasser—Limitation.*

Where a tenant, who was holding land as a tenant from year to year, was dispossessed by a stranger who, from the date of dispossession, claimed to hold absolutely against both landlord and tenant, the landlord must sue to eject the trespasser before the expiry of 12 years from the date of such dispossession, especially where the land has been abandoned by the tenant more than 12 years before suit.

For such a suit, the cause of action does not arise on the day when the landlord gives notice to the tenant to quit.

Per *Abdur Rahim, J.*—*Quære*:—Whether, when land is in possession of a tenant, the term of whose lease is outstanding, and such tenant is ousted from possession by a trespasser, time will not run against the owner until after the expiry of the term?

Per *Sundara Aiyar, J.*—Possession held by a person must be held to be in his own right even in cases that are governed by Article 144 of the Limitation Act, in the absence of any evidence to the contrary or any relationship between the parties or other circumstances that would throw on him the *onus* of proving that he intended to hold possession in denial of the owner's right.

Article 140 of the Limitation Act does not apply to a suit against a tenant, as Article 139 provides limitation for such a suit. The inference to be drawn from Article 140 is, that in a suit against a trespasser by one who had leased his land to a tenant, limitation is not postponed necessarily until his estate falls into possession. If the trespasser asserts only a right of tenancy, then, no doubt, limitation would not commence against the landlord until the tenancy (if his right to it is complete) has come to an end. If he has not acquired by his adverse possession the right of a tenant under the statute, then Article 144 would be applicable, his possession being regarded as adverse to the lessor only when the latter's estate falls into possession.

As against a stranger, the landlord is entitled to recover possession even though his tenant's lease has not been terminated, and when the stranger purports to hold absolutely and not by the acquisition of a prescriptive title as against the tenant, the landlord's cause of action arises on the date of the dispossession of the tenant.

Article 140 of the Limitation Act applies to suits by remainder-men and reversioners against all persons, including trespassers and not merely against persons, holding a limited estate, on the expiration of which the remainder or reversion falls in. AMBALAVANA CHETTY *v.* SINGARVELU ODAYAR, (1912) 1 M. W. N. 669 **146**

——— **art. 140** **146**

——— **art. 142** **146, 945**

——— **art. 144** **146, 343, 394**

——— **art. 148** **343**

——— **art. 164** **551**

——— **art. 179** **497**

——— **art. 181** **732**

——— **art. 182** **732**

Lunacy Act (XXXV of 1858), s. 9—*Lunatic's estate—Appointment of manager—Court of Wards, failure to assume superintendence of an estate of lunatic, effect of—Guardian of property, appointment of.*

Where a person, possessed of landed estate, was declared by the District Judge as of unsound mind, it was not necessary for the Judge under the provisions

Lunacy Act—concld.

of Act XXXV of 1858 to inquire from the Court of Wards whether it would assume the management of estate and only in case of refusal by that Court to appoint a manager of the lunatic's property. The appointment by the Civil Court of a manager of a lunatic's property is valid, until the Court of Wards avails itself of its power of assuming the management of the estate. JAI RAJ KUNWAR *v.* DWARKA PRASHAD PANDE **265**

Madras Court of Wards Act (Mad. Act I of 1902), s. 63—Zemindar, *Ward of Court— Ward, trustee of temple—Appointment by Court of Wards of manager to discharge trustee's duties—Suspension by manager of temple* archakas—*Liability of minor trustee for acts done by the manager.*

A manager, appointed by the Court of Wards, under section 63 of Madras Act I of 1902, to discharge the duties of a temple trustee, for and on behalf of the minor ward, who is the trustee of the temple, is empowered to suspend or dismiss temple servants and *archakas*, who are bound to obey his orders.

A minor trustee is not liable for acts done by the officer appointed by the Court of Wards under the statutory authority conferred by section 63 of Madras Act I of 1902. GOVINDA IYENGAR *v.* RAGUNATHA DORAISINGAM **902**

Madras District Municipalities Act (IV of 1884), s. 279 **376**

Madras Estates Land Act (I of 1908), s. 3 (e)—Inam *village carved out of a permanently settled estate—Applicability of the Act.*

The provisions of Madras Act I of 1908 apply to an *Inam* village carved out of a permanently settled estate, which was owned by certain *Agraharamdars* and was afterwards purchased by the *zemindar*. NARAYANASAWMI NAIDU *v.* GANGADHARAM **784**

——— ——— ——— **ss. 3 (11), 19, 77, 189**—*Rent, suit for—Landowner's private land—Jurisdiction of Civil Courts.*

A suit by a landowner against his tenant for rent in respect of his *kamatam* or private lands (*i.e.*, lands not coming under the head of '*ryoti*' lands, as defined in section 3, clause 16 of the Madras Estates Land Act), must be instituted in the Civil Court and not in the Revenue Court. PALAGANI SREERAMULA *v.* VENKATA RANGAYYA APPA ROW, 12 M. L. T. 117; 23 M. L. J. 241 **124**

——— ——— ——— **s. 6**—Ryot *in possession—Prior possession of another person for* 12 *years.*

When a person dispossesses another from land, of which the latter was in possession for the statutory period and acquired a prescriptive right, he cannot resist a suit for possession simply because he happened to be in possession at the time the Estates Land Act came into force.

The object of section 6 of the Act is only to confer on the tenants in possession as against the landlord an occupancy-right. It is not intended to destroy the occupancy-right which vested prior to July 1908, in favour of another person wrongfully in possession in July 1908. MAHARAJA OF VIZAYANAGARAM *v.* MAHASWARAM RAMABHADRAYYA, 11 M. L. T. 256; (1912) 1 M. W. N. 403 **397**

Madras Estates Land Act—concld.

——— ——— ——— **s. 19** **124**
——— ——— ——— **s. 53** **393**
——— ——— ——— **ss. 77, 189** **124**

Madras Forest Act (Mad. Act V of 1882), s. 26, rr. 8 and 9—*Charge under rule* 8—*Omission to state that the place from where accused cut tree was "reserved forest"—Material defect.*

A charge framed under rule 8, section 26 of the Madras Forest Act, must clearly state that the place from where the accused cut a tree was a 'reserved forest.' The omission to state this is a material defect and vitiates the trial. GOVINDA REDDI *v.* EMPEROR, 13 CR. L. J. 504 **648**

Madras Irrigation Cess Act (VII of 1865) **328**

Madras Land Encroachment Act (Mad. III of 1905), s. 14—*Suit for refund of penal assessment levied—Party aggrieved—Cause of action—Notice by Government, whether canstitutes cause of action—Proof of possession—Presumption as to prior possession.*

Under Madras Act III of 1905, section 14, the cause of action arises when a party deems himself aggrieved by the levy of a penalty or by eviction or forfeiture, that is, on the date of the levy of the assessment or penalty or of the eviction or forfeiture. A mere preliminary notice given by Government before exercising these powers under the Act cannot be regarded as a proceeding by which a person is "aggrieved". The notice itself is no grievance and cannot be the starting point for the computation of limitation.

When possession for a certain period is shown, it will be open to a Court deciding the facts to prove that possession prior to that period was also in the party whose subsequent possession is proved. NARAYANA PILLAI *v.* SECRETARY OF STATE, (1912) 1 M. W. N. 703; 12 M. L. T. 165; 23 M. L. J. 162 **257**

Madras Motor Vehicles Act (I of 1907)—*Motor rules, Rule No.* 9—*Omission to blow the horn at turning—Negligence.*

An omission to sound the horn, when a motor car driver goes from the right side to the wrong side of the road for the purpose of turning, which causes a collision with another vehicle, constitutes an offence under Rule 9 of the Rules framed under the Madras Motor Vehicles Act, 1907. RATHNAM *v.* EMPEROR, (1912) 1 M. W. N. 539; 13 CR. L. J. 487 **487**

Madras Rent Recovery Act (VIII of 1865) **432**

——— ——— ——— **s. 7** **393**

Madras Revenue Recovery Act (II of 1864), s. 59—*Demand by Government—Madras Irrigation Cess Act (Mad. Act VII of* 1865)—Tirvajasti *levied under the Act, suit for refund of—Limitation Act (XV of* 1877), *Sch. II, Art.* 16.

A mere demand by Government purporting to be made under the Madras Revenue Recovery Act will not make section 59 of the Act applicable as amounting to a proceeding under the Act.

A suit for the refund of *tirvajasti*, levied under the provisions of the Irrigation Cess Act, is governed by Article 16 of Schedule II of the Limitation Act (XV of 1877), and not by section 59 of the Madras Revenue Recovery Act. RAVULA VENGALA REDDI *v.* SECRETARY OF STATE **328**

Mahars in Berar—Right to carcases **567**

Maintenance. *See* MUHAMMADAN LAW.

———— ————-Husband and wife **603**

————————Impartible estate—Remoteness of relationship **412**

Malabar Law and Usage—*Demise—Demise by junior member of* Tarwad—Onus *of proof that demise was on behalf of* Tarwad.

There is no presumption that when a junior member of a Malabar *tarwad* makes a demise, he does so on behalf of the *tarwad*. The *onus* of proving that he acted on behalf of the *tarwad* lies on the party affirming it. ETTAKKAMANA MANHOLI GOVINDAN *v.* AMAYA MANGALATH PUTHIA, (1912) 1 M. W. N. 821 **103**

———————— Nambudris—*Affiliation by* Illom *consisting of one male and two females—Issue begotten by another* Illom *for the first* Illom—*Status of female issue of the offspring.*

According to the usages among the *Nambudris* of Malabar, the members of an *Illom* consisting of one male and two females cannot validly affiliate another by requiring a member of another *Illom* to marry and beget issue for the first *Illom* unless he or the lady proposed to be married to him is previously made legally an heir of the aforesaid *Illom*.

The female issue born of the marriage would be validly affiliated if the said condition is fulfilled.

Quære:—Whether the affiliation is valid without the said condition precedent? TACHOOR POONKUZHI ILLATH *v.* NICHOLAS, (1912) 1 M. W. N. 728; 23 M. L. J. 165 **100**

Malabar Tarwad—*Possession, suit for, by a member—Subsistence of mortgages on property—Whether plaintiff should first sue to set aside mortgages—Right of junior members of a Hindu family.*

A junior member of a Hindu family or of a Malabar Tarwad need not, in the first instance, sue to set aside all alienations made by the manager or Karnavan before suing to recover possession of the property alienated by him. He may sue to recover possession on his title and will be entitled to recover such possession if the defendant does not prove the validity and binding effect of the alienation on the plaintiff.

Where a junior member of a Tarwad sued to redeem a mortgage, ignoring the subsequent mortgages created on the property by the Karnavan as not binding on him:

Held, that the suit was maintainable and that the plaintiff was not bound to sue to set aside the later mortgages. MANDOTH VEETIL CHAPPAN *v.* PUTHANPURAYIL RANU **587**

Malicious prosecution—Suit for damages against Secretary of State **955**

Malikana, *suit for*—*Calculation of* malikana—*Burden of proof—Previous litigation between parties—Decision on mixed question of fact and law, binding though erroneous*—Res judicata—*Interest on arrears of* malikana—*Damage for wrongful detention of money—Limitation Act (XV of* 1877), *Sch. II, Art.* 115—*Transfer of Property Act (IV of* 1882), *s.* 90—*Decree, personal, when to be made.*

In a suit for recovery of a sum of money claimed as *malikana*, the burden lies upon the plaintiff in the first instance to prove the amount of the net assets of the estate, with reference to which *malikana* is to be calculated. The burden is discharged on the production by the plaintiff of a judgment in a previous litigation between the parties in which it was determined that the net assets amounted approximately to a certain sum. The *onus* then shifts to the defendant to establish that since the date of the decision in question, the condition of the property had deteriorated and that the assets at the present time are smaller than at the time of the previous litigation.

In a previous litigation between the parties, it was decided that the defendants were not entitled to deduct the Government revenue and the cesses but only the collection charges from the gross income of the estate in order to determine the net assets upon which *malikana* was to be calculated:

Held, that this being a mixed question of fact and law, the decision upon it, though erroneous, was binding upon the parties and their successors.

Although interest on arrears of *malikana* cannot be claimed under the provisions of the Interest Act, because the sum which the plaintiff seeks to recover is not due under a written instrument, nor has there been a demand of payment in writing, yet it is open to the Court to make a decree for damages for wrongful detention of the plaintiff's money.

The limitation applicable to a claim for damages is that provided by Article 115, of the Limitation Act, and the plaintiffs are entitled to damages upon each annual sum in arrear only for three years antecedent to the suit.

A decree, under section 90 of the Transfer of Property Act, can only be made after it has been found upon the sale of the hypothecated properties that the judgment-debt has not been satisfied thereby. Till that stage is reached, no question of a personal liability arises.

Therefore, at the preliminary stage of the suit, no personal decree can be made in favour of the plaintiff in addition to the decree for sale of the hypothecated properties. MOHAMAYA PROSAD SINGH *v.* RAM KHELAWAN SINGH, 15 C. L. J. 684 **911**

Mandamus, High Court's power to issue, on public officer **441**

Marriage—Man and woman cohabiting continuously—Recognition of children as legitimate—Presumption of marriage not to be displaced by unsatisfactory evidence of marriage held many years ago, but only by conclusive evidence **328**

———— ————Proof of **813**

Master and Servant—*Pleadings—Point pleaded but not put in issue—Evidence adduced on the point—Reliance on the point—Construction of document—Hardship—One part repugnant to another—"Guarantee," meaning of—Facts justifying dismissal—Waiver of right to dismiss—Agreement to supply work during period of service—Provision of dismissal on notice—Wrongful dismissal—Conversion—Measure of damages—Act of God, when an excuse—Contract Act (IX of* 1872), *ss.* 39, 73.

In an action for wrongful dismissal of a servant, the defendant, the master, pleaded fraud, general misconduct, negligence and breach of contract on the part of the servant.

Master and Servant—contd.

The lower Court framed a general issue as to the justification for dismissal, in which the question of negligence and breach of contract was not separated from the question of fraud and misconduct. The parties, however, produced evidence on all the points. On appeal, the allegations of fraud and misconduct were abandoned by the master and he sought to rely only on negligence and breach of contract by the servant:

Held, that the master was entitled to drop the allegations of fraud and misconduct and rely entirely on negligence and breach of contract.

The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued in order that each may bring forward evidence appropriate to the issues.

No question of surprise arises if a point is covered by the pleadings and evidence is adduced by both sides regarding it, although no issue on the point has been framed by the lower Court.

The ordinary meaning of the word "to guarantee" is to 'promise' or to 'undertake.'

The argument *ab inconvenienti* is only admissible in the construction of an agreement where the meaning is obscure. A possibility of hardship to one of the parties under an agreement cannot be allowed to obliterate the terms of such agreement.

If there are two clauses or parts of a deed repugnant to each other, the first will be received and the latter rejected unless there is some special reason to the contrary.

When a man chooses to answer for the voluntary act of a third person, he is held to warrant his ability to procure that act.

Where the master does not repudiate a contract which has been broken by the servant, but merely intimates that he would claim damages for the breach of contract and allows the servant to continue to perform his part of the contract, such conduct amounts to a waiver of the master's right to repudiate the contract.

Ordinarily, it is not necessary that a servant should be dismissed by his master for a valid reason; it is sufficient if a valid reason in fact exists, even if the master be not aware of it at the time of the dismissal. But this rule has no application to a case where the master has knowledge of the facts constituting the justification for the dismissal, and deliberately condones them and waives his right to dismiss the servant on account of them.

An agreement to retain or employ a servant does not involve an undertaking to supply work unless such an undertaking is expressly contained in or must be necessarily inferred from the whole of the terms of the agreement. But a contract, in which the servant is engaged for a definite period and is to be paid by wages estimated with reference to his work, does ordinarily involve an obligation to supply work and this inference is stronger if the contract contains a stipulation providing for dismissal by giving a specified length of notice.

In actions for wrongful dismissal, the general rule is that the plaintiff may recover damages for the whole unexpired period of service. Where, however, it is provided that the agreement may be terminated at an earlier date by giving previous notice, the parties may reasonably be held to have contemplated the time limit of the notice as attaching to any liability for wrongful termination of the agreement. In such cases, the damages for wrongful dismissal should be limited to the period of notice required under the agreement.

Where the law creates a duty and a party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him; but where a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity.

The ordinary measure of damages in an action for conversion is the market-value of goods at the time of the conversion. JACOB ELIAS SASSOON *v.* DOSSA KALIAN, 5 S. L. R. 192 **757**

Master's liability for excise offence committed by servant **1007**

Memorandum of objection—*Damages claimed by only one of objectors—Common basis of claim—Award of damages to all.*

Where, in the memorandum of objections put in by the respondents-plaintiffs in an appeal, only one plaintiff claimed damages for an infringement by the defendants of a right common to all the plaintiffs:

Held, that damages could be awarded to all the plaintiffs as the basis of the claim was common to them all. SOMA BALLACHARIAR *v.* THIRUVENKATACHARIAR **409**

Merger—Purchase of property—Lease to vendee **890**

Mesne profits, *application for assessment of—Application in suit—Dismissal of application for default—Fresh application, if may be made—Application for restoration—Proper course to follow.*

An application for assessment of mesne profits, is an application in the suit, although section 244, clauses (*a*) and (*b*) of the Civil Procedure Code of 1882, directs that an application of this kind when made should be entertained by the Court in its execution department.

Therefore, such an application cannot be entertained as one for execution of the decree where a similar application previously made had been dismissed for the default of the plaintiff.

But the plaintiff is entitled to make an application for the restoration of the application which was dismissed for default. UPENDRA CHANDRA SINGH *v.* SAKHI CHAND **709**

——— ——— ——*Proper basis for assessment—Principle--What defendant got, not what plaintiff lost—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (12).*

In assessing mesne profits, the Court should take into consideration what the defendant made, not what the plaintiff lost.

The decree-holder had let certain land out to tenants which during the period of dispossession was cultivated by the judgment-debtor:

Held, that mesne profits should be calculated according to what the judgment-debtor gained by the cultivation of the land, not according to what the decree-holder lost by being deprived of rent. ANUKUL CHANDRA CHAKRAVARTI *v.* NABIN CHANDRA BOSE **I**

Minor applying for Succession Certificate through guardian **408**

——— Guardian—Contract by guardian—Suit on such contract **835**

Minor—concld.

———Guardian *ad litem* or next friend of minor, whether can make application without leave of Court, or whether he can agree to be bound by oath of the other party without such leave —Leave to be expressly recorded —Effect of absence of such leave —Agreement *void* against minor but only *voidable* against other parties—Minor—Duty of Court **161**

———Sale by *de facto* guardian of minor—Valid necessity, whether justifies alienation—Benefit to minor **576**

———*Absence of order appointing guardian* ad litem *—Irregularity—Minor properly represented in a suit —Effect of decree in such suit.*

A decree against a properly represented minor is binding upon him, but if he has not been properly represented, the decree is a nullity, and a claim brought to have it declared that the decree is a nullity is superfluous.

The absence of a formal order appointing a guardian *ad litem* is a mere irregularity. POKHPAL SINGH *v.* CHHIDU SINGH **903**

———*Proper guardians appointed — Negligence of guardian, effect of, on decree.*

Where a minor was represented in a suit by a duly constituted guardian and by a person who could legally act as such, he is as much bound by the decree passed in the suit as he would have been if he were of full age.

If the guardian neglected to support the case of the minor but there is nothing to show that he did so deliberately, that circumstance alone would not entitle the minor to avoid the operation of the decree. CHANDAR SEKHAR TEWARI *v.* BALAKDHAR DUBEY, 10 A. L. J. 149 **611**

——*Sale of minor's property by step-mother—Prior mortgage—Benefit.*

Where the step-mother of a minor, in order to discharge a mortgage by his father, sold the family property:

Held, that the sale was not binding on the minor since he was not personally liable for the debt and hence did not gain anything by the sale.

Held, also, that the minor was entitled to recover the property on payment of the mortgage-debt of his father discharged by the sale. RAMA REDDI, *In re*, 11 M. L. T. 403 **678**

Mischief. *See* PENAL CODE, s. 427.

Misjoinder of Charges. *See* CRIMINAL PROCEDURE CODE, ss. 222 TO 239.

——— **of parties and causes of action**—Objection to be taken at the earliest opportunity — Appeal, objection not allowed to be taken in **744**

Mistake—Suit to recover money paid by mistake —Ignorance of law **361**

Mortgage by conditional sale—Test **423**

———Mortgagee entitled to but not obtaining possession—Foreclosure proceedings taken after 12 years—Suit for possession barred **275**

Mortgage—contd.

——— **by conditional sale** — *Foreclosure—Limitation Act (XV of* 1877*), Sch. II, Arts.* 135, 144, 147*—Limitation Act (XIV of* 1859*), s.* 1, *cl.* 12*—Limitation Act (IX of* 1908*), s.* 30, *Sch. I, Art.* 135.

A mortgage by conditional sale was executed in 1830 with a provision that the mortgagee would be entitled to enter into possession of the property if the mortgage-debt was not paid on a certain date in 1850. The debt was not paid on that date. No application under Regulation VII of 1806 was made for foreclosure of the mortgaged property. On 11th of July 1910, the mortgagee brought a suit for foreclosure :

Held, that the suit was barred by limitation.

The cause of action arose on the mortgagor's failure to pay the mortgage-money on the due date in 1850 and the mortgagee's right to possession of the property mortgaged was extinguished under section 1, clause 12 of Act XIV of 1859 as soon as twelve years had elapsed from the due date and the subsequent creation of foreclosure suits could not revive the extinct right.

Section 31 of the Limitation Act, IX of 1908, had, therefore, no application and the suit was barred by Article 135 of the Limitation Act. RAM DAWAR RAI *v.* BHIRGU RAI **240**

——— **by co-owners**—Clandestine redemption and re-mortgage by one owner—Right of the other owner to redeem mortgage **500**

———Interest—Rule of *damdupat* **824**

——— of *Nankar* rights—Mortgagee's right to enforce payment against *Talukdar* **389**

———, sale and lease, difference between **385**

———Usufructuary mortgage — *Mushrut-ul-rehan*—Apportionment of mortgage-money—Liability of person claiming pre-mortgage of usufructuary mortgage **907**

———*Assignment of mortgagee's right—Registration—Transfer of Property Act (IV of* 1882*), ss.* 8, 54*—Intangible property.*

The interest of a simple mortgagee is plainly an intangible thing within the meaning of section 54 of the Transfer of Property Act, 1882, and the transfer of such interest must be made by a registered instrument. MUTSADDI LAL *v.* MUHAMMAD HANIF, 10 A. L. J. 167 **853**

———*Bond—Executant if can be attesting witness—Validity of mortgage—Charge — Decision of first Court that charge was created—No appeal by plaintiff—Whether Appellate Court could hold that mortgage-bond valid against other executant—Transfer of Property Act (IV of* 1882*), s.* 100.

Defendants Nos. 1 and 2 executed a mortgage-bond in favour of the plaintiff. The defendant No. 2 wrote the bond and signed as an executant and also as the writer and one of the two attesting witnesses. The first Court held that the bond did not create a valid mortgage as there was only one attesting witness but that it created a charge under section 100 of the Transfer of Property Act. The plaintiff did not appeal, but the defendants did. The lower Appellate Court held that no charge was created but that the bond could be taken as a mortgage against defendant No. 1 because it was possible to treat defendant No. 2

Mortgage—contd.

not as one of the executants but as the writer and one of the two attesting witnesses. A decree was made against defendant No. 1 for one-half of the amount to be recovered by sale of one-half of the mortgaged property:

Held (1) that the lower Appellate Court was not justified in re-opening the question as to the validity of the document as a mortgage, for the Court of first instance had decided against its validity and there was no appeal against that finding by the plaintiff;

(2) that a party to a document cannot, under any circumstances, be allowed to sign it both as an attesting witness and as an executant;

(3) that, therefore, the bond could not be held to be valid as against defendant No. 1 as a mortgage;

(4) that as the document, if valid, amounted to a mortgage, no charge was created by it on the property.

(5) that, the plaintiff could sue on the personal covenant, but that remedy having been barred, the suit should be wholly dismissed. DEBENDRA CHANDRA ROY v. BEHARI LAL MUKHERJI, 16 C. W. N. 1075 **666**

Mortgage-decree—Execution of decree for costs **23**

———— *Execution application—Limitation—Decree absolute, starting point—Transfer of Property Act (IV of 1882), s. 89—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182.*

In an application for execution of a mortgage decree, the date of the order absolute is to be considered as the date of the decree for the purpose of calculating the period of limitation. YEMANI CHINNA SHESHAYA v. VARANASI PEPAYA **732**

———— *Decree for sale by subsequent mortgagee—Prior mortgagee's suit for declaration that sale must be subject to his right—Jurisdiction—Valuation of suit—Specific Relief Act (I of 1877), s. 42, proviso.*

Where a mortgagee sued for a mere declaration that the mortgaged property should be sold under a decree for sale obtained by a subsequent mortgagee, subject to his own prior mortgage for Rs. 3,300: *Held*, that the Munsif's Court had no jurisdiction in the case.

Since a prior mortgagee can institute a suit for sale against a subsequent mortgagee, the suit for a mere declaration by the prior mortgagee would be opposed to the proviso to section 42 of the Specific Relief Act. NARNA BALLAYYA v. RUDRAVARAM VENKATAPPA, 11 M. L. T. 190; (1912) 1 M. W. N. 414 **221**

Mortgage-deed—Alteration of date to secure registration—Consent of mortgagee—Subsequent lessee of mortgagor—Suit upon mortgage—Mortgagor and his lessee whether competent to object to mortgage on ground of alteration **460**

———, *essentials of—Interpretation of deed—*"Muakhiza", *meaning of.*

In order that there may be a simple mortgage, there must be *(a)* a transfer of an interest in specific immoveable property, *(b)* a personal undertaking by the mortgagor to pay the mortgage-money, and *(c)* an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold.

Mortgage—contd.

The word '*muakhiza*' is not commonly employed to denote a simple mortgage. The root meaning of *muakhiza* is taking and the word is generally used in the sense of taking satisfaction or calling to account. DALIP SINGH v. BAHADUR RAM, 9 A. L. J. 550; 34 A. 446 **435**

———— *Execution of mortgage admitted by mortgagor but denied by his transferee—Consideration—*Onus *of proof.*

A., a mortgagee, brought a suit on the basis of the mortgage against the mortgagor and his transferee. The mortgagor admitted execution of the bond but denied receipt of consideration, while the transferee denied both execution and consideration:

Held, that the burden of proving the payment of consideration lay upon the plaintiff. SALUK SINGH v. AJUDHYA PERSHAD, 10 A. L. J. 108 **121**

———— Kanom—*Landlord and Tenant—Lease—Right of landlord to possession—Tenant, whether can dispute landlord's possession—Estoppel—Evidence Act (I of 1872), s. 115.*

A tenant, who has got into possession under a lease from the landlord, is bound to restore the landlord's possession before he can set up an independent title.

Where defendants got into possession under a *kanom* deed from plaintiff, and after the execution of the *kanom*, the plaintiff accepted quit-rent *pattahs* from Government in respect of some of the lands demised:

Held, that the arrangement between the plaintiff and Government did not bar plaintiff's right to possession from the defendants. NARAYANA NAMBUDRI v. MUHAMMAD **844**

———— *Mortgage for a fixed period of 150 years—Right of the representative of mortgagor to redeem before the expiry of the term—Clog on the equity of redemption.*

In a suit for redemption in which the deed of mortgage contained the words "*tarikh imroza se miadi 150 sal rahn kardi*" and, "*bad inqiza miad mukarra jab zar-i-rahn* 1,600 * * * * *ada kiya to fak karakar kabiz wa dakhil loonga*";

Held, that the fixation of the period was of the essence of the contract and the right to redeem did not mature before the expiry of the term fixed in the deed. ABDULLA v. SAADULLA KHAN **917**

———— *Pleadings—Sale subject to a morigage, effect of—Purchaser of a mere equity of redemption as distinguished from a purchaser of the property—Incumbrances, effect of merely notifying—Consideration, failure of, right of a purchaser to take the plea as to—Burden of proof as to failure of consideration on purchaser—Undue influence, competency to raise plea as to—Hard and unconscionable bargain.*

A person, who purchases property at an auction sale *subject to a prior mortgage*, is estopped from challenging the mortgage on the ground of the failure of consideration or undue influence.

A distinction must be drawn between the case of a purchaser who buys property *not subject* to a mortgage but with *notice* of a mortgage and subject to such risks as the notice may involve, and the case of a person who purchases property which is declared to be *subject* to prior mortgages. In the former case, the Court does not decide whether the mortgage subsists or not. If there is in reality a subsisting mortgage, the purchaser has to redeem it.

If, on the other hand, the mortgage specified in the proclamation of sale, is a fictitious mortgage or did not subsist at the date of the sale by reason of its having been previously discharged by payment, the purchaser acquires the property free from liability for the mortgage.

When the sale is held *subject* to a mortgage, the purchaser does not get any greater right than the right of redeeming the mortgage.

Where property is sold in accordance with a decree for sale on mortgage, the purchaser of the property cannot raise a plea of priority, in respect of the mortgage, not set up by the mortgagee in his suit for sale.

The purchaser of an equity of redemption stands in the shoes of the mortgagor by virtue of his purchase and cannot, therefore, be allowed to be in a better position than the original mortgagor himself. If, therefore, the purchaser raises a plea as to want of consideration, the burden of establishing it would lie upon him.

Where, in such cases, the mortgagor himself has not raised the plea as to undue influence or as to the bargain being unconscionable, the purchaser, who has purchased the property *subject* to such a *mortgage*, cannot take those pleas and ask the Court to reduce the interest on the ground of its being a hard bargain. RAM KUMAR *v.* DWARKA PARSHAD, 15 O. C. 211 **5**

———*Priority.*

In 1892, *A.* obtained a mortgage decree on a mortgage of 1879. *B.*, a subsequent mortgagee of 1898, sued on his mortgage and impleaded *A.* as a defendant. *A.* did not set up his decree of 1892 as a defence but set up another mortgage of 1890, which the Court found did not exist:

Held, that it was not subsequently open to *A.* to assert that he had priority over *A.* as regards the mortgage decree of 1892. CHANDAR SEKHAR TEWARI *v.* BALAKOHAR DUBEY, 10 A. L. J. 149 **611**

———*Property mortgaged different from property described—Transferee of mortgaged property not bound by the mortgage—Priority.*

In 1876, one *B.* purported to hypothecate four plots of land situated in *Mouza* Nagala Salendi. As a matter of fact, the name of Nagala Salendi was inserted in the mortgage-deed by mistake, the property was situated in *Mouza* Arazi Zabti. The heirs of *B.* sold their proprietary right in *Mouza* Arazi Zabti to one *K.* in 1910 free of all charges. In a suit brought on the basis of the mortgage of 1876, *held*, that *K.* was not bound by that mortgage. KINLOCK *v.* TOTA RAM **335**

———*Provision not to redeem for 58 years—Whether unconscionable.*

The provision in a mortgage deed that the mortgagor would not be entitled to redeem for 58 years is not *per se* a hard and unconscionable bargain. RAM PRASAD *v.* JAGRUP, 10 A. L. J. 157 **880**

———*Usual form in Upper Burma is usufructuary.*

In Upper Burma, the usual form of mortgage is not simple but usufructuary, and if an exception be set up, it should be proved. MI SAW MYIN *v.* MI SHWE THIN, U. B. R. (1912) I, 125 **919**

———*Usufructuary—Mortgagor to redeem on the last day of* Jeth *in a particular year—Notice—Mortgagee entitled to notice of redemption.*

A usufructuary mortgage contained a covenant that the mortgagor would redeem the mortgage on the last day of *Jeth* of the year 1317 *Fasli* corresponding with the 22nd of June 1910. On the 17th of June 1910, the mortgagor deposited in Court the full amount of the mortgage-money under section 83 of the Transfer of Property Act. The notice of deposit, however, could not be issued from the Court before 27th of June 1910:

Held, that the mortgagee was entitled to a notice of the deposit either on or before the 22nd of June 1910, and that, under the circumstances, he was entitled to maintain his possession and cultivate the land for two more harvests and was not liable to damages. DWARKA PERSHAD *v.* SHEOAMBAR KOERI **592**

———**Redemption**—Oral sale of equity of redemption to usufructuary mortgagee **343**

———Money left with purchaser for payment to a prior mortgagee—Amount due to mortgagee in excess of that deposited with the purchaser. **854**

———*Purchase of part of equity of redemption by plaintiff and another part by defendant—Right of plaintiff to redeem the whole mortgage—Consolidation—Mortgages to be united in one person—Transfer of Property Act (IV of 1882), ss.* 60, 61, 95.

The rule is that a mortgage is one and indivisible, and the exception only arises when the mortgagee, or, if there are more mortgagees than one, all such mortgagees have acquired in whole or in part the share of a mortgagor.

Plaintiff sued for redemption of a mortgage as the purchaser of a part of the equity of redemption. First defendant, who was one of the several mortgagees, was the purchaser of the other part:

Held, that the plaintiff was both bound and entitled to redeem the whole mortgage and not only the part purchased by him.

Both under section 61 of the Transfer of Property Act and the law prior to its enactment, it was necessary, for the consolidation of mortgages that the two mortgages to be consolidated should have become united in title or come into the same hand. VELAYADAIN CHETTY *v.* ALANGARAN CHETTY **605**

———**decree**—Deposit in Court—Security for mesne profits **383**

———**suit**—*Valuation.*

The proper valuation of a suit to redeem a mortgage is the amount of the mortgage or mortgages admitted by the plaintiff to be binding on him and not the mortgages set up by the defendant. The question of jurisdiction has to be decided on the averments in the plaint and not with reference to the pleas of the defendant. MANDOTH VEETIL CHAPPAN *v.* PUTHANPURAYIL RANU **587**

———**suit** against the manager of a Hindu joint family—Other members not impleaded as parties—Suit whether maintainable—Parties **126**

———by manager of joint Hindu family—Other members not impleaded—Parties, non-joinder of, whether fatal to the suit **138**

Mortgage—concld.

——— **suit**—*Mortgagor and mortgagee—Final decree—Accounts—Execution—Legality.*

Accounts between a mortgagor and mortgagee should be taken by the Court before passing a final decree. A provision in the judgment for taking accounts between the parties in execution is not in accordance with law. VARID SAHAYAM FERNANDEZ *v.* RANCHORDIN KHEKI, (1912) 1 M. W. N. 400 **362**

Mortgagee—Damages - Breach of contract—Mortgagee failing to discharge prior incumbrances with money left in his hands, effect of **526**

Muhammadan Law—Dower—Widow's right to sell immoveable property left by husband **196**

——— ——— ——— *Prompt dower, non-payment of—Wife's right under* Sunni *Law to refuse to surrender her person in spite of consummation—Decree for prompt dower passed by a competent Court out of Oudh*—Res judicata—*Oudh Laws Act (XVIII of* 1876), *s.* 5.

Under the *Sunni* Law, a wife has the right to refuse to surrender her person to her husband, in spite of consummation of marriage, so long as the prompt dower remains unpaid.

Where a decree fixing the amount of prompt dower was passed by a competent Court out of Oudh: *Held*, that the question could not be re-opened by the Oudh Courts and section 5 of the Oudh Laws Act had no application to the case as the matter had passed out of the stage of contract and dower had become a debt of record. WAJID ALI KHAN *v.* SAKHAWAT ALI KHAN, 15 O. C. 127 **747**

——— ——— ——— *Widow in possession of property left by her husband—Her title to retain possession until dower is paid.*

Where a Muhammadan widow obtains possession of her husband's property peacefully and quietly, she is entitled to retain such possession until her dower-debt is paid. MUMTAZUDDIN *v.* SAIDUNNESSA **687**

——— ——— ——— **Gift**—*Deed of gift—Registration—Delivery of possession.*

Mere registration of a deed of gift by a Muhammadan is not equivalent to possession. It is essential that the donor should give either actual or constructive possession of the property to the donee. RAHIMJAN BIBI *v.* IMANJAN BIBI **698**

——— ——— ——— **Guardianship**—*Sale by* de facto *guardian of minor—Valid necessity, whether justifies alienation—Benefit to minor—Partition—Decree directing division of a shop into a number of shares—Non-reservation of power to sell if division not effected—Power of Court to make order after decree.*

The *de facto* guardian of a minor can, under Muhammadan Law, alienate the minor's property in cases of urgent and imperative necessity, whether the property be moveable or immoveable. He can also do acts on behalf of the minor which, from their nature, must necessarily be beneficial to the minor. In either class of cases, there is no substantial difference between the power of such a person who has assumed the duties of guardian without lawful authority and of a legal guardian, though there are cases wherein the powers exercisable by a lawful guardian are not within the competence of other persons.

Muhammadan Law—contd.

According to the general principles of Muhammadan Law, the sale of a minor's property by an unauthorized guardian, even if it was not made for a valid cause, *i.e.*, for necessity, or under circumstances which would make the transaction purely advantageous to the minor, would, strictly speaking, be neither void nor voidable in the ordinary sense of the term. An alienation of the minor's property without any justifying cause is regarded as *maugut*, *i. e.*, its validity will depend upon the minor accepting the transaction on attaining majority. It is not inoperative until it is avoided, nor is it invalid unless and until it is ratified. It is a transaction in a state of suspense. Its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of the inception of the transaction. If he decides to adopt the transaction, it becomes valid from the inception; otherwise, it will be treated as void and of no effect from the very commencement.

A sale by a Muhammadan mother of her minor son's property to find money for the expenses of the minor's sister's marriage or for the discharge of family debts or for family purposes is not for a justifying cause, according to Muhammadan Law, and is, therefore, invalid.

Where a decree directed the division of a shop into 54 shares, without making any provision for the sale of the shop in case such a division could not be conveniently effected:

Held, that it was competent to the Court to make the latter order at any time subsequently. THANDAN VALAPPIL EASUF *v.* KOTUSERI VALAPPIL KOYA, 12 M. L. T. 147; (1912) 1 M. W. N. 889 **576**

——— ——— ——— Kashmiris of Jhelum town **556**

——— ——— ——— **Maintenance**—*Minor son—Right to maintenance not dependent on custody—Charge on property of father—High Court—Law applicable to Muhammadan family relations—English Law—Hindu Law*—Cutchi Memons.

When the family relations of Muhammadans, such as marriage, guardianship and maintenance, come into litigation before the High Court of Bombay, the Court should be guided by the laws and usages of Muhammadans. The English law of family relations cannot be applied to such cases.

The rights of maintenance are enforceable under Anglo-Muhammadan Law and the right to enforce them under section 9 of the Civil Procedure Code is unaffected by the fact that there is a concurrent permission for their enforcement in Criminal Courts under section 488 of the Criminal Procedure Code.

Under Muhammadan Law, a minor son can sue his father for maintenance. This right to maintenance can be enforced against the father even when the custody of the minor is withheld from the father and the minor is in the lawful custody of his mother.

The maintenance of a minor son cannot be charged on the father's property.

Cutchi Memons are governed by the principles of Hindu Law with regard to inheritance and succession only and not with regard to maintenance. MOHAMED JUSAB *v.* HAJI ADAM, 14 BOM. L. R. 336 **520**

Muhammadan Law—concld.

———————**Shia sect** — *Widow, childless—Dower—Immoveable property left by husband—Adverse possession—Estoppel—Mortgagor and mortgagee.*

The right to dower of a *Shia* Muhammadan widow, does not confer upon her a saleable estate in her husband's immoveable property.

A., a member of a joint Hindu family, ceased to be joint in food and joint in business, with *B.* and *C.*, the other members, but no partition of the family property was then made. After that he received a present of a considerable sum of money from his grandmother, with which he carried on the business of a money-lender on his own account, and out of his separate self-acquired property, he purchased some property in 1853-54 from a childless *Shia* Muhammadan widow, which was in 1846 mortgaged to *B.* and *C.* by her husband. The heirs of the husband sued, in 1906, for possession of the property, the representatives of the mortgagees upon the allegation that the mortgage had been discharged by the usufruct:

Held, that the defendants possessed a title by adverse possession and the suit of the plaintiffs must fail. PARBATI *v.* MUHAMMAD MUZAFFAR ALI KHAN, (1912) 1 M. W. N. 417; 11 M. L. T. 316; 9 A. L. J. 450; 15 C. L. J. 468; 14 BOM. L. R. 450; 23 M. L. J. 11; 34 A. 289; 16 C. W. N. 913 **196 P. C.**

———————**Wakf**—*Deed—Construction.*

There was a recital in a deed that the income of certain property be spent on the tomb and the *fateha* and *urs* ceremonies of a certain deceased person and in payment of the salary of the *Hafiz* who would read the *Quran* at the tomb but there was nothing to show that the income of the property was ever appropriated for the objects set out in the deed:

Held, that the property did not form part of the subject of a valid *wakf* under the Muhammadan Law. GHULAM HAZRAT *v.* GULZARI LAL **42**

———————*Distribution of food to poor on the occasion of* urs *and* fateha—*Valid charitable object.*

The distribution of food to the poor and the like on the occasion of *urs* and *fateha* is a valid religious charitable object for a Muhammadan *wakf*. ABDUR RAFEY KHAN *v.* BANNI BEGAM **36**

Mukhtarnama—Duty leviable **122**

Municipality — *Assessment — Lands forming part of revenue paying estate—Whether exempted from assessment—'Holding', basis of—Occupation—Bengal Municipal Act (III B.C. of* 1884), *ss.* 6 *cl.* (3), 101, 103, 110—*Jurisdiction—Civil Court—Declaration that assessment illegal.*

The mere circumstance that the lands assessed by a Municipality form part of a revenue-paying estate is no ground for exemption from an assessment of rates.

The basis of a 'holding' is occupation, and the term 'holding' is used with reference to land held by an occupier under one title and surrounded by one set of boundaries.

When a Municipal Corporation has acted in contravention of the provisions of the statute, it is open to a Civil Court to declare that the assessment is illegal.

Municipality—concld.

Where there is some indication that the assessment has possibly been illegal, but the plaintiff has not been able to establish, with regard to any particular holding, that the assessment has been, on the facts, made in contravention of the statue and is liable to be declared *ultra vires* by a Civil Court, the suit should be dismissed. SHAH HAMID HUSSAIN *v.* CHAIRMAN OF PATNA MUNICIPALITY **548**

Murder—Common intention—Evidence—Assault by hatchet—Hitting by stick another person—Death of the person assaulted **810**

Nankar, mortgage of **389**

Navigation Company. *See* RAILWAYS ACT, s. 3

Negligence—Omission to blow horn of motor car at turning **487**

———————-Use of land in ordinary manner—Damage to neighbour—Tort—Liability **543**

Notice—Ejectment suit — Denial of landlord's title **584**

———————-Mortgage - Mortgagor to redeem on the last date of *Jeth* in a particular year **589**

Oath—Minor's guardian whether can agree to be bound by oath of other party **161**

Oaths Act (X of 1873)—*Failure to take oath—Practice.*

A fact which was to have been proved by oath cannot be taken to have been proved simply because a party resiles from an agreement to take oath.

If a party resiles from his agreement to take oath or be bound by the oath, a decree cannot be passed against him forthwith. The only course open to the Court in such a case is to proceed with the trial of the suit in the ordinary way drawing such inference as might be proper from the conduct of the defaulting party and mulcting him in costs as may be considered appropriate. ULAGAPPA CHETTIAR *v.* PERIA KARUPPAN CHETTY, (1912) 1 M. W. N. 361 **195**

Occupancy-holding. *See* LANDLORD AND TENANT.

———————Partition **331**

———————re-appearing after submersion—Rights of occupancy-tenant **942**

———————*Non-transferability — Objection to be taken by landlord.*

Where two parties claim an occupancy-holding under the original owner, the plaintiff by right of inheritance and the defendant under a deed of transfer, it is not open to the plaintiff to contend that the deed did not take effect in respect of the occupancy-holding because it was not transferable by custom. That is a question which only the landlord or his representative-in-interest is competent to raise. RAHIMJAN BIBI *v.* IMANJAN BIBI **698**

———**Rights**—*Presumption—Practice—Registered occupant, whether entitled to occupancy-rights—Berar Land Revenue Code, ss.* 4 (14) & (15), 69, 72, 105.

According to the Revenue law and practice in Berar, the "registered occupant" and the "actual occupant" may be different persons.

Occupancy-rights—concld.

There is no presumption that the occupancy-rights in unalienated land are held by the registered occupant until some other person is recognized as the registered occupant.

Nor is there a presumption that any person newly recognized as the registered occupant must necessarily be the owner of the rights of occupancy. KISAN *v.* HIRA LAL, 8 N. L. R. 76 **899**

———————— *Suit for possession of alienated land—Plaintiff not a registered occupant—Prayer for declaration not necessary—Berar Land Revenue Code*, ss. 4, 15, 72, 73, 74, 76.

In a suit for possession of unalienated land in Berar, it is not a condition precedent for a decree for possession that the plaintiff should already be the registered occupant or that the decree should be accompanied by a declaration that the plaintiff is entitled to be the registered occupant. LAXMAN *v.* SHEORAM, 8 N. L. R. 73 **895**

Order—Sanction to review whether an order **937**

Oudh Laws Act (XVIII of 1876), s. 5 **747**

Oudh Rent Act (XXII of 1886), s. 138 —Scope of inquiry **857**

Oudh Sub-Settlement Act (XXVI of 1866) **181**

Pardon. *See* CRIMINAL PROCEDURE CODE, s. 337.

———, tender of — Recording of reasons for pardon **1004**

Parties. *See* TRANSFER OF PROPERTY ACT, s. 85 **334**

———— Lessor when to be impleaded in lessee's suit against tenants **857**

———— Mortgage suit by manager of Hindu family **138**

———— Mortgage suit against manager of joint Hindu family **126**

———— Non-joinder of parties in appeal—Discretion of Court to make parties **295**

———— Suit for rent by party placed in possession—Previous attornment by tenant to defeated party in possession proceedings—Joinder of parties **24**

———— Suit on mortgage by manager of joint family **876**

———— Suit on pro-note in favour of partners **380**

Partition—Benefit to a third party—Burden goes with benefit **388**

———— Decree directing division of a shop into a number of shares—Non-reservation of power to sell if division not effected—Power of Court to make order after decree **576**

———— *Mahal* formed in the name of a *benamidar*—No objection by real owner—Subsequent suit for declaration not barred **339**

———, permission to withdraw application for—Discretion—Circumstances **937**

———— Proprietary title—*Res judicata*—Person not recorded as co sharer at the time of partition **685**

Partition—concld.

———— Question of proprietary title which ought to and might have been raised—*Res judicata*—Jurisdiction **817**

———— *Occupancy-holding—Suit for partition of occupancy-holding, if maintainable—Landlord, whether bound.*

Any property held for the time being jointly can be partitioned between joint holders. Therefore, a suit for the partition of an occupancy-holding is maintainable.

But the division, unless made with the landlord's permission, would not be binding on him. RAJENDRA NARAIN SAHA *v.* SATISH CHANDRA PAL **331**

———— **of houses**—Effect on rights of easements **818**

———— **suit.** *See* HINDU LAW—MITAKSHARA **184**

————Decree in accordance with award—Objections to award not considered—Revision application—Award attacked *re* mode of partition—Court-fee payable **57**

———— *Civil Procedure Code (Act V of 1908), O. II, r. 2—Subsequent suit for a share in the property not included in the general suit for partition, maintainability of—Property held by the members of a family jointly with a stranger cannot be included in general suit for partition.*

Although as a general rule, a partition suit should embrace all the joint family property, there is an exception in favour of property held jointly with strangers to the family who have no interest in the family partition, and, therefore, cannot be made parties to the general suit for partition.

Where in a previous suit for partition of the joint ancestral property between the plaintiffs and defendants, Nos. 1 to 4, certain shares held in the Paper Mills Company were not included in the suit and it was found that these shares had been inherited from a collateral relation of the parties by the plaintiffs and defendants Nos. 1 to 4 jointly with defendants Nos. 5 to 8, who were collateral relatives of the plaintiffs and defendants Nos. 1 to 4:

Held, that Order II, rule 2 of the Code of Civil Procedure was no bar to a subsequent suit by the plaintiffs for their share in this property. DEBI SAHAI *v.* GOURI SHANKAR SAHAI, 15 O. C. 81 **214**

Partners—*Suit on a pro-note—Parties—Promissory-note—Transfer—Actionable claim—Assignment—Transfer of Property Act (IV of 1882), ss. 130, 137.*

The proper parties to a suit on a pro-note in favour of a firm are all the members of the firm when the obligation on it was contracted; the fact that one of them has retired would make no difference. He is still a proper party to join the suit unless before suit there has been a due and valid assignment of the chose in action from the partners to one of them.

A promissory-note unless transferred in accordance with the Negotiable Instruments Act, must be transferred according to the provisions of section 130 of the Transfer of Property Act. Section 137 of that Act does not render oral assignments valid. RAMAN CHETTY *v.* NAGARATHNA NAICKER, 11 M. L. T. 246 **380**

Partnership *account—Plaintiff to prove his own case.*

As a plaintiff has to prove his own case, therefore, in a partnership suit, though the defendant may have been negligent in not keeping detailed account and may possibly be to blame for not producing books, the plaintiff cannot succeed if he has been, at least, equally negligent in not keeping up any correct detail of the various works undertaken and of the profits realised thereon. BUDHU SINGH *v.* BHAGWATI PARSHAD, 110 P. W. R. 1912 **878**

Party--Suit by *zemindar* against Digwar for declaration of right--Whether Government a necessary party **219**

———*Auction-purchaser, whether necessarg party—Application to set aside sale—Confirmation of sale—*
An auction-sale cannot be set aside after it has been confirmed in a proceeding to which the auction-purchaser is not a party. KONNORMAL OSWAL *v.* NABIN CHANDRA DAS. **228**

——— *Necessary party—Application to set aside sale—Transferee from auction-purchaser, whether necessary party—Reversal of sale - Transferee of auction-purchaser not made party—Transferee not bound by reversal of sale.*

No person should be deprived of his property in any judicial proceeding unless he has had an opportunity of being heard.

A transferee from an auction-purchaser is a necessary party to a proceeding for reversal of the execution-sale when such proceeding is commenced after the transfer has been effected.

A landlord purchased in execution of a rent decree the holding in arrears and sub-let it to the defendant. The tenant judgment-debtor applied for reversal of the sale, but the sub-lessee was not made a party to the application. The sale was set aside, and the tenant brought this suit to recover possession:

Held, that as against the defendant, the sub-lessee of the auction-purchaser, the plaintiff acquired no valid title in spite of the reversal of the sale as he, the defendant, was not made a party to the proceeding for reversal of the sale. MENAJUDDI BISWAS *v.* TOAM MANDAL, 39 C. 881 **176**

———*Necessary party—Person not made party to proceeding, not bound by order—Purchase of occupancy-holding in execuion—Permanent lease granted to plaintiff by purchaser--Reversal of sale without making plaintiff party—Whether plaintiff bound by order of reversal.*

An occupancy-holding was sold in execution of a money-decree against the defendant and the purchaser obtained possession and subsequently granted a permanent lease to the plaintiff. The sale was afterwards set aside but in the application for the reversal of the sale, the plaintiff was not made a party. The plaintiff brought this suit for recovery of possession, and the defendant pleaded that the sale, which was the basis of the plaintiff's claim, having been set aside, the plaintiff had no enforceable title as against the defendant:

Held, that, as the plaintiff was not made a party to the proceedings for the reversal of the sale, he was not bound by the order. SADHAN SARDAR *v.* LAKAN MANDAL, **255**

Party wall—*Treatment as such by common consent of a wall built by one owner—Evidence of conduct, force of.*

Where a wall stands between two houses, it is open to each of the owners of the two houses to show that it is mere party wall. Although the wall may have been built by one of the two owners, yet if their conduct shows that they have by common consent always treated it as party wall, it must be treated as such. MUHAMMAD SHABBIR *v.* MUHAMMAD JAWAD **270**

Patni lease—Construction—Annual rent fixed at certain amount—Payment of Government dues to be made by tenant out of rent—Remission of portion of Government dues—Who is to get benefit **301**

Patni Regulation (VIII of 1819), ss. 8, 10 **537**

———————**s. 11, cl (3)**—*Incumbrance, annulment of*—Raiyati *rights*—Khudkasht raiyat.

A *raiyat* is not protected from ejectment under section 11 clause (3) of the Patni Regulation by a purchaser at a sale under the Regulation unless he is a *khudkasht* or a resident cultivator. ISHAN CHANDRA NANDI *v.* GOUR MOHAN PODDAR. **468**

———————**s. 11** **869**

———————**s. 14** **537**

———**sale**—*Patni Regulation (VIII of 1819), ss. 8, 10, 14*—Patni *sale only viodable, not void—Suit to set aside sale—Mortgagee of defaulting* patnidar, *if entitled to bring such suit—Notice in sections 8 and 10, what to contain—One lot comprising several tenures—Notice specifying only one, bad—Sale irregular—Patni Regulations, provisions to be strictly complied with.*

A *patni* sale is not void, but only voidable, by reason of any irregularities in the transaction, and it can only be avoided by a suit under the provisions of section 14 (1) of the Patni Regulation.

A mortgagee of the defaulting *patnidar* is entitled to bring such a suit.

The notice mentioned in sections 8 and 10 of the Regulation must contain the various lots to be sold with the amounts claimed in respect of them. Where a lot comprised three tenures and the notice specified only one:

Held, that the notice was bad and the sale irregular and liable to be set aside.

The provisions of the Patni Regulation, which allow of sales in a summary manner, must be strictly complied with. HARIHARNATH DAS *v.* RAJANI KINTA LAIK **537**

Patni tenure—*Creation of tenure—Two estates comprised in one tenure—Power given by* kabulyats *to bring tenure to sale under Regulation VIII of* 1819, *legality of—Suit for declaration that tenure liable to sale under Regulation—Party--Collector not made party to suit—Suit improperly framed—No declaration should be made.*

A *patni* tenure comprised two estates bearing separate *towji* numbers. By the *kabulyat*, express power was given to the landlord in default of payment of any part of the rent due for any year to bring the tenure to sale under Regulation VIII of 1819. The landlord made two applications to the Collector to sell the tenure

Patni tenure—concld.

under the Regulation. Both were refused, and on the second occasion, the Collector's action was upheld by the Board of Revenue. The landlord brought a suit for rent and interest and a declaration of his right to have the tenure sold under the Regulation. The Collector was not made a party to the suit:

Held, that the Collector ought to have been made a party and that the suit not being properly framed, no declaration should be made. MANINDRA CHANDRA NANDI *v.* ANNODA MOHAN ROY **586**

Patwari. *See* CONTRACT ACT, s. 23 **933**

Pauper suit—Decree for Court-fee against defendant—Collector realising amount by sale of defendant's property—Property mortgaged—Sale-in-execution of mortgaged-property—Priority **177**

——— *Application for leave to sue as a pauper—Question to be determined—Civil Procedure Code (Act V of* 1908), *O. XXXIII, r.* 5.

In an application for leave to sue as a pauper, the Court is bound to inquire into and determine the question of plaintiff's pauperism, unless it is satisfied that, under Order XXXIII, rule 5, plaintiff's allegations do not show a cause of action. VENKATARAMANA IYER *v.* KITTAMMAL, (1912) 1 M. W. N. 173; 11 M. L. T. 187 **184**

Penal Code (Act XLV of 1860), ss. 7, 20 **1004**

——— **ss. 34, 302**—*Common intention—Evidence—Assault by hatchet—Hitting by stick another person—Death of the person assaulted.*

A. struck *B.* with hatchet. *B.* fell down whereupon *C.* hit *B.* and *B.* subsequently died:

Held, that it was not a necessary inference that *C.* had a common intention with *A.* to kill *B.* EMPEROR *v.* VAHIAL, 5 S. L. R. 247; 13 CR. L. J. 538 **810**

——— **ss. 34, 149, 325**—*Rioting—Charge of grievous hurt by implication under s.* 149 *—Acquittal under rioting—Conviction under substantive offence not allowed.*

When a Court draws up a charge under section 325 read with section 149, Penal Code, it clearly intimates to the accused persons that they did not cause grievous hurt to any body themselves but that they are guilty by implication of such offence, inasmuch as some body else, in prosecution of the common object of the riot in which they were engaged, did cause such grievous hurt.

When these persons are acquitted of rioting, all the offences which they are said to have committed by implication disappear, and they cannot be convicted of the substantive offence under section 325.

Section 34 can only come into operation when there is a substantive charge of causing grievous hurt. The considerations which govern section 34 are entirely different and in many respects the opposite of those which govern section 149. REAZUDDI *v.* EMPEROR, 13 CR. L. J. 502; 16 C. W. N. 1077 **646**

——— **ss. 40, 79** **802**

——— **ss. 109, 467**—*Forgery—Abetment—Conspiracy—Fellow conspirator acquitted—Conviction of other conspirator.*

A. and *B*, who were partners, conspired to make a false *khata*. In furtherance of the conspiracy, *B.* went to a professional forger, *C.*, who prepared the false *khata*.

Penal Code—contd.

A. and *B.* were both tried for abetment of forgery. *B.* was acquitted on the ground that the only evidence against him was the uncorroborated testimony of an accomplice. *A.* was convicted under sections 467, 109 of the Penal Code. On appeal, *A.* contended that as *B.* had been acquitted, the charge of conspiracy failed and *A.* was entitled to an acquittal:

Held, that the charge against *A.* was that he abetted *C.*'s offence of forging the *khata*, and, if that abetment is proved against *A.*, he must be convicted of that charge, even although the prosecution were not successful in establishing the particular means or instrument selected by *A.* for the abetment of *C.*'s offence. EMPEROR *v.* CHHOTALAL BABAR, 14 BOM. L. R. 367; 13 CR. L. J. 542 **814**

——— **s. 114** **802**

——— **ss. 114, 406**—*Criminal Procedure Code (Act V of* 1898), *ss.* 236, 237—*Criminal breach of trust—Absence of trust—Presence at wrongful pledging—Offence—Abetment — Altering charge and finding.*

Entrustment to accused is a necessary element of the offence of criminal breach of trust under section 406, Indian Penal Code.

A jewel was entrusted to *A.* who gave it to *B.* for being pledged to some person. *C.*, who was aware that the jewel did not belong to *B.*, took *B.* to a money-lender and induced him to give a loan to *B.* on the pledge of the jewel. Both *B.* & *C.* acted at the instance of *A.* *C.* was charged with and convicted of the offence of criminal breach of trust:

Held, (1) that *C.* was not guilty of the offence of criminal breach of trust under section 406, Indian Penal Code, read with section 114, as the latter section applied only where the act, at the doing of which the abettor was present, would itself amount to an offence;

(2) that though *C.* was charged with the offence of breach of trust, he could, without altering the charge, be convicted, under sections 236, 237, Criminal Procedure Code, of abetment of criminal breach of trust. YEDITHA SUBBAYA *v.* EMPEROR, 13 CR. L. J. 453; (1912) 1 M. W. N. 725; 12 M. L. T. 203 **85**

——— **s. 143**—*Persons passing by the village of their enemies—Attack by the villagers—Revision—Power to quash conviction of persons not applying for revision—Criminal Procedure Code (Act V of* 1898), *ss.* 439, 562.

Persons by simply passing close to the village of their enemies cannot be convicted under section 143, Indian Penal Code.

The High Court has power on revision to quash the conviction of the accused who have been dealt with by an Appellate Court under section 562, Criminal Procedure Code, 1898, even if the convicts have not moved the High Court to exercise that power. RADHA KISHAN *v.* EMPEROR 7 P. W. R. 1912 CR; 67 P. L. R. 1912; 13 CR. L. J. 476 **316**

——— **s. 147** **92**

——— **ss. 147, 296**—*Causing disturbance to a religious procession—Right of members of a community to pass in procession along the public streets—Assaulting members of procession—Rioting —Common object.*

The members of a religious community or denomination have every right to pass through the King's

Penal Code—contd.

Highway in procession for purposes of religious worship.

Assaulting a religious procession with the common object of disturbing it, amounts to rioting. SENGODAN *v.* EMPEROR, 13 CR. L. J. 534 **806**

——— ——— ——— **ss. 147, 225, 353**—*Rescue from lawful custody—Arrest on warrant with bail—No intimation that bail was allowed—Arrest, whether legal.*

Where a warrant allowing bail is being executed by a constable, it is his bounden duty to state that bail would be taken. If the constable did not give the slightest intimation to the person arrested of the fact that bail had been allowed, the arrest would be illegal. The arrested person's people would be justified by the law of private defence, in rescuing him, by committing a common assault upon the constable. SHYAMA CHARAN MAJUMDAR *v.* EMPEROR, 16 C. W. N. 549; 13 CR. L. J. 590 **1006**

——— ——— ——— **ss. 147, 323, 325**—*Right of private defence — Exceeding the right—Unlawful assembly—Acquittal by Court of Session under section* 325, *Indian Penal Code—Conviction by High Court under section* 323, *whether lawful.*

The fact of exceeding the right of private defence, which a man has, cannot make him a member of an unlawful assembly, and he can only be convicted and punished for the individual act which he himself has done in excess of the right of private defence.

Where the accused have been acquitted by the Sessions Judge of a charge under section 325, Indian Penal Code, the High Court can convict them under section 323. KUNJA BHUNIYA *v.* EMPEROR, 13 CR. L. J. 481; 13 C. W. N. 1053 **481**

——— ——— ——— **ss. 148, 149** **972**

——— ——— ——— **s. 149** **646**

——— ——— ——— **s. 182**—False charge to Police **992**

——— ——— ——— **s. 193**—*False evidence — Offence against public justice—Sanction to prosecute—Discretion of Judge.*

An offence under section 193 of the Indian Penal Code is an offence against public justice. The person best qualified to say whether a prosecution should or should not be instituted is the Judge before whom the evidence was given and who had considered all the facts of the case. CHIRANJI LAL *v.* RAM LAL, 9 A. L. J. 538; 13 CR. L. J. 493 **496**

——— ——— ——— **s. 211**—False charge to Police **992, 994**

——— ——— ——— **s. 211** **320, 482, 484, 799**

——— ——— **s. 214** — *Illegal gratification — Offer of money to forest subordinate for not proceeding with a compoundable offence - Burma Forest Act (Burma Act IV of* 1902), *s.* 62.

A. had a license under the Burma Forest Act for one saw-pit but worked two saw-pits. *B.*, a forester, discovered this breach of the rules and told *A.* that he would be prosecuted. Whereupon *A.* offered him Rs. 5 not to proceed with the case.

The offence of working more saw-pits than one covered by the license was compoundable under the Forest Act:

Penal Code—contd.

Held, (1) that the offer of Rs. 5 to *B.* did not amount to an offence under section 214 of the Penal Code;

(2) that the fact that *B.* was not authorized to compound the offence, did not make any difference. EMPEROR *v.* KYA SONE, 6 L. B. R. 48; 13 CR. L. J. 574 **990**

——— ——— **s. 225** **1006**

——— ——— ——— **s. 228** **983**

——— ——— ——— **s. 296** **806**

——— ——— ——— **ss. 302, 304**—*Death by strangulation—Sentence.*

The accused had been appointed a *rakha* to watch certain crops of gram. The deceased came to the field and began to steal the stuff. Thereupon the accused and the deceased quarrelled and proceeded to fight. The accused got the deceased down and strangled him to death with his hands:

Held, that the accused was guilty of an offence punishable under the 2nd part of section 304, Indian Penal Code, and that a sentence of four years' rigorous imprisonment was quite sufficient to meet the ends of justice in the case. SUNDAR SINGH *v.* EMPEROR, 6 P. W. R. 1912 CR.; 13 CR. L. J. 478; 68 P. L. R. 1912 **318**

——— ——— ——— **s. 304** **318, 972**

——— ——— ——— **s. 322** **92**

——— ——— **ss. 322, 325**—*Grievous hurt—Intent to cause—Nature of injury and circumstance of case—Drunkenness—Question of intent or motive.*

An intent to cause grievous hurt may be inferred from the circumstances of the case and the nature of the injury caused.

When a man hits another over the head with a stick hard enough to fracture his skull and endanger his life, he must, in the circumstances, have either intended to cause grievous hurt or known that he was likely to cause it.

Drunkenness may be taken into consideration when dealing with the intention or motive to commit an offence in a state of drunkenness. NGA BA GYAW *v.* EMPEROR, U. B. R. (1911) I, 105; 13 CR. L. J. 471. **311**

——— ——— ——— **s. 323** **481**

——— ——— ——— **s. 325** **311, 481, 646**

——— ——— ——— **s. 353** **1006**

——— ——— **ss. 354, 376, 511**—*Assault upon a girl—Rape—Attempt.*

The accused took off a girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her nor did he do anything more to her:

Held, that the accused committed an offence under section 354, Penal Code, and was not guilty of an attempt to commit rape. NUNA *v.* EMPEROR, 16 P. W. R. 1912 CR.; 116 P. L. R. 1912; 13 CR. L. J. 459 **309**

——— ——— ——— **s. 376** **309**

——— ——— **s. 379** — *Sentence — Theft from Railway train - Accused previously convicted of theft and bound over for good behaviour—Deterrent sentence.*

When a Magistrate is satisfied that an accused has committed the offence of theft from a Railway train

Penal Code—contd.

the sentence should be of a deterrent nature, especially where the accused had already been convicted of theft and had been repeatedly bound over for good behaviour. EMPEROR *v.* ANANDA LAXMAN BABAJI, 14 BOM. L. R. 504; 13 CR. L. J. 531 **803**

——— ——— **s. 399** **65**

——— ——— **s. 401**—*Gang associated for habitual theft—Evidence—Previous convictions of individual, relevancy of.*

When, under section 401 of the Penal Code, it has to be determined whether a party of accused persons constitute a gang of persons associated for the purpose of habitual theft, evidence that each individual of the party is a convicted thief, is relevant evidence for the purposes of that question.

That evidence can be tendered whether before or after the prosecution have established the association. EMPEROR *v.* TUKARAM, 14 BOM. L. R. 373; 13 CR. L. J. 539 **811**

——— ——— **s. 406** **85**

——— ——— **ss. 406, 417**—*Criminal breach of trust—Cheating—Landlord sending for tenant—Payment of rent by tenant—Illegal demand by landlord—Detention of money paid—Criminal offence.*

A tenant was sent for by his landlord to whom the tenant paid Rs. 90 as rent. The landlord deducted Rs. 25 towards a subscription and refused to grant a *dakhila* or return the money until Rs. 25 more was paid:

Held, that the landlord did not commit any criminal offence. KUMEDA CHARAN GHOSE *v.* EMPEROR, 15 C. L. J. 515; 13 CR. L. J. 512 **656**

——— ——— **s. 408** **319, 645, 802**

——— ——— **s. 411** **492**

——— ——— **s. 411**—*Theft of currency notes—Possession of accused after* 18 *months—No presumption of guilty knowledge.*

Where 18 months after a theft of currency notes, a few of them were found in the possession of the accused, and no other suspicious circumstances were found against him:

Held, that there was no presumption of guilty knowledge on his part in the absence of an explanation and consequently the fact that he had given a false explanation of his possession was not sufficient to warrant his conviction for dishonest retention of stolen property. VELLAI OCHA THEVAN, *In re*, 11 M. L. T. 186; (1912) 1 M. W. N. 362; 13 CR. L. J. 475 **315**

——— ——— **s. 411**—*Criminal Procedure Code (Act V of* 1898), *s.* 439—*Stolen property—Defective identification—Interference in revision—Irrelevancy of statement of person not examined in Court.*

Where a stolen article is of ordinary make and there is nothing peculiar in it, the uncorroborated evidence of the complainant of ordinary position as to its identification is not sufficient for finding that it does not belong to the accused, specially where it has been equally contradicted by a witness on the other side.

Even a unanimous finding of fact by the lower Courts, without due regard to the evidence on the record, is liable to be set aside on revision under section 439, Criminal Procedure Code, 1898. MANI RAM *v.* EMPEROR, 22 P. W. R. 1912 CR; 13 CR. L. J. 555 **971**

Penal Code—contd.

——— ——— **s. 417** **656**

——— ——— ——— **s. 420** **88**

——— ——— ——— **s. 420**—*Cheating—Immoral and illegal contract—Advance on such contract by false representation.*

A. agreed to let her daughter on hire to *B.* for concubinage for a period of one year in consideration of *B.* paying her Rs. 70.

B. paid *A.* Rs. 35 in advance. Subsequently, *A.* refused to deliver her daughter to *B.* or to return the sum of Rs. 35 advanced by him.

On these facts, *A.* was convicted of cheating:

Held, that the conviction should be set aside, as a party should not be allowed to prosecute on a charge of cheating when he would not be entitled to obtain from a Civil Court any relief for breach of the contract. EMPEROR *v.* JANI HIRA, 14 BOM. L. R. 503; 13 CR. L. J. 521 **793**

——— ——— ——— **s. 427**—*Mischief—Act done negligently.*

Where the accused is only guilty of negligence, he is not liable to be convicted of mischief, for that offence imports that the act was done wilfully. EMPEROR *v.* AKIDULLAH, 5 S. L. R. 263; 13 CR. L. J. 536 **808**

——— ——— **s. 447**—*Entry in order to assert a right on land—Criminal trespass—Intention to intimidate, etc., must be found.*

An entry on land in another man's possession, solely in order to assert a right in the land, does not constitute 'criminal trespass' within section 447, Indian Penal Code. The intention to intimidate; insult or annoy, or to commit an offence must be distinctly found. AMAVASAYA CHINNA KRISHNA REDDY *v.* MARRI POLLIAH, (1912) 1 M. W. N. 395; 13 CR. L. J. 477 **317**

——— ——— **s. 465** **81, 645**

——— ——— ——— **s. 466** **81**

——— ——— ——— **s. 466**—Alteration of plaint after filing **1004**

——— ——— ——— **s. 467** **814, 979**

——— ——— ——— **s. 471** **81**

——— ——— ——— **s. 477** **979**

——— ——— ——— **s. 498**—*Enticing away a married woman—Essential ingredients—Evidence—Proof of marriage—Statement of complainant.*

The two essential ingredients of an offence under section 498 of the Penal Code are that the woman enticed away is the wife of the complainant and that the fact of marriage is known to the accused.

The mere statement of the complainant that the woman is his wife is not sufficient evidence of marriage. EMPEROR *v.* BECHAR, 5 S. L. R. 270; 13 CR. L. J. 541 **813**

——— ——— **s. 499** — *Defamation—Witness, liability of.*

A person, who makes a defamatory statement as a witness in a judicial proceeding, is not exempted from criminal liability under section 499, Indian Penal Code, unless his statement is covered by any of the exceptions to the section. MIRAN SHAH *v.* EMPEROR, 13 CR. L. J. 494; 31 P. W. R. 1912 CR. **494**

Penal Code—concld.

——— ——— **s. 499**—*Defamation—Will, registration of—Defamatory statements by party opposing Will — Privilege — Absolute privilege — Registrar, whether a Court.*

Defamatory statements made by a party opposing the registration of a Will are not so absolutely privileged as to exempt him from liability to punishment for an offence under section 499, Indian Penal Code.

The Registration officer in such proceedings is not a Court. KRISHNAMAL *v.* KRISHNAIYANGAR, (1912) 1 M. W. N. 473; 23 M. L. J. 50; 13 CR. L. J. 508 **652**

——— ——— **s. 500** **488, 489**

——— ——— **s. 506** **488**

——— ——— **s. 511** **309**

Pensions Act (XXIII of 1871), s. 4 **871**

Plaint—Proceeding of a Court of Justice—Alteration of plaint after it has been filed **1004**

———— *Verificaiton, improper — Trial on merits, effect of—Second appeal—Objection as to defect in verification—Civil Procedure Code (Act XIV of 1882), ss. 53, 578.*

A plaint was verified by the first three plaintiffs, who were *sui juris*, for themselves, and on behalf of the mother of the other three plaintiffs, who were minors, by her son who was the first plaintiff. The first plaintiff had no authority from the mother of the infants to verify the plaint on their behalf. The first Court held that the plaint had not been properly verified, but yet proceeded to try the suit on the merits and dismissed it. That decision was affirmed by the lower Appellate Court. The plaintiffs contended in second appeal that, so far as the minor plaintiffs were concerned, the plaint ought to have been taken off the file as it was not properly verified:

Held, that the proper procedure here was not to frame any issue but to decide the preliminary question, whether the plaint was properly verified, first, for then the plaintiff would have had an opportunity of curing the defect; that, therefore, there was no substance in the plaintiffs' contention; and further, that the defect, if any, was completely cured by section 578 of the Code of 1882. SHASHEE BHUSHAN *v.* RASIK LAL ROY **583**

Pleader—Admission as to question of fact—When binding on client **156**

——— ———Authority to receive rent from transferee **156**

——— ———*Professional misconduct — Misbehavior —Sale of client's shares in private capacity—Appropriation of money to fees as Pleader—Wrongful conversion—Lien—Set-off—Undue influence—Consent—Burden of proof—Practice of not reducing agreements to writing—Sind Courts Act (XII of 1866), s. 16—Contract Act (IX of 1872), ss. 217, 221.*

M., a Pleader of 20 years' standing, received, in his private capacity, certain shares from a lady client with instructions to sell them, and realize the proceeds on her behalf.

He appropriated the proceeds, without her consent, to the payment of his fees as a Pleader. The client repeatedly insisted on the payment of the money realized as sale-proceeds; but her consent to the appropriation of the money was obtained owing to a desire on her part to avoid a quarrel with her Pleader:—

Held, (1) that in appropriating to himself the sale-proceeds of the shares, *M.* was guilty of wrongful conversion of his client's money, and was liable to be dealt with under section 16 of the Sind Courts Act for his misbehaviour;

(2) that *M.* had no right to pay himself for his fees out of the sale-proceeds of the shares, irrespective of his client's wishes;

(3) that *M.* had no lien or right of retainer under section 221 or 217 of the Contract Act, for that would only attach in respect of services rendered in the matter of sale;

(4) that *M.* could have no general lien as a factor for sale in respect of a general balance due to him as Pleader;

(5) that *M.* had not even a right of set off, for the shares were given to him in his private capacity;

(6) that *M.* stood in a fiduciary relation to his client and it was for him to show that she consented to the appropriation without undue influence on his part;

(7) that, under the circumstances, *M.* should be given an opportunity to atone for his misconduct by making restitution to his client.

The practice of special agreements of engagements of Pleaders for the conduct of important cases for heavy fees not being reduced to writing, strongly deprecated. VARANBAI *v.* M., PLEADER, 5 S. L. R. 222; 13 CR. L. J. 513 **785**

Pleader's fees—Remand order—Inclusion of Pleader's fees in costs **828**

Pleadings—Mortgage—Sale subject to a mortgage, effect of—Purchaser of a mere equity of redemption as distinguished from a purchaser of the property—Incumbrances, effect of merely notifying—Consideration, failure of, right of a purchaser to take the plea as to—Burden of proof as to failure of consideration on purchaser—Undue influence, competency to raise plea as to **5**

——— ——— ———Point pleaded but not put in issue—Evidence adduced on the point—Reliance on the point **757**

——— ———Suit by widow—Presumption **556**

——— ——— *Compromise during suit—Court's duty to inquire if parties are bound by compromise set up by one of them—Decision on pleadings of parties.*

The plaintiff sued the defendant for a certain sum basing his claim on a balance of account struck by the latter. The claim was dismissed as not proved. In the course of the proceedings, the defendant put in applications stating that under pressure of people in the village, a certain compromise was arrived at between the parties. On appeal, the Divisional Judge, taking into consideration defendant's applications and without going into the merits of the case, decreed the claim for the sum settled by the said compromise:

Held, that the Appellate Court should have inquired as to whether the compromise was binding between the parties, and if the compromise was not binding, whether the plaintiff had proved his case on the merits. NARAYAN SINGH *v.* LAL SINGH, 63 P. L. R, 1912; 142 P. W. R. 1912 **478**

Pleadings—concld.

——— ———, *defective—Finding on evidence which plaintiff had no opportunity to meet—Appellate Court, duty of—Remission of issue.*

If an Appellate Court is of opinion that the plaintiff has been prejudiced by the defective pleadings and that there has been a finding upon insufficient evidence and upon evidence which the plaintiff had no reasonable opportunity of meeting, the proper course is to remit an issue on the point. AHMAD BAKHSH *v.* SAIRA BIBI **3**

——— ——— *Inconsistent pleas—No rule of law to prevent.*

There is no rule of law which prevents a defendant from raising inconsistent pleas, at any rate, where the facts to which the pleas relate are not within his personal knowledge. JANAGANTI CHINA VENKATA RAJAUM GARU *v.* KAPPOJEE LINGANNA, (1912) 1 M. W. N. 413 **382**

——— ——— *Memorandum of appeal, point not raised in.*

A Court is not bound to allow a point to be raised which has not been taken in the grounds of appeal. MUHAMMAD SHABBIR *v.* MUHAMMAD JAWAD **270**

Police Act (V of 1861), ss. 25, 26—*Criminal Procedure Code (Act V of 1898), ss. 87, 88—Priority of claim—Seizure of absconder's property by Government—Attachment of property under Civil Court decree before attachment and proclamation by Government.*

The Police seized certain property belonging to two absconding accused under section 25 of the Police Act. The property, however, was not declared to be at the disposal of Government under section 88 of the Criminal Procedure Code until 19th February 1912. Prior to that, *i.e.*, on 5th October 1911, the applicant sought to attach the said property in execution of his decree against the said accused. The Magistrate of the District refused to hand over the property in obedience to the order of the attachment of the Civil Court:

Held, that, as the Government had established no right to the property on 5th October 1911, and as the applicant had at the time established a right to have the right, title and interest of the judgment-debtors (the absconders) in it sold by the Civil Court, the order of the District Magistrate refusing to hand over the property to the Civil Court for disposal was wrong. SUBRAMONIAN CHETTY *v.* EMPEROR, 5 BUR. L. T. 113; 13 CR. L. J. 568; 6 L. B. R. 57 **984**

——— ——— **s. 26** **984**

Police officer, complaint against **482**

———————, *complaint against—Government Circular, meaning of—If case be made over to another Magistrate, the latter to have jurisdiction to decide case finally and order sanction for prosecution—Criminal Procedure Code (Act V of 1898), ss. 203, 476, 529—Penal Code (Act XLV of 1860), s. 211.*

When a complaint is made against a Police officer the Magistrate, who entertains the complaint, under section 202 of the Criminal Procedure Code, must, either go to the spot and make inquiry himself and issue process if he finds it necessary to call upon the accused to answer to anything, or if he makes it over under section 192 to any other Magistrate of the first class, that Magistrate must be vested with full

Police officer—concld.

seizin of the case and must continue the inquiry upto the necessary order of discharge, acquittal or conviction, as the case may be.

The Government Circular, with regard to inquiries into complaints against Police officers, does not refer to any kind of local investigation under section 202, Criminal Procedure Code, and the local investigation which it mentions, is a full and complete judicial inquiry on the spot after issuing process issued, hearing witnesses on both sides, and taking the explanation of the accused person.

A complaint was made before a District Magistrate against a Police officer. He allowed the complainant to make his complaint before a Deputy Magistrate at the head quarters. That Deputy Magistrate transferred the investigation to the Sub-Divisional officer, at B. After inquiry by the Sub-Divisional officer he found the case to be false. Then the Deputy Magistrate at the head-quarters re-called the case and passed an order under section 476, Criminal Precedure Code, directing the trial of the complainant under section 211 of the Indian Penal Code:

Held, that the order for prosecution under section 476 was without jurisdiction, that the erroneous order of transfer to the Sub-Divisional Magistrate may be cured by section 529 and give jurisdiction to the Sub-Divisional Magistrate, but the Deputy Magistrate at the head quarters can have no jurisdiction to re-call the case and deal with it under section 203 or pass any orders under section 476. EMPEROR *v.* BHIKA HOSSEIN, 16 C. W. N. 885; 13 CR. L. J. 484 **484**

Poramboke *land in a* zemindari—*No presumption that it is cultivable* poramboke—Onus *on* zemindar *to make out his right to cultivate or let out to tenants.*

There is no presumption that any *poramboke* land in a *zemindari* is of such a character as could lawfully be cultivated or given out by the *zemindar* for purposes of cultivation. Therefore, the *zemindar* must prove that it is such as he is entitled to let out on cultivation or receive *kist* for, if cultivated without his permission. GOPISETTI NARAYANASAWMY NAIDU GARU *v.* BONDADA CHINA NARSIGADU, (1912) 1 M. W. N. 381 **359**

Possession—Proof of possession—Presumption as to prior possession **257**

——— ——— of stolen property **492**

———————Registration is not equivalent to delivery of possession **698**

——— ——— *Dispossession, suit based on—Groveholder, right of, to mortgage—Re-entry, no provision as to* Wajib-ul-arz, *custom recorded in—Custon as to non-transferability.*

Certain grove-holders mortgaged their trees though under the custom embodied in the "*Wajib-ul-arz*" they had no right to do so.

The *Wajib-ul arz*, however, did not contain any provision enabling the *Talukdar* to re-enter and take possession of any trees which may have been dealt with in a manner contrary to that allowed by the village custom:

Held, that the *Talukdar* under the circumstances had no right to dispossess the mortgagee forcibly. If the mortgagee is so dispossessed, he is entitled in law to recover possession on the ground of his previous possession and dispossession. MUHAMMAD ABUL HASAN KHAN *v.* LALTA **277**

Possession—concld.

——— ———, *suit for—Dispossession of plaintiff by defendant—Non-acquisition of prescriptive title by defendant—Right of prior possessor to possession.*

In a suit for possession, where it appears that plaintiff, who was in possession, had been dispossessed by defendant, and at the date of suit defendant had not acquired a title by prescription, and neither party is found to have a good title, plaintiff, as the prior possessor, has a right to recover possession from the defendant, who cannot show a better title. KALYANAM BASAVAYA *v.* ALAKAM MALAPPA **613**

——— ———, *suit for—Finding that property belongs to plaintiff and another—Decree for joint possession—Whether can be passed.*

Where plaintiff sues for exclusive possession of property and it is found that plaintiff is entitled only to joint possession with the defendants, it is open to the Court to give plaintiff a decree for joint possession, but plaintiff cannot claim it as a matter of right. PURUVALA PERUMALA CHETTY, *In re* **665**

Poundage-fee, whether judgment-debtor bound to deposit **436**

——— ——— **and fees**—Land Acquision case **771**

Power-of-attorney—*Attorney not a Legal Practitioner—Duty leviable—Court Fees Act (VII of 1870), Sch. II, Art. 10—Stamp Act (II of 1899), s. 2 (21), Sch. I, Art. 48—"Case"*—Mukhtar—Mukhtarnama—*Interpretation of statutes—Technical and popular meaning of words.*

A power-of-attorney empowering a person, who is neither a *Vakil* of a Court nor a certificated *Mukhtar* of a Court, to represent another in a Civil Court is governed not by Article 48 of 1st Schedule of the Stamp Act but by Article 10 of Schedule II of the Court Fees Act.

The first and most elementary rule of construction is that words or phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not.

The documents specified in Article 10, Schedule II of the Court Fees Act, are the documents which it was intended to exclude from the definition of a power-of-attorney in section 2 (21) of the Stamp Act.

The word "case" in the Court Fees Act must be confined to judicial cases or *quasi*-judicial cases as opposed to transactions.

Article 10, Schedule II, of the Court Fees Act is not restricted to documents given to and presented by duly certificated *Mukhtars* and Pleaders under the Legal Practitioners Act.

A *Mukhtar* is an attorney, whether appointed specially or generally or certificated as a legal practitioner and *Mukhtarnama* is a document which empowers him to act for the person by or on whose behalf the document is executed and includes a power-of-attorney in favour of a person other than a certificated *Mukhtar*. GANPAT *v.* PREM SINGH, 108 P. W. R. 1912 **122 F. B.**

Practice. *See* CRIMINAL PROCEDURE CODE, s. 256 **970**

———— ——Accused ill—Power to dispense with attendance in Court **96**

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———— ——Duty of Magistrate—Same facts constituting offences under more than one section—Proceeding to be with respect to the more serious offence **993**

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———— ——Suit adjourned for want of time—No duty on trying Court to direct witnesses to appear **367**

—— ———Time-barred appeal admitted in exercise of discretion before issue of process—Discharge of order of admission on respondent's objection **562**

———— ——Warrant issued on requisition of Native State—Accused surrendering of his own accord—Certificate granted by Political Agent for trial of accused in British India - Subsequent recall of certificate—Accused ordered to be tried in Native State **809**

———— ———*Assessors' opinions how to be taken—Cross-examining assessors, contrary to law.*

A trial is altogether vitiated if the assessors are not asked and are apparently not allowed to give an independent opinion on the case.

The cross-examination of the assessors is entirely contrary to law. Section 309 of the Code of Criminal Procedure gives the Judge no power to question the assessors until they have delivered their opinions orally and he has recorded such opinions.

If there is anything obscure in their verdicts, there is no objection to the Judge asking questions to clear up such obscurity; but he is bound to allow the assessors to express their own opinions independently in their own words on the whole case before interfering with them in any way or asking them any question whatever except "what is your opinion." NAJUMUDDI *v.* EMPEROR, 13 CR. L. J. 497 **641**

———— ——*Court finding value of suit beyond its jurisdiction—Plaint presented to a competent Court—Trial de novo—Evidence taken by first Court, inclusion of.*

A suit for dissolution of partnership was brought in the Court of a Munsif first class. In order to decide whether the suit was within his jurisdiction, the Munsif held an inquiry, found that the value of the suit exceeded his jurisdiction and returned the plaint for presentation in a competent Court.

The Sub-Judge, in whose Court the plaint was presented, ordered that the case should be tried *de novo* and refused to include in the evidence before him the evidence recorded by the Munsif:

Held, (1) that the order was correct;

(2) that as the Munsif decided that he had no jurisdiction, he could not proceed to decide any point other than that of jurisdiction and no finding by him that a certain amount was due by one party to the other could be treated as a finding on the merits. RADHA KISHEN *v.* KIDAR NATH **773**

———— ——*Decision different from the case of either party—Unsustainable.*

The Court should not decide a suit in a way which is not the case of either party and on a matter on which no issue was raised. SAVIRIMUTHU MOOPAN *v.* SATTAN CHINAPPAN SAVARIMUTHU, (1912) 1 M. W. N. 177 **185**

———— *Procedure—Trial of suit—Summoned witnesses of party absent—Application by party for issue of warrants to witnesses—Another application for adjournment of case—Order granting adjournment—Failure of Court to pass orders on application for warrants—Applicant's failure to secure attendance of witnesses at adjourned hearing—Refusal of Court to grant further adjournment.*

At the first hearing of the suit, the defendant represented to Court that his summoned witnesses were absent and applied for the issue of warrants against them and also for adjournment. The Court adjourned the hearing but did not pass orders on the application for warrants. The defendant took no steps to secure the attendance of his witnesses at the adjourned hearing, when he again prayed for a further adjournment which was refused:

Held, that the adjournment was rightly refused. ARMUGAM PILLAY, *In re* **584**

———— ———— *Return of summons—Order of Court—Clearness.*

When summonses are returned unserved, the Court should pass subsequent orders very clearly, stating the delay for non-service, etc. A vague order to the effect "no vigilant steps are taken to secure attendance of witnesses" is not sufficient. PONNA KRISHNAVASUDEMUDU *v.* KOUVIRIRI BASURI REDDI, (1912) 1 M. W. N. 174 **188**

———— ———— *Sind Judicial Commissioner's Court Rules, Rules 23, 24, 27—Remand order—Inclusion of Pleader's fees in costs—Failure to file certificate of fee—Review of taxation after success in lower Court—"Successful party", meaning of.*

Under Rule 27 of Rules of the Court of the Judicial Commissioner in Sind, no application for review of taxation of costs is allowable unless made before the decree is signed.

When a case is remanded for fresh decision and costs of appeal are directed to be costs in the cause, the lower Court when passing its decree has no power to alter the order of the Appellate Court as to costs and to allow costs not shown in the order of the Appellate Court.

The expression "successful party" in rule 23 of the rules of Court means the party who, as a result of the Court's judgment, is entitled to formulate a claim for costs against other party; it does not include a party obtaining success in proceedings before another Court.

Where the final incidence of the burden of costs is left for the decision of the lower Court, as in the case of remand, a party desiring his Pleader's fees to be included in the costs must file the usual certificate of fees in the Appellate Court before the decree of that Court is signed. MATHRADASS *v.* SECRETARY OF STATE, 5 S. L. R. 254 **828**

———— ———— *Trial with assessors—One of them found disqualified to act after the trial was begun—De novo trial—Criminal Procedure Code (Act V of 1898), ss. 268, 284, 285, 438, 439.*

Where it is discovered, after the trial has begun in a case tried with the aid of assessors, that one of them is interested or otherwise unfit to sit as an assessor, the Sessions Judge should refer the case to the High Court to set aside the order by which the incompetent assessor was appointed and all the subsequent proceedings in the trial.

In such cases, the Sessions Judge ought to choose another assessor and proceed with the trial *de novo*. SESSIONS JUDGE OF TANJORE *v.* THIAGARAJA THEVAN, (1912) 1 M. W. N. 378; 13 CR. L. J. 473 **313**

Pre-emption. *See* PRE-MORTGAGE; PUNJAB PRE-EMPTION ACT.

———— ———— "Co-occupant having a right of pre-emption"—Subsequent transferee from person having right of pre-emption **570**

———— ———— Jurisdiction—Appeal **407**

———— ———— Bhai bhatija hakiki—*Sister, whether included in the term*—Wajib-ul-larz.

A sister is included in the terms *bhai bhatija hakiki*. NIAZ FATIMA *v.* TAMIZ BEGAM **175**

———— ———— *Co-sharer—Partition, effect of.*

The sale in respect of which the present pre-emption suit was instituted took place on the 22nd of July 1909.

On the 21st June previously, partition had been made and confirmed with effect from the 1st of July 1909. Under the partition the plaintiff and the vendor were co-sharers in the same *mahal* and the vendee ceased to be co-sharer with the vendor. The *Wajib-ul-arz*, which was prepared after the partition, was verified on the 2nd of August 1909:

Held, that the plaintiff had a right to sue for pre-emption. NAND KISHORE SINGH *v.* RAM BIRICH RAI **704**

———— ———— *Co-sharer of equal degree joining in sale a co-sharer of inferior degree—Loss of preferential right.*

Where a co-sharer of equal degree joins in the sale a co-sharer of an inferior degree, he forfeits his right as such and a suit for pre-emption can lie against him. GUPTESHWAR RAM *v.* RATE KRISHNA RAM, 10 A. L. J. 70 **174**

———— ———— *Custom — Dasuha town, District Hushiarpur.*

The custom of pre-emption, in respect of house property, obtains in the town of Dasuha. UDHO RAM *v.* RODA, 61 P. R. 1912; 185 P. W. R. 1912 **934**

———— ———— *Custom or contract—Proof.*

A custom of pre-emption should, like any other custom, be proved by clear and sufficient evidence. BIDHATA RAM *v.* RAM CHERI **251**

———— ———— *Custom or contract*—Onus—Wajib-ul-arz—*Evidence.*

The existence or non-existence of a custom of pre-emption must be proved in the same manner as any other question. The proper issue in the case is does or does not the particular custom alleged by the plaintiff exist. The onus of proving the existence of such custom lies on the plaintiff and if he is unable to produce evidence other than an obscure clause in a *wajib-ul-arz*, he must be held to have failed to prove the existence of the custom. A *wajib-ul-arz* is merely evidence. BECHU SINGH *v.* LACHMI NARAYAN SINGH **54**

Pre-emption—concld.

———— ————*Deposit of decretal amount—Costs taken out of the amount deposited, effect of.*

In a pre-emption suit, *A.* got a decree and was ordered by the Court of first instance to pay Rs. 6,800. He deposited this sum but subsequently attached Rs. 314 on account of his costs in the suit which had been awarded by the first Court. On appeal to the High Court, he was ordered to pay Rs. 10,000 and hence he deposited another sum of Rs. 3,200:

Held, that this was a proper deposit in spite of the fact that he had taken out Rs. 314 towards costs. ALI HUSAIN *v.* AMIN ULLAH, 10 A. L. J. 153 **337**

———— ————*Right of Hindus in Behar—Ceremonies to demand pre-emption, if may be performed by manager of disqualified proprietor—Co-sharers—Payment of Government revenue jointly, whether constitutes co-parcenary to give rise to right of pre-emption.*

A right or custom of pre-emption is recognised as prevailing among Hindus in Behar.

The manager of an estate, in charge of the Court of Wards of a disqualified proprietor under the Court of Wards Act, 1879, is competent, independently of the provisions of section 40 of the Act, to observe on behalf of the proprietor the formalities to demand the right of pre-emption in accordance with the prescriptions of the law.

The claim to co-parcenary, on which a pre-emptor's right of pre-emption is based, may arise out of the fact that the vendor and pre-emptor are jointly liable for the payment of the Government revenue assessed on the property, because that joint liability arises from the fact that they own undivided interests. JADU LAL SAHU *v.* JANKI KOER, 16 C. W. N. 553; 11 M. L. T. 61; (1912) 1 M. W. N. 486; 15 C. L. J. 483; 9 A. L. J. 525; 14 BOM. L. R. 436; 23 M. L. J. 28 **659 P. C.**

———— ————*Title of the plaintiff at date of sale and at date when decree ought to have been passed—Partition after the decree of first Court, effect of.*

A plaintiff having a right to a decree in a pre-emption suit at the date of the sale and at the date upon which the decree ought to have been made by the first Court, does not lose that right because of a partition, which comes into force before the decree becomes final on appeal. BIDYA PERSHAD RAM *v.* ACHAIBAR RAM **865**

———— ———— ————*Vendee drawing money deposited by pre-emptor in Court—Appeal, right of, if affected by such withdrawal—Pre-emption suit about land—Jurisdiction value less than Rs. 5,000 under rules—Decree given on payment of more than Rs. 5,000—Appeal from such decree, whether lies to the Divisional Court or to the Chief Court.*

A vendee appellant in a pre-emption case is not precluded from proceeding with his appeal against the pre-emption decree merely because he withdraws from the Court the purchased-money deposited by the pre-emptor in pursuance of the pre-emption decree.

In a pre-emption suit relating to land of which the value for purposes of jurisdiction under the Suits Valuation Act is less than Rs. 5,000, but in which a decree has been passed by the Court of first instance on payment of more than Rs. 5,000, an appeal lies to the Divisional Court and not to the Chief Court. IFTIKHAR ALI *v.* THAKAR SINGH, 170 P. W. R. 1912; 83 P. R. 1912 **347**

Preliminary decree—Decision on the question of *res judicata* **563, 566**

Pre-mortgage — *Usufructuary mortgage* — Mushrut-ul-rehan — *Apportionment of mortgage-money—Liability of person claiming pre-mortgage of usufructuary mortgage.*

H. and three other persons usufructuarily mortgaged their property to one *M.* On the same day *H.* alone executed a *Mushrut-ul-rehan* in favour of the same mortgagee and agreed to pay the amount due under this mortgage along with the money due under the usufructuary mortgage. *K.* sued to pre-empt the usufructuary mortgage so far as *H.*'s share was concerned:

Held, that he was not bound to pay the money under the *Mushrut-ul-rehan* which was a separate and independent transaction. He was liable to pay the proportionate amount of the consideration of the usufructuary mortgage on *H.*'s share. KALLA *v.* HARGIAN, 9 A. L. J. 661; 34 A. 416 **907**

Presidency Towns Insolvency Act (III of 1909), s. 52 **371**

Presumption—Adoption—Authority to adopt **299**

———— ————Correctness of Revenue Record **467**

———— ———— of guilty knowledge—Using forged document **81**

———— ————*Thakbast* map **341**

———— ————*Marriage—Man and woman cohabiting continuously—Recognition of children as legitimate—Presumption of marriage not to be displaced by unsatisfactory evidence of marriage held many years ago, but only by conclusive evidence.*

The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously.

This presumption of law is not lightly to be repelled. It is not to be broken in or shaken by mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. It can be repelled only by conclusive evidence, and cannot be displaced merely because direct evidence of the marriage which took place many years ago is not satisfactory.

The mother of the plaintiff and the father of the defendants lived as husband and wife for a long series of years. The defendants treated the plaintiff as their legitimate brother. The plaintiff's mother described herself in a document executed by her as the wife of the defendants' father who was a witness to the document:

Held, that the presumption of law was that the plaintiff's mother and the defendants' father were married lawfully, and the presumption was not repelled though the evidence of marriage which took place long ago was not satisfactory. BIPIN BEHARI DAS *v.* ATUL KRISHNA DAS **328**

———— ———— ————*Permanent tenure, heritable and non-enhanceable—Tenancy created 50 years ago—Residential purposes—Improvements permanent—Rent unchanged—Transfers by sale—Inheritance—No attempt to eject—Recognition of transferees as tenants.*

A tenancy was created some years before 1861. It was granted for residential purposes and since that

Presumption—concld.

ime the land had been enclosed and improved by the tenant to form the grounds or compound of a residential building. Expenses had been incurred by the tenant on permanent improvements to the land so as to make it fit for residential purposes. The rent during all these years remained the same, though the land had of late years increased very considerably in value. The land was transferred by sale and passed by inheritance on several occasions without any objection raised by the landlords. On the contrary, they recognised the transferees as tenants receiving rents from them, and no attempt was made to eject the tenants:

Held, that all these facts justified the conclusion that the tenancy was a permanent, transferable and heritable tenancy at a fixed rental.

The mere retention of the name of the old tenant for the purpose of identifying the holding in the *Sherista* of the landlord is not in itself sufficient to indicate that there was no recognition by the landlord that the tenancy was heritable and transferable. GREY *v.* RAM SHASHI ROY **110**

Price—Exchange—Sale **343**

Primogeniture, rule of—Succession to *lambardari* **925**

Priority. *See* MORTGAGE.

——— of claim—Seizure of absconder's property by Government—Attachment of property under Civil Court decree before attachment and proclamation by Government **984**

———Decree on mortgage—Suit for dower by mortgagor's wife—Pauper suit—Decree against mortgagor only—Decree for Court-fee against amount decreed and against husband—Collector realising amount by sale of mortgaged property—Right of purchaser—Sale in execution of mortgage decree—Purchase by mortgagee—Priority of title—Crown debt **177**

———Purchase of holding—Plaintiff's purchase at mortgage decree sale—Defendant's purchase at co-sharer landlord's rent decree sale—Question of transferability of holding, if can be raised by defendant **718**

Privacy, right of **270**

Private defence, right of—Exceeding the right **481**

———Onus *of proof—No allegation as defence.*

It is for the person who relies on the right of private defence to prove that he is within the exception, though the right is not alleged as a defence. VEERANA NADAN *v.* EMPEROR, 11 M. L. T. 251; (1912) 1 M. W. N. 404; 13 CR. L. J. 470 **310**

———*Rioting—Right of private defence, if exceeded—Punishment.*

When a Court finds that an accused had the right of private defence in any case, it ought not to convict any of them of rioting. It is impossible that a man who is acting in the exercise of a legal right can be a member of an unlawful assembly.

Any person who exceeds the right of private defence is liable to be punished for the specific offence of culpable homicide or other crime which he may be found to have committed in excess of that right. NAJUMUDDI *v.* EMPEROR, 13 CR. L. J. 497 **641**

Privy Council Appeal—Application for leave—Allowance of period occupied in obtaining copy of decree—Date of signing decree—Delay for which applicant not responsible—Application for copy made after period of limitation had expired—Misled by Full Bench ruling—Sufficient cause for delay in filing application **59**

———Application for leave to appeal—Time for obtaining copies of judgment and decree, whether to be excluded **497**

———*Application for leave—Award—Judgment of High Court based on award—Appeal from judgment of High Court—Civil Procedure Code (Act V of* 1908), *ss.* 109, 110, 111, *Sch. II, para.* 21, *cl.* (2).

In a case, the value of the subject-matter of which is over Rs. 10,000, and the High Court has reversed the decision of the lower Court, an applicant is entitled to a certificate for leave to appeal to the Privy Council.

The certificate cannot be refused on the ground that in accordance with the provisions of the Code of Civil Procedure, no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Such provisions only affect the appeals in India and do not affect the appeals to His Majesty in Council. AMEER BEGAM *v.* BADRUDDIN HUSSAIN, 15 O. C. 55 **2**

Probate—Court-fee **621**

Probate and Administration Act (V of 1881), ss. 50, 69, 86 *Will disinheriting son—Son's creditor if has* locus standi *to oppose grant—Order of Judge holding he has right to oppose—Appeal—If order appealable.*

An order of a District Judge holding that a certain party has a *locus standi* to contest a Will, is merely an interlocutory order and is not appealable.

A judgment-creditor who, but for a Will, would, in execution of his decree, have a right to seize the property which would descend to his judgment-debtor, and who alleges that the Will is a forgery set up for the purpose of defrauding the creditors, has a *locus standi* to make an application for the revocation of the Probate of the Will. LAKHI NARAIN SHAW *v.* DHANADA KUMAR GHOSE, 16 C. W. N. 1099 **686**

——— ——— **s. 50 Expl. 4**—*"Just cause"—Mal-administration—Disagreement between joint administrators—Grant "becoming useless and inoperative," meaning of.*

The words "become useless and inoperative"in section 50, Explanation (4) of the Probate and Administration Act imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it, *e. g.*, the discovery of a later Will or codicil or the subsequent discovery that the Will was forged or that the alleged testator was still living.

Therefore, mal-administration is not a just cause under section 50, Explanation 4, of the Probate and Administration Act, for revoking a Probate.

Consequently, a disagreement between joint administrators is not a just cause for annulling the Letters of Administration. GOUR CHANDRA DAS *v.* SARAT SUNDARI DASYA, 16 C. W. N. 880 **44**

——— ——— **s. 69** **686**

Probate and Administration Act—concld.

——————— **s. 82**—*Letters of Administration—Suit by legatee for declaration of title—Decree in suit—Subsequent suit by legatee against tenant for rent for period subsequent to death of testator—Right of suit.*

Letters of Administration to the estate of a deceased person were granted to his widow. The present plaintiff in a previous suit obtained a declaration that he was entitled as a legatee to 4-annas share of the property left by the deceased. He now sued to recover a 4-annas share of the rent from a tenant of the deceased:

Held, that the suit was maintainable. RAJANI KANTA SARKAR *v.* MAKHAN LAL GOSWAMI **542**

——— ——— **s. 86** **686**

Procedure—*Case remitted by Privy Council to High Court—Case pending in Court of Appeal—Limitation Act (IX of* 1908), *s.* 31.

The Subordinate Judge held that to a suit upon a simple mortgage, the twelve years' rule of limitation, under Article 132 of the Limitation Act of 1877, would apply. The High Court, on appeal, held, that the sixty years' rule of limitation was applicable under Article 147. On appeal the Privy Council, on July 22, 1907, restored the former decision and remanded the case to the High Court for disposal. While the case was pending in the High Court the Limitation Act of 1908 was passed on August 7, 1908, which enacted that "no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable:"

Held, that this legislation applied to this suit, as the former judgment of the Privy Council did not end the suit which was remitted for inquiry upon allegations of fact, and when the new Limitation Act was passed, the suit was pending. VASUDEVA MUDALIAR *v.* SADAGOPA MUDALIAR, 16 C. W. N. 489; (1912) 1 M. W. N. 433; 11 M. L. T. 313; 9 A. L. J. 504; 15 C. L. J. 466; 14 BOM. L. R. 455, 23 M. L. J. 16; 35 M. 191 **222 P. C.**

———— ———*Sessions case—Inquiry by Magistrate—Evidence—Framing of charge—Cross-examination.*

In every inquiry into a Sessions Court, a Magistrate is bound, before he draws up a charge, to take all such evidence as may be produced (1) in support of the prosecution, (2) on behalf of the accused and (3) as may be called for by the Magistrate. If the Magistrate does not take that evidence, he errs unless he can justify his procedure on the ground that the evidence of such and such witness is obviously irrelevant or that he considers the fact in issue between the parties proved one way or the other by the evidence already produced.

A Magistrate is further bound, if the complainant or the officers conducting the prosecution or the accused applies to him, to issue process to compel the attendance of witnesses, to issue such process and as a matter of consequence to take the evidence thus caused to be produced unless the Magistrate records reasons to show that it is unnecessary to compel the attendance of the witnesses.

Procedure—concld.

As each witness out of the classes mentioned above is examined, the accused is at liberty to cross-examine him. DURGA DUTT *v.* EMPEROR, 13 CR. L. J. 443; 10 A. L. J. 144 **75**

Professional misconduct. *See* PLEADER; SOLICITOR.

Provincial Insolvency Act (III of 1907), s. 6—*Jurisdiction—Insolvency petition by debtor arrested or imprisoned—"Or", construction of.*

A debtor, who has been arrested or imprisoned in execution of a decree, may present an insolvency petition to the Court having jurisdiction either in the local area where he is in custody or where he resides or carries on business.

The word 'or' in section 6 of the Provincial Insolvency Act is used in the sense of giving the debtor an alternative choice. It does not restrict the debtor to present his insolvency petition only to the Court within whose jurisdiction he is in custody. GHANSHAMDAS *v.* VISHINDEVI, 5 S. L. R. 259 **830**

——— ——— ——— **s. 15**—*Insolvency, petition for—Dismissal—Ground to be indicated in judgment—Adjudication—Equitable distribution of assets—Advantage to creditors.*

An adjudication of insolvency ensures the distribution of the assets, if there are any, according to the equitable arrangement for which provision is made in the Insolvency Act.

Therefore, if there are considerable assets, it would be most disadvantageous to the general body of creditors that there should not be an adjudication.

A Judge, in dismissing a petition for adjudication, should indicate one of the grounds set forth in section 15 of the Provincial Insolvency Act as that on which he purports to act. PREONATH ROY *v.* NIBARAN CHANDRA SARKAR, 15 C. L. J. 631 **870**

——— ——— ——— ——— **ss. 16 (2), 31**—*Civil Procedure Code (Act V of* 1908), *s.* 64—*Secured creditors, rights of—Mortgages effected during the course of attachment, validity of, in insolvency proceedings—Procedure to be followed in the case of secured creditor—Assets, realized by sale, right of secured creditors to proceed against.*

Certain mortgages were executed by an insolvent judgment-debtor during the continuance of an attachment of the mortgaged property by certain decree-holders, who contended in insolvency proceedings that the mortgages were void against them under section 64, Civil Procedure Code:

Held, (1) that according to the provisions of section 16(2) of the Provincial Insolvency Act, the claims, which the creditors were able to enforce under the Civil Procedure Code, ceased to be enforceable upon the making of the order of adjudication and the creditors could only work out their remedy under the conditions laid down in the Insolvency Act and they could not, therefore, claim that the mortgages were void against them;

(2) that if the property were sold up, the mortgagees would have the same remedy against the assets realized by sale as against the property itself;

(3) that in all such cases where claims were set up by the mortgagees, the provisions of section 31 of the Insolvency Act must be strictly complied with.

Provincial Insolvency Act—concld.

An attaching creditor has no lien or charge upon the debtor's property which he attaches and is not entitled to rank as a secured creditor.

It is expedient in the interest of all the creditors that the Court should be allowed to bring the insolvent's mortgaged property to sale and give the mortgagee the same remedy against the sale-proceeds as he had against the property itself.

The rights of secured creditors are not affected in any way by the passing of an order of adjudication. GOPI NATH *v.* GUR PRASHAD **860**

——————————— **s. 20**—*Receiver entering into arrangement without leave of the Court—Sale by officers of Court—Contract Act not applicable.*

The purchaser of property belonging to an insolvent cannot impugn the sale on the ground that the Receiver, who sold the property, entered into an arrangement with the purchaser for deferred payment of the purchase-money without the leave of the Court.

The Contract Act has no application to sales by officers of Courts. SHWE WA *v.* SULLIVAN, 5 BUR. L. T. 79 **368**

——————————— **ss. 24, 25, 28**—*Claims on forward contracts—Contingent debts—Proof in insolvency—Creditor's affidavits—Duty of Official Receiver.*

Claims in respect of forward contracts are demands in the nature of unliquidated damages arising out of contract. They are contingent debts capable of being fairly estimated and can be proved, under the Insolvency Act, before the due dates for the performance of the contracts have arrived.

Where different creditors file affidavits before the Official Receiver in proof of such debts, it is his duty to inquire into the matter and to determine a uniform rate for the purpose of making a fair estimate or valuation of these debts. The creditors' affidavits should not be accepted without question, as the affidavits can only disclose the chance of liability, and are nothing but the creditor's estimate and opinion as to the present value of the debt. A creditor's estimate is no part of the proof of such a debt. MOSSAJI ISMAILJI LOTIA, *In re*, 5 S. L. R 249 **825**

——————————— **ss. 25, 28** **825**

——————————— **s. 31** **860**

Provincial Small Cause Courts Act (IX of 1887), s. 15 **352**

——————————— **s. 25**—*Lower Court refusing costs to the successful party on insufficient grounds—High Court can interfere in revision.*

Ordinarily, costs should follow the event, and when the lower Court does not act on this rule, it ought to give a sufficient reason for not doing so. Where the reason given by a Subordinate Judge for disallowing the costs of a successful plaintiff is unsatisfactory, the High Court can interfere under section 25 of Act IX of 1887. NARAYANA IYER *v.* VENKATARAMA AIYAR, (1912) 1 M. W. N. 366 **202**

——————————— **s. 25**—*Finding opposed to evidence—Power of High Court to interfere in revision—Acknowledgment of payment by one trustee without actual receipt of money—Such acknowledgment not binding on the institution.*

Provincial Small Cause Courts Act—concld.

Even if a finding of fact arrived at by a lower Court is entirely opposed to the evidence, the High Court has no power to interfere in revision under section 25 of Act IX of 1887.

A mere acknowledgment of payment by one of the trustees who did not really receive the money cannot bind the institution. GANAPATHI PILLAI, *In re*, (1912) 1 M. W. N. 181 **186**

——————————— **Sch. II, Arts. 8, 11** **32**

——————————— **Art. 15** **352**

——————————— **Art. 18**—*Suit by trustee—Claim based on agreement by defendant to pay a specified sum to plaintiff.*

A suit by a trustee for the recovery of a specified amount agreed to be paid to him by the defendant for being used as a trust is not a suit relating to a trust within the meaning of Article 18 of Schedule II of the Provincial Small Cause Courts Act and is triable by a Small Cause Court if the amount of the claims falls within its pecuniary jurisdiction. AIYYA PILLAY *v.* VRITHACHELLAM PILLAY **273**

——————————— **Art. 35 (l)**—*Small Cause Suit—Suit for injury—Assault—Threatening to beat with a shoe—Suit for compensation.*

A suit to recover damages from defendant for running after plaintiff with a shoe in his hand, threatening to beat him and using abusive language, though not actually touching the plaintiff's person, is a suit for "injury to the person" within the meaning of clause 35 (*l*) of the second Schedule of the Provincial Small Cause Courts Act and is, therefore, excluded from the cognizance of the Small Cause Court.

The act complained of amounts to an assault and to an offence affecting the human body. GOBIND BALKRISHNA JOSHI *v.* PANDURANG VINAYAK, 14 BOM. L. R. 323; 36 B. 443 **505**

——————————— **Art. 41** **218**

Public Demands Recovery Act (I of 1895), s. 19 (2) **291**

Public Record—Map prepared by *Kanungo* **459**

Punjab Courts Act (XVIII of 1884), s. 70 (a)—Onus *wrongly laid—Revision.*

A revision is not justified on the mere ground that the *onus* was placed on the wrong party. KARIMULLAH *v* KIMON, 213 P. W. R 1912; 207 P. L. R. 1912; 102 P. R. 1912 **839**

Punjab Land Revenue Act (XVII of 1887), Rules under, rule 17 (ii)—Lambardari—*Succession to office—Primogeniture, rule of—Adopted son cannot succeed.*

The expression "nearest eligible heir according to the rule of primogeniture", in rule 17 (*ii*) of the rules under the Land Revenue Act, should be strictly construed; it does not apply to an adopted son.

The rule of primogeniture embraces only descent by birth and does not embrace descent by adoption.

Consequently, in the case of a vacancy in the office of headman, an adopted son cannot succeed to or through his adoptive father under any rule of primogeniture.

Punjab Land Revenue Act—concld.

A., *B.* and *C.* were three brothers. *A.* was the eldest and *C.* the youngest. The last holder of the post of *Lambardar* was a descendant of *B.*, and he died childless.

D. and *E.*, the two sons of *C.*, claimed the office. *D.* was the elder son but *E.* had been adopted by *A.* who had no son of his own;

Held, (1) that *E.* could not succeed to the *lambardarship* as the adopted son of *A.*;

(2) that *D.* was entitled to succeed and his title could not be postponed to *E.* in consequence of the latter's adoption by *A.* BHAG SINGH *v.* JAURA SINGH, 2 P. R. 1912 REV.; 7 P. W. R. 1912 REV. **925**

——————— **ss. 15 (1) (a) and (3), 118 (3) and (4)**—*Civil Procedure Code (Act V of* 1908), *s.* 2 (14)—*Sanction to review, whether an order—Review—Revision—Appeal—Partition, permission to withdraw application for—Discretion—Circumstances.*

An order passed on review is appealable, provided that it does not merely confirm the previous order. A mere sanction, however, given by a controlling to a Subordinate Revenue Officer to review an order is not in itself an "order" and is, therefore, not appealable, though it may be open to revision.

Where a Revenue Officer allowed an application for partition to be withdrawn, because numerous irregularities had occurred in the conduct of partition proceedings and the original second party had alienated his share to other persons, who represented him in the proceeding:

Held, that the Revenue Officer had exercised a sound discretion in allowing the withdrawal of the application, and that no action, under section 118 (4), Land Revenue Act, was necessary, because there was no applicant other than the first party who had been permitted to withdraw his application. AHMAD *v.* AHMAD, 3 P. R. 1912 REV.; 6 P. W. R. 1912 REV. **937**

——————— **s. 118 (3), (4) 937**

——————— **s. 144**—*Punjab Tenancy Act (XVI of* 1887), *s.* 17—*Appraisement—Value of Record of Rights entries in revenue proceedings.*

Under the joint force of section 17 of Act XVI of 1887 and section 144 of Act XVII of 1887, a co-sharer in a joint holding is competent to make an application for appraisement; it is not necessary for all the co-sharers to join in it.

In dealing with applications under sections 144, Land Revenue Act, XVII of 1887, and 17 of the Punjab Tenancy Act, XVI of 1887, the Revenue Officer should not go behind the entries in the Revenue Records. He should act as if the co-sharers recorded therein were in fact the co-sharers in the holding. A procedure is provided for those who dispute the correctness of the Record of Rights entries to have them altered. Pending alterations, the Revenue Officer should, in a proceeding under section 17, Tenancy Act, treat the entries as correct. NIHAL DEVI *v.* KISHORE CHAND, 4 P. W. R. 1912 REV. **914**

Punjab Municipal Act (XX of 1891), s. 94, cls. (a) and (e)—*Superstructure built on an old* chhatta—*Material alteration—Security of building affected.*

The re-placing of an old by a new superstructure, upon an old *chhatta* or bridge over a lane is a material

Punjab Municipal Act—concld.

alteration within the meaning of clause *(a)* of section 94 of the Punjab Municipal Act and affects the security of the old building within the meaning of clause (*e*) of the same section. Therefore, the Committee acts *intra vires* if it requires the removal of such new superstructure erected without its permission. MUNICIPAL COMMITTEE OF DELHI *v.* MAMAN CHAND, 178 P. L. R. 1912; 210 P. W. R. 1912 **658**

Punjab Pre-emption Act (II of 1905), ss. 11, 12, 12 (a), 12 (c), thirdly—*Right of vendee to resist—Pre-emptor himself debarred by s.* 11 *from claiming pre-emption—Right of only* some *owners to sue under s.* 12 (*c*) thirdly.

A vendee, in order to resist a suit for pre-emption, must show that he has himself a right to purchase the property which is equal to, or superior than, the right of the person who claims to pre-empt it. A person, who is, by virtue of section 11 of the Act, entirely debarred from any right of pre-emption, cannot claim that under section 12 he has, as a defendant, a right of pre-emption which enables him to defeat the right of a person to whom the Act gives the right of claiming pre-emption. Therefore, a vendee, who is debarred under section 11 from claiming pre-emption as a plaintiff, is not entitled to resist a suit for pre-emption as defendant on the ground that as the next heir of the vendor he has a superior right to that of plaintiff under section 12 (*a*) of the Act.

Section 12 (*c*), *thirdly*, does not require that either *all* the owners should sue *jointly*, or only *one* of them should sue in respect of his individual and several right. Under it, even *some*, out of many owners, can sue, while the rest elect to stand aside without taking any action in the matter. DAULAT RAM *v.* SOBBA SINGH, 179 P. W. R. 1912 **102**

——————— **ss. 12, 12 (a) 102**

——————— **s. 12 (a)**—*Widow's right to pre-empt as heir—Widow, whether heir under Customary Law.*

Where a widow has a right to succeed collaterally she has a right to pre-empt under section 12 (*a*) of the Pre-emption Act. Under section 12*(a)*, the right of pre-emption is not confined to agnates alone.

Obiter—Under the Customary Law, as under the Hindu Law, a widow is an heir of her husband. BHAGI *v.* MUHAMMAD, 212 P. W. R. 1912 **734**

——————— **s. 12 (c), thirdly 102**

Punjab Tenancy Act (XVI of 1887), s. 5 (1) (b)—*Owner losing ownership by inability to pay revenue—Occupancy-tenant.*

An owner, who through inability to pay the revenue loses his ownership, ceases to be a landowner by an involuntary act within the meaning of section 5 (1) (*b*) of Act XVI of 1887. GHIPI *v.* SIGARU, 3 P. W. R. 1912 REV. **927**

——————— **s. 17**—Appraisement **914**

——————— **ss. 84 (3), 98**—*Revenue Record—Presumption of correctness of entries.*

One Tola Singh sued certain tenants for arrears of rent in respect of a holding. The entries regarding the holding in the *jamabandi* were as follows:—

Punjab Tenancy Act—concld.

In the ownership column, *shamilat deh* and in the cultivators' column, certain tenants on behalf of Haidar Shah co-sharer $\frac{1}{3}$ and Tola Singh $\frac{2}{3}$.

The defendants pleaded that they had paid the entire rent to Haidar Shah. Haidar Shah was then joined as defendant and he repudiated Tola Singh's claim alleging that Tola Singh was out of possession altogether and that the entry in *jamabandi* was wrong.

The Assistant Collector, 1st grade, applied to the Collector under section 98 of the Punjab Tenancy Act for sanction to an order directing the defendant Haidar Shah to institute a suit in a Civil Court within two months to establish the fact that the entries in the Revenue papers were wrong, and that he was entitled to the proprietary possession of the whole area in suit. The Collector replied that the *onus* of suing in a Civil Court should be placed upon Tola Singh, the plaintiff, and not on Haidar Shah, the defendant. The Revenue Assistant passed order accordingly and Tola Singh's appeal against the orders was rejected by the Collector. On a reference under section 84 (3) of the Punjab Tenancy Act by the Commissioner:

Held, that a presumption of correctness attaches to Revenue Records and the proper course would have been to postpone the case for two months to allow Haidar Shah to prove his exclusive title if so advised. If no suit was brought, the Court should decide in favour of the plaintiff. TOLA SINGH *v.* MUHAMMAD. 54 P. L. R. 1912 **467**

——— ——— ——— ——— s. 98 **467**

Raikumat—Legally recoverable if payable under custom **837**

Railway—*Consignment of goods—Risk note—Freedom of Railway Company from liability except where loss due to wilful negligence of or theft by Company's Servants—Burden of proof.*

The plaintiffs consigned certain goods through the defendant Railway Company. The contract between the parties provided that the Railway Company would not be liable for loss or damage to the goods except where the loss was due to wilful negligence on the part of the Railway Company's servants or due to theft by the Company's servants or agents. In a suit for loss of the goods:

Held, that the *onus* lay on the plaintiffs to prove that they came within the proviso, that is, that the loss was due either to the wilful negligence of or theft by the Company's servants. SHEO BARAT RAM *v.* BENGAL AND N.-W. RAILWAY CO. **56**

Railway Company. *See* RAILWAYS ACT.

Railways Act (IX of 1890), ss. 3 (4), (5), 80—*Railway Company—Navigation Company in connection with Railway traffic—Liability for loss to goods—Detention—"Deterioration"—Goods conveyed by different Companies—Liability of Company detaining goods—Agreement between two Companies for non-liability to public—Jurisdiction—Place of trial—Contract made where goods delivered for transit—Civil Procedure Code (Act XIV of 1882), s. 17, Exp. III.*

A. delivered certain goods to the North-Western Railway Company at Ludhiana for carriage to Bhairab in Eastern Bengal.

Railways Act—concld.

The Railway Receipt for the goods was made over to *A.* at Ludhiana and payment for freight was also made there. The lines of various Railway Companies were used for the transit of the goods, which were conveyed to Goalundo by the Eastern Bengal State Railway, and were conveyed thence by the Indian General Navigation and Railway Company to Bhairab.

The goods were detained at Goalundo and Bhairab and plaintiff, after due notice, sued the India General Navigation and Railway Company for damages for loss in the value of goods owing to the detention. The defendant never pleaded in the first Court that it was not a Railway Company. Between the Eastern Bengal State Railway and the defendant Company there was alleged to be an agreement by which each Company was to be responsible to the other for damage to goods but not to the public:

Held, (1) that the defendant Company could not plead in appeal that it was not a Railway Company;

(2) that the defendant Company was a Railway Company and that section 80 of the Railways Act applied to the case;

(3) that as the contract was made at Ludhiana, the Ludhiana Court had jurisdiction to try the suit;

(4) that even if *A.* had notice of the agreement between the Eastern Bengal State Railway and the defendant Company, it would not relieve the latter of liability to *A.* in the suit;

(5) that "deterioration" in section 80 of the Railways Act included decrease in market-value consequent on detention;

(6) that the defendant Company was liable for loss caused by detention at Bhairab but not for detention at Goalundo. INDIA GENERAL NAVIGATION AND RAILWAY CO., LD. *v.* HARCHARAN DAS, 233 P. L. R. 1912 **12**

——— ——— ——— s. 80 **12**

Rape. *See* PENAL CODE, s. 354 **309**

Receiver, appointment of, before completing inquiry under section 145, Criminal Procedure Code **808**

———Charge of defamation against Receiver—Sanction of Court, whether necessary—Defamation arising out of matter of repairs of estate under charge of Receiver **489**

——— ——— entering into arrangement without leave of Court **368**

——— ———*Sanction of Court—Prosecution of Receiver for ordinary criminal offence.*

The sanction of the Court appointing a Receiver is not necessary in order to proceed against him for a breach of the ordinary Criminal law of the country, *e. g.*, defamation. NAGENDRA NATH *v.* JOGENDRA NATH, 13 CR. L. J. 491 **491**

Registrar, whether a Court **652**

Registration is not delivery of possession **698**

——— ——— ———Lease for more than a year **830**

——— ——— ———Mortgage for a sum of Rs. 100 and upwards **206**

——— ——— ——— Oral sale of equity of redemption to usufructuary mortgagee **343**

Registration—concld.

——— ——— ———Transfer of right to cut and appropriate plants **234**

——— ——— ———*Petition of compromise filed in mutation proceeding affecting immoveable property of value less than* 100 *rupees—Whether admissible in evidence without registration— Whether it confers title.*

A petition of compromise relating to immoveable property of value less than Rs. 100 was filed in a Revenue Court in a mutation proceeding and the order of the Revenue Court was passed in accordance with the terms of the compromise. It was not registered:

Held, (1) that a petition of this sort should not be excluded altogether from evidence for want of registration;

(2) that in view of the fact that the compromise related to property of value less than Rs. 10, it was capable of operating as a document of title, although it was not registered. NIDHAI *v.* BIDESI **741**

Registration Act (III of 1877), s. 17—*Registration of document—Recitals or memoranda of previous disposition—Document drawn up to evidence partition made at the time.*

Deeds which are mere recitals or memoranda of dispositions of property, which have been previously agreed upon or made and which do not themselves operate to effect any such disposition, need not be registered.

Where a person made a partition of his property, exceeding Rs. 100 in value, among his sons and there and then drew up a document to evidence the partition, and there was no evidence to show that there was any previously completed partition or that the document was merely intended to serve as a memorandum of what had been previously arranged:

Held, that the document was compulsorily registrable. NIHAL CHAND *v.* DAVID SASSOON & Co., KARACHI, 231 P. W. R. 1912; 229 P. L. R. 1912 **28**

——— ——— ——— ——— **s. 17 cl. (d) proviso**—*Rent in kind.*

The proviso to section 17, clause (*d*) of the Registration Act, is not confined to cases where the rent is payable in money; it applies also where the rent is wholly, or partly payable in grain. SAKKI REDDI APPALASAWMY *v* PAKKURTI VENKATASAWMI NAIDU, 11 M. L. T. 405; (1912) 1 M. W. N. 918 **682**

——— ——— ——— ——— **s. 17 (e)**—*Construction of document—Composition deed—Test—Transfer of property to trustees for payment of debts—Registration.*

The essential test of a composition deed is that there ought to be a compounding of debts due.

A deed, by which the owner of certain property transferred it to trustees for the purpose of enabling them to pay off his creditors, and in which there was nothing whatever to show that there was any composition, any settlement with the creditors, that the debtor should pay less than he owed to them and that they agreed to accept that composition, is not a composition-deed but merely a conveyance or a trust-deed and is compulsorily registrable. SHEKH ADAM HASANALI *v.* CHANDRASHANKAR **850**

——— ——— ——— ——— **ss. 32, 33, 87**—*Presentation of document for registration by person holding general power-of-attorney, validity of—Evidence Act (I of 1872), s. 114—Presumption in favour of validity of registration—Presence of executant of document at the time of registration, effect of.*

A Court will presume that a registered document was presented for registration by a person duly authorized under the law. But this presumption may be rebutted.

Where a document was proved to have been presented for registration by a person holding a general power-of-attorney, not authenticated in the manner prescribed by section 33 of the Registration Act and not authorising its holder to register documents:

Held, that the presumption in favour of the validity of registration proceedings was rebutted.

The provisions of sections 32 and 33 of the Registration Act are not open to a lax interpretation and the fact that the executant of a document was present and admitted execution when it was registered does not justify the inference that he was present at the moment when the document was actually presented for registration.

Where a document was presented for registration by a *karinda* (agent) of the executant and no attempt was made to prove that he did not hold a proper authority to present it:

Held, that the presumption in favour of the validity of the registration proceedings must be given effect to. JAMBU PRASAD *v.* AFTAB ALI KHAN, 9 A. L. J. 420; 34 A. 331 **881**

——— ——— ——— **ss. 33, 87** **881**

——— ——— **(XVI of 1908), ss. 20, 72**—*Refusal to receive document—Appeal.*

Semble:—If a Sub-Registrar merely refuses to take up a document for registration, no appeal will lie to the Registrar against the order. YELAMBAL ACHI *v.* GOVINDASAMI ODAYAR, (1912) 1 M. W. N. 412 **370**

——— ——— ——— **s. 72** **370**

Regulation VIII of 1800 **691**

——— ——— ——— **XVII of 1806** **275**

——— ——— ——— ——— **XI of 1825**—*Alluvion and diluvion—Occupancy-holding re-appearing after submersion—Occupancy-tenant, whether loses his right to recovered land—Custom—Agreement in contravention of custom— Consideration—Onus of proof of custom.*

The general custom in the Punjab is that an occupancy-tenant does not lose his right by reason of the land of his holding being submerged. Therefore, he has the same rights after alluviation as he had before diluviation of the holding. If a custom to the contrary is alleged, it must be very strictly proved by the landlord.

The *Wajib-ul-arz* of a village recorded an agreement that occupancy-tenants will have no right to land re-appearing after being carried away by the stream:

Held, that the entry was inoperative, because,

(1) the agreement was void for want of consideration:

(2) the parties to the agreement, who were subject to the Customary Law in alluvion and diluvion matters, were not at liberty to enter into a contract providing that they and their descendants shall not in future be subject to that rule of decision. JANGI *v.* DALIPA, 4 P. R. 1912 REV.; 8 P. W. R. 1912 REV. **942**

Religious Institution—Ward, trustee of temple—Appointment by Court of Wards of manager to discharge trustee's duties—Suspension by manager of temple *archakes*—Liability of minor trustee for acts done by the manager **902**

———————*Succession to* Mahantship—Byragi Thakurdwara *in Banswala Bazar, Amritsar City—Suit by senior* chela *to oust junior with equal right.*

Only a person with a superior right can disturb another in possession of property. So where in a suit for possession of a *Byragi Thakardwara* in Banswala Bazar, Amritsar city, brought by the senior *chela* against the junior, the right of both was found to be equal and the plaintiff failed to prove that as senior *chela* he had a preferential right to succeed, his claim was disallowed on the ground that he was not entitled to oust the defendant. MANGAL DAS *v.* RALLA RAM, 83 P. W. R. 1912; 152 P. L. R. 1912 **721**

Remand. *See* CIVIL PROCEDURE CODE, 1908, O. XLI, RR. 23 AND 25.

———————*Judgment of Court—Finding based on document and on statement of witness—High Court—Second appeal—Document found not to support the conclusion.*

Where the finding of a Subordinate Court is based on documentary evidence as well as on the statement of a witness and the High Court, on second appeal, finds that the documentary evidence does not support the conclusion, it will not act on the assumption that the Court of fact would have come to the same conclusion apart from the document, but will remand the case for a fresh finding on the question. ETTAKKAMANA MANHOLI GOVINDAN *v.* AMAYA MANGALATH PUTHIA, (1912) 1 M. W. N. 821 **103**

———————*Remand by Appellate Court not on a preliminary point, validity of—Settlement out of Court, inquiry into—Evidence not placed on record—Remand for re-trial.*

An order of remand may, in some cases, be made by an Appellate Court, even where the disposal has not been on a point which can be strictly called a preliminary point.

In an inquiry as to whether a dispute between the parties was settled out of Court, the Munsif looked at a receipt and, without exhibiting it in evidence or taking other evidence, decided that there had been a settlement out of Court. On appeal, the District Judge remanded the suit for re-hearing and disposal:

Held, that the District Judge had power to order the remand. VEMULA JAMBALAYA *v.* ISKALA RAJAMMA, (1912) 1 M. W. N. 1000 **859**

——————**order**—Appeal **725**

——————————not passed under O. XLI, r. 23 appealable **367**

——————————Inclusion of Pleader's fees in costs—Failure to file certificate of fee—Review of taxation after success in lower Court **828**

Rent, definition of **27**

——, enhancement of. *See* ENHANCEMENT OF RENT.

——**in kind** **682**

Rent—concld.

——**decree** obtained by co-sharer landlord—When admissible in another suit for rent by another co-sharer—Tenancy under one contract—Proportionate share of entire rent payable to each co-sharer—Co-sharer made *pro forma* defendant in first suit **624**

——**suit**—Decision when *res judicata* **863**

————, scope of issue—*Res judicata* **837**

————————*Exchange of* patta *and* muchilikas—*Madras Rent Recovery Act* (*VIII of* 1865), *s.* 7—*Madras Estates Land Act* (*I of* 1908), *s.* 53—*Accrual of right—Limitation*

A landlord is entitled to maintain a suit for rent under the Estates Land Act without tendering a *patta*. Even under the Rent Recovery Act. the exchange of *pattas* and *muchilikas* or the tender of a *patta* was not necessary to give the landlord a right to the rent, and section 7 of the Act did not lay down any rule of limitation

The effect of section 7 was to make the tender of a *patta* a condition precedent to entitle the landlord to institute *legal proceedings* to enforce the terms of a tenancy and not a condition necessary to complete his right to the rent.

The right to each instalment of rent accrues on the date fixed for the payment of the instalment according to the contract between the parties or according to usage and not when a *patta* is tendered. Limitation would run from that date. SATRUCHERLA VEERABHADRA RAJU GARU *v.* GANTA KUMARI NAIDU, 11 M. L. T. 248; (1912) 1 M. W. N. 397 **393**

Representative suit—*Death of plaintiff—Another member of the class entitled to continue suit—Civil Procedure Code* (*Act V of* 1908), *s.* 2, *O. I, r.* 8, *scope of.*

Where a voter in *Devastanom* circle instituted a suit with sanction under the Civil Procedure Code, Order I, rule 8, for a declaration that the election of a member of a *Devasatanom* committee was void and for an injunction restraining him from exercising the office of such member and he died pending suit:

Held, that another voter was entitled to be brought on the record and to continue the suit:

Order I, rule 8 of the Civil Procedure Code applies not only to cases where concurrent interests are concerned but also where they are similar though distinct and the sanction granted to a voter whose interest is personal to himself is not, therefore, bad.

Mere misdescription of a proper party as legal representative would not in itself justify the setting aside of the order of revival. SIVAGURUNATHA CHETTIAR *v.* RAMASWAMI IYENGAR, 11 M. L. T. 257; (1912) 1 M. W. N. 105 **399**

Residence, meaning of **794**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, s. 11.

——————Decision of Revenue Court **239**

——————Decree for prompt dower passed by a competent Court out of Oudh **747**

——————Estoppel—Suit for pre-emption—Plea of bar by limitation—Suit dismissed as premature—Plea of limitation in subsequent suit **890**

Res judicata—contd.

——————Partition—Question of proprietary title which ought to and might have been raised **817**

——————Person not recorded as co-sharer at time of partition **685**

——————Previous litigation between parties—Decision on mixed question of fact and law, binding though erroneous **911**

——————*Agreement to maintain defendant in consideration of Will—Prior suit on agreement by defendant for arrears of maintenance and decree therein—Present suit by plaintiff to set aside agreement—Plaintiff not entitled to rely on events prior to former suit—Subsequent events disclosing intention to defeat the Will—Not a sufficient cause of action.*

By an agreement, Exhibit I, the plaintiff agreed to give maintenance to the defendant in consideration of her executing a Will bequeathing all her moveable property to him after her death. The defendant instituted Original Suit No. 160 of 1907 for two years' payment due to her under Exhibit I and obtained a decree. Then the plaintiff sued for a declaration that there was a failure of consideration for Exhibit I and, therefore, the agreement could not be enforced against him:

Held, (1) that the plaintiff could not rely on events prior to Original Suit No. 160 of 1907 to avoid the agreement, as he was bound to put forward in that suit *all* pleas which would entitle him to get the Court to hold that the agreement was not enforceable against him;

(2) that the only events subsequent to that suit alleged as entitling him to relief, *viz.*, that the defendant made false complaints to the Police of loss of some properties included in the Will and also concealed some of them in a third person's house, disclosed no cause of action to avoid Exhibit I, and that the allegation of a mere intention on her part to defeat the bequests was not sufficient. ATYAM VENKIAH, *In re*, (1912) 1 M. W. N. 182 **186**

——————*Alienation by husband—First suit by wife for protecting her right of maintenance—Second suit for recovery of property after husband's death—Judgment—Evidence—Point not in issue.*

A. transferred certain properties to *B.* In a suit by *A.*'s wife, *C.*, it was decided that the transfers in question would not affect *C.*'s right to maintenance out of *A.*'s properties. The only issue in that suit was whether the alienations were binding on *C.* There was no issue as to whether they were nominal or bogus transactions but in one portion of the judgment they were characterised as bogus transactions, while in another portion they were treated as collusive transfers brought about by *A.* and *B.* to defeat *C.*'s right to maintenance.

After *A.*'s death, *C.* sued *B.* to recover the properties on the ground that the transfers were nominal transactions:

Held, (1) that the question whether the transfers were nominal transactions was not *res judicata* by reason of the decision in the previous suit;

(2) that the judgment in the previous suit could not be treated as evidence on the question of the nominal character of the transfers. RAYI KRISHNAYYA *v.* GANGA BAI, (1912) 1 M. W. N. 380 **357**

Res judicata—contd.

——————*Bengal Tenancy Act (VIII of 1885), s. 106—Dismissal of suit under section 103 for default—Whether decision* res judicata—*Rent suit—Question, what is rent payable annually—Decision upon evidence—Decision conclusive—Civil Procedure Code (Act V of 1908), s. 11.*

The dismissal of a suit, under section 106 of the Bengal Tenancy Act, for default, may bar a second suit of the same scope and nature, but it does not operate as *res judicata*. Where there is no adjudication that the rent was as alleged by the tenant or by the landlord, the determination of the question in a subsequent suit between the parties is not barred.

Where the question in controversy in a previous suit between the landlord and tenant was, not the amount of rent payable for the particular years for which rent had been claimed, but the amount of *jama* annually payable by the tenant to the landlord, and the Court expressly found that the plaintiff had failed to prove his allegation while the tenants (defendants) had established by affirmative evidence that the *jamas* were as stated by them:

Held, that, there was an express adjudication by the Court upon the question of the amount of rent annually payable and the decision in the previous suit must be deemed conclusive. SARJUG PROSAD NARAIN SINGH *v.* AJODHYA RAI **863**

——————*Decision in rent suit by defaulting* patnidar—*Subsequent rent suit by purchaser of* patni *under* Patni *Regulation—Whether former decision* res judicata *in later suit*—Patni *Regulation (VIII of* 1819), *s.* 11—*Action in ejectment by purchaser at* patni *sale—Limitation—Incumbrance—Adverse possession, when incumbrance.*

Although the position of a purchaser at a *patni* sale may not be precisely that of a purchaser at a revenue sale (*Moizuddi* v. *Ishan Chandra*, 7 Ind.Cas. 849; 13 C. L. J. 293;15 C. W.N. 706), yet he is not privy in estate to the defaulting proprietor and does not derive his title from him, as, under section 11 of the *Patni* Regulation, he acquires property free of all encumbrances that might have been created upon it by the act of the defaulter, his representatives or assignees.

Therefore, a suit for rent by the purchaser cannot be barred as *res judicata*, because a previous suit for rent by the defaulter failed on the ground that the relationship of landlord and tenant between the then plaintiff and the defendant was not established.

If an action in ejectment is brought by the purchaser, limitation will run against him only from the date when his purchase became final.

The interest of a person in adverse possession is an incumbrance only when the adverse possession has continued for the statutory period.

Therefore, where the defaulting *patnidar* was not dispossessed for ten years before the *patni* sale, the trespasser's title by adverse possession had not been perfected, and, consequently there was no incumbrance to be annulled by the purchaser. SATISH CHANDRA SINHA *v.* MUNJANALI DEBI **869**

——————*Former application of insolvency dismissed for failure to produce evidence—Whether second application for declaration of insolvency is barred.*

Where an application to be declared an insolvent is dismissed for failure to produce evidence, a second

Res judicata—concld.

application for such declaration is not barred as *res judicata*. SALIG RAM *v.* RAM KISHEN DAS, 10 A. L. J. 51 **51**

———————*Rent suit—Scope of issue—Incidents of tenancy—Not relating to claim for particular year*—Raikumat—*Legally recoverable if payable under custom—Decision that* raikumat *payable, whether* res judicata.

The decision in a rent suit may operate as *res judicata*, where it is upon a question as to the incidents of the tenancy, not merely in relation to the claim for that particular year, but from a wider point of view.

Therefore, a decision that *raikumat* was payable, in a previous rent suit, involved, by implication at any rate, a decision that the *raikumat* claimed was payable under a custom; and the decision, being upon a mixed question of fact and law, operates as *res judicata*. BECHA RAM SAHU *v.* CHAMRU URAON **837**

———————*Second suit for redemption.*

T. mortgaged her occupancy-holding with possession to *G.* in 1899. In 1909, *T.* brought a suit, not properly framed as a redemption suit, in which she obtained a decree for possession subject to her first paying within 30 days the amount secured under the mortgage. She, however, did not pay the money within time. Subsequently, she brought a suit for redemption:

Held, that the second suit for redemption was not barred by the former suit.

The cause of action in a suit for redemption is the mortgagor's title plus a valid tender or deposit of the mortgage-debt. Unless, therefore, there has been a decree which makes it impossible for the mortgagor to make a valid tender or deposit, his right to do so continues. GANPAT SINGH *v.* TOHFA, 10 A. L. J. 36 **15**

———————*Suit for rent—Ex-proprietary tenant's liability to pay rent fixed by Revenue Courts.*

Where a former suit for arrears of rent brought by the plaintiff against the defendant was dismissed on the ground that the plaintiff had failed to prove the defendant to be a tenant-at-will: *Held*, that it did not operate as *res judicata* to bar a subsequent suit for recovery of rent for the same period against the defendant as an ex-proprietary tenant.

A *Zemindar's* right to claim rent against an ex-proprietary tenant at the rate fixed by the Revenue Courts accrues not merely from the date on which the rent is so fixed but from the date on which the ex-proprietary tenancy arises. BHAN PARTAB SAHI *v.* SHEO DAT BAHADUR SINGH **189**

Restitution by party to illegal transaction **836**

———————— of conjugal rights—Non-payment of prompt dower **747**

———————*of conjugal rights—Marriage of a Muhammadan minor girl by doubtful guardian—Husband taking second wife when the girl was about to attain her puberty—Effect of her repudiating marriage—Court not to help such a husband to take custody of his wife—Costs.*

A., a minor Muhammadan girl, was married at the tender age of 6 to *B.* She was given in marriage by a person about whom there were doubts as to his competency to give her in marriage.

Restitution—concld.

When *A.* was about to attain puberty, *B.* took a second wife. Thereupon *A.* eloped with another person, took up her abode with him and finally married him. *B.* then sued for restitution of conjugal rights with *A*:

Held, (1) that this was a case in which the discretionary power of the Court should be exercised and *B.* should not be granted the custody of *A.*;

(2) that *A.* should not be allowed her costs against *B.* but the parties should be left to bear their own costs. SAHIB JAN *v.* GHULAM HAIDAR, 111 P. W. R. 1912 **560**

Retrial. *See* CHEATING **88**

Revenue Record—Presumption of correctness **467**

Revenue Sale Law (XI of 1859), s. 37 **701**

Review—Application to set aside *ex parte* decree **554**

———— Execution application dismissed on objection - Review of the dismissal order—Attachment, whether subsists pending the review **49**

———— Guardian appointed residing outside jurisdiction **559**

———— , order sanctioning **937**

———————*Application filed on 90th day—Previous day, a Sunday—Court-fee, whether half or full to be paid—Court Fees Act (VII of 1870), s. 14, Sch. I, Arts. 4, 5—Limitation Act (XV of 1877), s. 5—General Clauses Act (X of 1897), s. 10.*

Where an application for review of a judgment is filed on the ninetieth day, the eighty-ninth day being Sunday, it must be stamped with the full fee leviable on the plaint or the memorandum of appeal as the case may be. SAYERA BIBI *v.* BHUTNATH HALDAR, 15 C. L. J. 505 **455**

Revision (Civil). *See* CIVIL PROCEDURE CODE, 1908, s. 115; PROVINCIAL SMALL CAUSE COURTS ACT, s. 25; PUNJAB COURTS ACT, s. 70.

———— Appeal — Rejection of application for restoration of suit **34**

—— Material irregularity—Pronouncing judgment before written statement filed **212**

———— Material irregularity—Interference by High Court **897** **937**

———— Order sanctioning review **937**

———— Court passing decree on void contract **35**

———— Material irregularity **431**

———————*Material irregularity.*

Where the lower Court has not duly considered the law applicable to the matter and has committed an error which goes to the root of the matter, the Court has acted with material irregularity in the exercise of its jurisdiction and the High Court would be justified in interfering in revision. MA HNIN U *v.* OSMAN GANI, 5 BUR. L. T. 99 **423**

———————*Practice—Matters not urged before first Court of revision, it can be urged in moving High Court.*

Matters which are not urged before the first Court of revision, may be urged in moving the High Court. MANIRUDDIN SARKAR *v.* ABDUL RAUF, 13 CR. L. J. 482 **482**

Revision—concld.

——— **(Criminal).** *See* CRIMINAL PROCEDURE CODE, s. 439.

———*Criminal Procedure Code (Act V of 1898), Chapter XII, proceedings under—High Court, power of.*

A High Court has no power to send for the record of a case which in intention and in fact has been begun and continued under Chapter XII of the Criminal Procedure Code. SHOHRAT SINGH *v.* DARYAO SINGH, 13 CR. L. J. 495 **495**

———Interference discretionary—Belated application not to be entertained—Sind Judicial Commissioner's Court Rules, R. 3, Ch. XV **803**

———Power of High Court to make consequential order **492**

———Power to quash conviction of persons not applying for revision **316**

Right to skins of carcases—*Chamars* **108**

——— **to sue**—Cause of action—Infringement of trade-mark—Actual deception not necessary **116**

———Joint promissory-note by insolvent and another person **363**

———Purchase of land by plaintiff in execution of decree against defendant No. 2—Growing of crops by defendant No. 2 after plaintiff's purchase—Removal of crops by defendant No. 1—Plaintiff's title to crops—Suit for value of crops, whether sustainable **619**

———Suit by legatee for declaration of title—Decree in suit—Subsequent suit by legatee against tenant for rent for period subsequent to death of testator **542**

———*Cause of action—Execution of decree—Obstruction by third person—Damages.*

Where a judgment-creditor is obstructed by a third person in executing his decree by attachment of his judgment-debtor's property, he has a right of action to recover damages from the third person arising from the latter's act. HARI VENKATESH PAI *v.* HARI VENKAPPA SHETTI, 14 BOM. L. R. 356 **541**

———*Minor—Guardian—Contract by guardian—Suit on such contract.*

It is open to a minor to either affirm or disaffirm contracts entered into by his guardian but not binding on him.

At the same time, it is the right of the guardian protecting the interests of the minor to sue on such contracts on his behalf.

When such a suit is brought, it is the duty of the Court to entertain it and dispose of it according to law and not on grounds of expediency, real or supposed. If the Court refuses to give relief on the ground that the suit can be brought by the minor after he has arrived at the age of majority, then the minor's interest may be seriously prejudiced by reason of important evidence disappearing by the time the suit is brought VENKATRAMANBHAT *v.* PADMANABH PARAMBHAT, 14 BOM. L. R. 393 **835**

———*Suit to set aside decree—Mere ground of fraud—Fraud—Decree based on perjured evidence—Whether suit to set aside such decree lies.*

Right to sue—concld.

An action will not lie to set aside a decree merely on the ground that it was based on perjured evidence. MORUFUL HUQ *v.* SURENDRA NATH ROY, 16 C. W. N. 1002 **893**

Riot—*Constable struck while quieting riot—Discrepant evidence—Penal Code (Act XLV of 1860), ss 147 and 332.*

Where a public servant is struck with a stick while trying to quiet a riot, but the evidence as to who actually struck him is discrepant, it is not necessary to frame a separate charge under section 332, Penal Code, against any one of the rioters in particular. SUNDAR SINGH *v.* EMPEROR, 14 P. W. R. 1912 CR.; 13 CR. L. J. 460; 111 P. L. R. 1912 **92**

Rioting—Charge of grievous hurt by implication under s. 149—Acquittal under rioting—Conviction under substantive offence not allowed **646**

———Exceeding right of private defence—Punishment **641**

Road Cess Return—Admissibility of admission **691**

———*Admissibility in favour of* zemindar—*Return filed by temporary lessee if can be used in favour of* zemindar—*Return previously used by tenant in suit against* zemindar—*Return filed by tenant's predecessor-in-interest, evidentiary value against tenant—Bengal Cess Act (Bengal Act IX of 1880), s. 95—Evidence Act (I of 1872), s. 21.*

The mere circumstance that a Road Cess Return was successfully used in evidence by a tenant against his landlord for the purposes of another litigation, does not show that it is admissible in evidence in a subsequent rent suit on behalf of the landlord himself.

A Road Cess Return is not admissible in evidence under section 95 of the Bengal Cess Act in favour of the person by or on behalf of whom it has been filed or in favour of one who claims through him or may be deemed to be his representative-in-interest.

A Road Cess Return, filed by a *ticcadar* or temporary lessee of a property, is admissible in evidence in favour of the *zemindar* who cannot be regarded as a person by or on behalf of whom the return was filed or one who claims through the *ticcadar*.

The evidentiary value of a Road Cess Return, which was made by a predecessor-in-interest of the tenant defendant, is very considerable in favour of the plaintiff landlord and against the defendant tenant.

The provisions of section 95 of the Bengal Cess Act are not exhaustive. They merely limit the application of section 21 of the Evidence Act, and exclude Road Cess Returns when they are sought to be admitted in favour of the person by or on behalf of whom they have been filed. MOHENDRA NARAIN SINGH *v.* AJODHYA PROSAD SINGH. **284**

Sale. *See* TRANSFER OF PROPERTY ACT, s. 54.

———, lease and mortgage, difference between **395**

——— by officers of Court—Contract Act not applicable **368**

———*Joint sale to two persons—Consideration paid by one vendee—Right of other vendee to recover his share of property.*

Certain immoveable property was purchased by two persons jointly. One of them alone paid the consideration and took possession of the property.

Sale—contd.

Sometime afterwards, the vendee who was not in possession brought a suit for possession:

Held, that the suit for possession ought to be decreed on the condition of the plaintiff paying his share of the consideration-money as the ownership in the property vested in both the vendees as soon as the sale was complete. PARAG *v.* JAGANNATH **173**

—— **in execution**—Application to set aside sale—Transferee from auction-purchaser, whether necessary party—Reversal of sale—Transferee of auction-purchaser not made party—Transferee not bound by reversal of sale **176**

———————Application to set aside sale—Auction-purchaser whether necessary party **228**

———————Purchase of occupancy-holding in execution—Permanent lease granted to plaintiff by purchaser—Reversal of sale without making plaintiff party—Whether plaintiff bound by order of reversal **255**

———————Sale of land without sanction of Government **780**

———————Sale without notice **506**

———————Sale in one lot of separate parcels of land—Power of Court to sever sale—Absence of saleable interest of judgment-debtor in some of the plots—Onus of proof **109**

———————Suit for rent accrued due after death of full owner—Decree against female heir—Sale of property—Purchaser, what passes to—Suit for contribution against female heir—Decree and sale—Title of purchaser, absolute or not **351**

———————*Application to set aside sale—Person who had attached property sold, before judgment—Whether entitled to apply to set aside sale—Present interest—Difference between attachment before judgment and attachment after judgment—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 90 *and O. XXXVIII, r.* 5.

An attachment before judgment does not by itself create any interest in the property attached.

Therefore, a person, who has obtained an attachment of property before judgment under Order XXXVIII, rule 5 of the Code of 1908, is not a person whose interest is affected by the sale of that property at the instance of a decree-holder against the defendant in suit, within the meaning of rule 90 of Order XXI of the Code, and, consequently, he cannot apply to set aside the sale under rule 90. JOGENDRA NATH CHATTERJEE *v.* MANMATHA NATH GHOSE **668**

———————*Application to set aside sale—Irregularities—Inadequacy of price—Value of property equal to decretal amount—Liability of judgment-debtor ceased on ground of limitation—Substantial injury—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 90, *Proviso.*

In an application by a judgment-debtor to set aside a sale, it was found that there was a group of irregularities, that the price was inadequate, that this inadequacy was due to the irregularities, but that the value of the properties sold would not exceed the decretal amount and that the judgment-debtor's liability under the decree had ceased on the ground of limitation. It was contended on behalf of the decree-holder that no substantial injury was suffered by the judgment-debtor and that, therefore, the sale should not be set aside:

Held, that the irregularities occasioned a substantial injury to the applicant and the sale should be set aside. SANT PERSHAD SINGH *v.* SHEO NARAYAN SINGH, 16 C. W. N. 1022 **728**

—— **in execution**—*Priority—Decree on mortgage—Suit for dower by mortgagor's wife—Pauper suit—Decree against mortgagor only—Decree for Court-fee against amount decreed and against husband—Collector realising amount by sale of mortgaged property—Right of purchaser—Sale in execution of mortgage decree—Purchase by mortgagee—Priority of title—Crown debt—Civil Procedure Code (Act XIV of* 1882), *s.* 411.

A mortgagee obtained a decree for sale upon a mortgage executed by a Muhammadan. The decree was under execution when the wife of the mortgagor brought a suit *in forma pauperis* against her husband and the mortgagee, claiming from her husband a lakh of rupees on account of her dower and alleging that that sum was charged on the mortgaged property in priority to the mortgage. The suit was decreed against her husband, but dismissed against the mortgagee, and it was ordered that the amount of Court-fees, which would have been paid by the plaintiff, should be the first charge on the amount decreed and also should be recoverable from the husband.

The Collector then obtained execution of the decree as to the Court-fee against the mortgaged property which was sold and the defendant in the present suit became the purchaser. Subsequently in execution of his mortgage-decree, the mortgagee purchased the property and brought this suit for possession against the first purchaser:

Held, that the decree in the suit for dower did not create any charge on the mortgaged property in favour of the Government, and, therefore, the Government had no right to sell the mortgaged property to realise the amount of the Court-fee and the purchaser had got no title by his purchase.

It is only when claims of the Crown and claims of common persons come into competition that the Crown is preferred. But it is a matter of common justice and of common honesty that the Crown has no more right than a common person to seize *A.*'s property and apply it in or towards the discharge of a debt due from *B.* RAGHO PROSAD *v.* MEWA LAL, 11 M. L. T. 19; (1912) 1 M. W. N. 311; 14 BOM. L. R. 212; 34 A. 223; 16 C. W. N. 433; 15 C. L. J. 327; 9 A. L. J. 401; 22 M. L. J. 457 **177 P. C.**

Sanction—Charge of defamation against Receiver **489**

———— Prosecution of Receiver for ordinary criminal offence **491**

———— **to prosecute**—*Object being to enforce payment of debt.*

Sanction to prosecute should not be granted if it appears that it is not to be used *bona fide* for the purpose of obtaining a conviction, the object being to enforce payment of a decree. DONALD GRAHAM AND CO. *v.* GHANSHAMDAS KEWALRAM, 5 S. L. R. 237; 13 CR. L. J. 533 **805**

———————. *See* CRIMINAL PROCEDURE CODE, s. 195.

S. N. DAR, Advocate, Civil & Sessions Court, SRINAGAR

Search *under Explosive Act in presence of Superior Police Officers, if legal—Explosives Act (IV of 1884), r. 32 (1) (b) of Government Rules—Criminal Procedure Code (Act V of 1898), ss. 529 (e), 530 (k), 531.*

Where a search was conducted, not under the Criminal Procedure Code, but under Rule 32 of the Government Rules under the Explosives Act, 1884, and at the search, Police officers of superior rank were present, including the Superintendent of Police himself:

Held, that the proceedings were legally conducted.

Unless it appears that proceedings wrongly held have, in fact, occasioned a failure of justice, they ought not to be set aside. LALIT CHANDRA *v.* EMPEROR, 39 C. 119; 13 CR. L. J. 433 **65**

Second appeal. *See* APPEAL, SECOND.

Secondary evidence—Admissibility—Rejection in appeal **625**

Secretary of State, whether mere name or body corporate and person—Suit for damages for malicious prosecution against Secretary of State in High Court, whether maintainable **955**

Security—*Redemption decree—Mortgage-money—Deposit in Court—Execution—Security for mesne profits—Whether deposit money can be security.*

In a redemption suit, the mortgagor obtained a decree and in accordance with the decree deposited the mortgage amount of Rs. 10,000 in Court. An appeal was filed by the mortgagee and execution was ordered only on the mortgagor furnishing security for Rs. 3,000 for any mesne profits that might be payable by the mortgagor to the mortgagee in case the decree of the lower Court was reversed on appeal. The mortgagor wanted the Court to accept as security the sum of Rs. 10,000 which he had deposited in Court:

Held, per *Abdur Rahim, J.*, confirming the order of the lower Court, that the mortgagor was entitled to give it as security. The decree directed that the money should be deposited in Court; it did not say to the credit of the defendant. The money remained to the credit of the suit and there was no reason why it could not be given as security.

Per *Sundara Aiyar, J. contra*—The sum of Rs. 10,000 was no longer the money of the mortgagor and he had no disposing power over it. Only some property over which one has a present disposing power could be given as security. So, no charge could be created over the mortgagee's liability for Rs. 10,000 which would come into existence in case the decree for redemption was reversed. Such a mere possibility of a debt could not be transferred according to the principles embodied in section 6 of the Transfer of Property Act. SINGARAM CHETTIAR *v.* KALIYANA SUNDARAM PILLAY, 11 M. L. T. 248; (1912) 1 M. W. N. 397 **383**

Sentence—*Concurrent sentences—Criminal Procedure Code (Act V of 1898), s. 397—Different trials.*

It is an error in law to direct that a sentence of imprisonment passed by a Judge on a person in a subsequent trial should run concurrently with the sentence of imprisonment which had been passed on him in a former trial. ADVOCATE-GENERAL *v.* GOVINDASAWMI, 11 M. L. T. 213; (1912) 1 M. W. N. 396; 13 CR. L. J. 466. **306**

Sessions case—Procedure — Evidence — Inquiry by Magistrate - Framing of charge **75**

Set-off for Pleader's fees **785**

——— ——— *Court-fee—Plea of payment.*

A plea of *set off* is quite distinct from the plea of payment and should not be entertained until Court-fee with respect to it has been paid by the defendant in the Court of first instance, nor should it be entertained if the claim is not within the jurisdiction of the Court. MUHAMMAD RAZA *v.* KUBRA BIBI **526**

Settlement Circular No. 63 of 1863, *legal force of—Grove-holder of long standing, position of.*

Settlement Circular No. 63 of 1863 has not the force of law and the position of a grove-holder who has been in possession of the trees of a grove for a long period, whether he be a mere tenant or one of the old proprietary body, is not, in respect of under-proprietary rights, in any way different from that of any other person who claims those rights.

A claimant to under-proprietary rights on the basis of prescription is bound to prove his claim according to the provisions of the Oudh Sub-Settlement Act of 1866. GIRDHARI LAL *v.* JASWANT SINGH **181**

Sind Courts Act (XII of 1866), s. 16 **785**

Sind Judicial Commissioner's Court Rules, Ch. XV, r. 3 **803**

——— ——— ——— **rr. 23, 24, 27** **828**

Small Cause Court—*Record of evidence—Judgment—Procedure.*

The reason why the Judge of a Small Cause Court is not required to record more than a brief memorandum of the substance of the evidence given before him, or to give any reasons for his judgment on that evidence, is that the law pre-supposes a prompt and continuous trial, usually finished in one hearing, followed by an immediate decision while the evidence of both sides, most of it unrecorded, is still fresh in all its details in the mind of the Judge. This is of the very essence of the Small Cause Court procedure.

Where the judgment in a case was delivered by a Small Cause Court Judge seven months after he had heard the evidence in the case and the record of evidence was very incomplete and imperfect:

Held, that his judgment was without the basis necessary for a legal decision, and, therefore, a retrial should be ordered. RAJABKHAN *v.* LANGDAJI, 8 N. L. R. 91 **938**

Small Cause Suit—Claim to recover money on fulfilment of a stipulated condition **352**

——— ——— ——— Suit for contribution—Undissolved partnership **218**

——— ——— ——— ——— Suit for injury—Assault—Threatening to beat with a shoe—Suit for compensation **505**

——— ——— ——— ——— Suit by trustee — Claim based on agreement by defendant to pay a specified sum to plaintiff **273**

——— ——— ——— *Lease of immoveable property—Suit by lessor to recover rent from lessee—Provincial Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 8, 11.*

B. was the mortgagee in possession of a certain Bazar and entitled as such to receive rents from the shop-keepers. He let out this right to the defendant for Rs. 24 a month:

Small Cause Suit —concld.

Held, that the lease was a lease of immoveable property and a suit by the lessor to recover the said sum of Rs. 24 a month from the lessee did not lie in a Small Cause Court. BABU LAL *v.* BHAWANI DAS, 9 A. L. J. 776 **32**

Solicitor—*Professional misconduct—Two remedies open—Recourse to both—Contempt of Court—Irregularity—Forgery—Intention to defraud—Substituting name of another witness in subpœna—Striking name off the Roll—Charges upon which Solicitor was not heard.*

If a Solicitor on behalf of his client has recourse to another tribunal and a different process, in order to get what one Court had decided he was not entitled to have, the Solicitor does not commit any contempt of the first Court.

Therefore, where a plaintiff who had been refused a warrant for the detention of the defendant by a Civil Court straightway started a criminal process on the same subject-matter, and, by means of allegations to which the Civil Court attached no credit, obtained his warrant from a different Court, almost as a matter of course, his conduct does not necessarily involve any punishable contempt of the Civil Court, because he is not restricted by law to a single form of remedy and may pursue all the legal remedies appropriate to his grievance.

The appellant, a Solicitor, was desirous of securing the attendance of two witnesses on behalf of his client, *sub pœnas* were issued upon them and duly served. It turned out that the witnesses said they knew nothing about the case, so the appellant asked them to return the *sub pœnas* to him, which they did. He then struck out their names and substituted for them the names of two other witnesses:

Held, that the appellant was not guilty of forgery, as there was no intent to defraud on the part of the appellant, and that at the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment.

The appellant's name was struck off the Roll of Barristers and Solicitors of the Supreme Court on charges of contempt and forgery and for his conduct in other professional matters upon which he was not heard. The Privy Council set aside the order and restored his name to the Roll. MOSES AMADO TAYLOR, *In re*, 16 C. W. N. 386; 9 A. L. J. 676; 15 C. L. J. 639; 13 CR. L. J. 440; 14 BOM. L. R. 471; 23 M. L. J. 194; 12 M. L. T. 106; (1912) 1 M. W. N. 683 **72 P. C.**

Specific performance of contract of sale —Agreement by manager of joint family—Other members not parties—Enforcibility of the contract **623**

———— ———— ————*Dismissal of suit for specific performance—Decree for refund of earnest money though not asked for by plaintiff as alternative relief—Civil Procedure Code (Act V of 1908), O. VII, r. 7.*

It does not necessarily follow from the dismissal of a suit for specific performance that an order for the refund of the purchase-money should also be denied.

If a suit for specific performance be dismissed, the Court can, nevertheless, give the plaintiff a decree for refund of the deposit, although he had not asked for any such alternative relief. RAGHU NATH SAHAY *v.* CHANDRA PROTAP SINGH **268**

Specific performance—concld.

———— ————, *suit for—Claim to recover money on fulfilment of a stipulated condition—Suit of a Small Cause nature—Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, cl. 15.*

A suit to recover a sum of money on the fulfilment of a condition on which it was stipulated to be paid is not a suit for the specific performance of a contract so as to except it from the jurisdiction of a Small Cause Court. KONDUGARI SUBBIAH *v.* KAVUPATI VENKATASUBBIAH **352**

Specific Relief Act (I of 1877), s. 15—*Specific performance of contract of sale—Agreement by manager of joint family—Other members not parties—Enforcibility of the contract.*

Section 15 of the Specific Relief Act applies where a member of an undivided Hindu family agrees to sell part of the joint property in which he has only a share.

Where the managing member of a Hindu family agrees to sell the family property and the other coparceners are not parties to the agreement, and it is found that the agreement is not binding on the latter, specific performance of the contract cannot be enforced. JUTURI NAGIAH *v.* ARIPARALA VENKATARAMA SASTRULU **623**

———— **s. 21** **140**

———— **s. 21 (last clause),** *application of—Arbitration Act (IX of 1899), ss. 2, 3, 19—Civil Procedure Code (Act V of 1908), Sch. II, s. 18—Arbitration—Agreement to refer—Bar to suit.*

The provisions of Act IX of 1899 apply to a case where a suit could be instituted in a Presidency town if the matter submitted to arbitration were the subject of a suit.

Consequently, the last 37 words of section 21, Specific Relief Act, do not apply to an agreement to refer to arbitration in such a case.

Where no application for stay of suit under section 19 of the Arbitration Act, or under section 18, Schedule II, Civil Procedure Code, 1908, is made, the existence of the agreement to refer to arbitration does not bar the suit under section 21 of the Specific Relief Act. TAPESSIER AND COMPANY *v.* NASIR-UD-DIN, 37 P. R. 1912; 130 P. W. R. 1912 **402**

———— **s. 42** **441**

———— **s. 42, proviso** **221**

———— ———— **s. 42**—*Declaration, suit for—Consequential relief—Suit for declaration that defendant not* mutwalli *or not legally appointed* mutwalli—*No prayer for possession or appointment of another* mutwalli—*Whether suit maintainable.*

The plaintiff asked (1) for a declaration that a certain *wakfnamah* was invalid and that the defendant had not acquired any valid title as *mutwalli* under that document, or (2) that if the *wakfnamah* be valid, then the defendant had not been legally appointed *mutwalli*. But the plaintiff did not ask for recovery of possession or for the removal of the defendant and the appointment of a trustee duly appointed:

Held, that under section 42 of the Specific Relief Act, the suit was incompetent as the plaintiff, being able to seek further relief, had not done so.

Specific Relief Act—concld.

The further relief referred to in the proviso to section 42 of the Specific Relief Act, is further relief in relation to the legal character or right to any property to which the plaintiff is entitled and whose title to such character or right the defendant denies or is interested in denying, and it must be relief appropriate to and consequent on the right or title asserted. ERFAN MANDAL *v.* SAMIRUDDIN MANDAL **552**

——— **s. 42**—*Declaratory decree What sanctioned by section—Injunction, whether consequential relief—Device to evade payment of Court-fee, not to be encouraged—Court-Fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii).*

Section 42 of the Sepecific Relief Act does not sanction every form of declaration; but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property.

An injunction is a consequential relief.

In a suit, the plaintiff sought for the following reliefs:—(1) that it may be declared that a certain mortgage-deed executed by one of the defendants in favour of another, is collusive and without consideration; that the decree passed on the basis thereof has been fraudulently obtained and it is ineffectual, and that for the satisfaction of that decree the mortgaged property mentioned in the decree cannot be sold; (2) that if the Court finds any obstacle in granting the above relief, then it may be declared that without the deduction of the fair value of 3-annas share of each of certain *mouzas* named and excluding the same, the defendant has no right to lay the whole charge on the remaining property in claim and to bring about the sale of the said property; and (3) that any other relief which the Court may find the plaintiff entitled to, be granted to her:

Held, that the suit is not such as is contemplated by section 42 of the Specific Relief Act, and, therefore, not "a suit to obtain a declaratory decree where no consequential relief is prayed" within the meaning of clause (*iii*) of Article 17 of Scdedule II of the Court Fees Act.

The history of decrees merely declaratory traced.

The device to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape, does not merit encouragement or favour.

DEOKALI KOER *v.* KEDAR NATH, 16 C. W. N. 838, 39 C. 704. **427**

Stamp Act (II of 1899), s. 2 (21) **122**

——— ——— **s. 12**—*Adhesive stamp, cancellation of—Adhesive stamp, lines drawn on, effect of.*

Where an adhesive stamp on a pro-note or a receipt was cancelled by drawing lines across it in different directions, each line extending more or less beyond the edges of the stamp on to the paper on which the document was written: *Held*, that cancellation had been effected in a sufficiently effectual manner.

The question whether the requirements of law about the cancellation of stamps have or have not been sufficiently complied with is to be determined upon an examination of the document concerned in each particular case. MOHAMMAD AMIR MIRZA BEG *v.* KEDAR NATH, 15 O. C. 58 **202**

——— ——— **Sch. I, Art. 1**—*Acknowledgment of debt—Balance-sheet signed by debtor—Amount due taken to separate account "errors and omissions excepted"—Whether such acknowledgment requires one anna stamp.*

A balance-sheet prepared and signed by debtor and showing a balance, errors and omissions excepted, due from him and which was carried forward, is not an acknowledgment of debt within the meaning of Article 1 Schedule I of the Stamp Act, 1899, which requires an anna stamp, and is admissible in evidence without being stamped. GALSTAUN *v.* HATCHISON, 16 C. W. N. 945; 39 C. 789 **279**

——— ——— ——— **Art. 48** **122**

Stay of execution—Appeal to Privy Council **187**

——— ——— ——— ———*Sufficient cause—Substantial injury—Civil Procedure Code (Act V of 1908), O. XLI, r. 5.*

In an appeal from a decree in a suit for a declaration that certain property is not liable to attachment and sale in execution of a decree, the Appellate Court can and should stay execution of that decree inasmuch as otherwise it would be difficult for the claimant to recover the property in the event of his succeeding in the appeal.

In such a case, the property should remain under attachment pending decision of the appeal. RADHA BALAB SINGH *v.* SEWA RAM, 94 P. W. R. 1912 **876**

——— **of proceedings**—Execution proceedings—Decree of Revenue Court—Suit for declaration that decree bad—Temporary injunction, if may be issued—No prayer for permanent injunction **614**

Stock-in-trade, possession, order and disposition of **371**

Street, definition of **785**

Subrogation—*English and Indian Law—Reversioner—Transfer of Property Act (IV of 1882), ss. 58, 91—Person interested in the property—Contract Act (IX of 1872), s. 69—Charge under a mortgage executed by daughters during the life-times of widows—Registration—Lien.*

A person, who pays off a mortgage-debt on the properties of a deceased male owner, cannot claim to be subrogated to the rights either of the daughters or of the original mortgagee whose debt he discharges. The scope of the rule of subrogation in India is much narrower than in England or America.

Mere payment of a mortgage-debt by a stranger would not entitle him to the mortgagee's rights by subrogation.

A reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose. But when a suit is instituted by the mortgagee for sale, a reversioner has sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow. In the latter case, the reversioner is entitled under section 69 of the Contract Act to be reimbursed by the widow in respect of the money which the latter was bound by law to pay. The scope of section 69 of the Contract Act and of sections 85 and 91 of the Transfer of Property Act is not co-extensive. The daughters of a deceased mortgagor, therefore, have sufficient interest in the land to entitle them to

Subrogation—concld.

discharge the mortgage-debt when the property is brought to sale in execution of the mortegage-decree against the mortgagor's widow. By so discharging, they obtain a charge over the land which they are entitled to assign or charge in favour of a third person who has enabled them to discharge the motgage-debt.

Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. In India, the scope of the rule is narrower still. A mere agreement, either with the creditor holding a mortgage or with the debtor owing it, cannot give a person, lending money to discharge the mortgage, a lien over the property. An agreement with the creditor or the debtor may entitle him to sue him for the exection of a mortgage-deed, or a deed of assignment of the mortgage as the case may be: but mortgages for a sum of Rs. 100 and upwards can be created only by registered instruments and a mere agreement to mortgage is insufficient to create a lien. NARAYANA KUTTI GOUNDAN *v.* PECHIAMMAL, 11 M. L. T. 174, (1912) 1 M. W. N. 353, 22 M. L. J. 364. **206**

Suburbs of Calcutta—*Station of Howrah—Order and good Government—Act XXI of* 1857, *s.* 2, *cl.* 1—*Reasonable suspicion—Accused found to be in possession of cement—No evidence that cement missing from complainant's premises—Penal Code (Act XLV of* 1860), *s.* 411—*Difference between s.* 411 *and s.* 2, *cl.* 1 *of Act XXI of* 1857—*Stolen article—Possession.*

The accused was convicted for being in possession of a certain quantity of cement; and because there was a heap of cement lying on the premises of the East Indian Railway Company at L. and because the accused was a *mistry* in the employ of the Company at L., it was assumed that this cement was stolen from the Company:

Held, that, in the absence of any evidence that shortly or immediately previous to the finding of the cement in the possession of the accused, a quantity of cement belonging to the Company had been missing, there could not be any reasonable suspicion which would bring the case within section 2 of Act XXI of 1857.

The only difference which section 2 of this Act makes between an offence under this Act and one under section 411, Indian Penal Code, is that it is not necessary under this Act to offer proof that the stolen property has been in the hands of a third person who actually stole it, as is the case under section 411. ABDUL KARIM *v.* EMPEROR, 13 CR. L. J. 492 **492**

Succession—Hindu Law—Widow's estate **17**

Succession Act (X of 1865), ss. 82, 355 111

Succession Certificate Act (VII of 1889), s. 4—*Equity of redemption not a security—Letters of Administration not to be granted when proper remedy of petitioner is to file regular suit to recover property.*

Succession Certificate Act—concld.

The respondents applied for Letters of Administration to the estate of a deceased person claiming to administer the estate as his daughters. The appellants denied the legitimacy of the respondents and claimed to be in possession for 30 years as the deceased's nieces. The property was alleged to be under a mortgage to another person:

Held, (1) that the equity of redemption was not a security or debt within the meaning of section 4 of the Succession Certificate Act and the respondents could file a suit for redemption without such a certificate or Letters of Administration;

(2) that the application for Letters of Administration was an attempt to obtain adjudication as to the status of the respondents and to obtain possession without filing a regular suit and should be rejected;

(3) that the proper remedy of the respondents was to bring a regular suit against the parties in possession of the property. MA THEIN MAY *v.* MA THAN MYA, 5 BUR. L. T. 102 **425**

——— ——— ——— ——— **ss. 4, 9**—*Minor—Applying through natural guardian—Issue of certificate.*

A succession certificate may be granted to a minor on application made by him through his natural guardian.

Otherwise, section 4 of the Succession Certificate Act would stand in the way of the minor suing for the effects of the deceased father and no such suit could be filed during his minority.

The provisions of section 9 of the Act can be satisfied by the guardian depositing the necessary security on behalf of the minor. SINGANAMALA KRISHNAMACHARLU *v.* SINGANAMALA VENKATAMMA, (1912) 1 M. W. N. 407 **408**

——— ——— ——— ——— **s. 9** **408**

Succession (Property Protection) Act (XIX of 1841), s. 3—*Inquiry—Question to be considered before taking action under.*

It is necessary before action can be taken under Act XIX of 1841 that the provisions of section 3 of that Act are strictly fulfilled. And in order to fulfil the provisions of that section, it is necessary to consider, (1) whether the opposite party has no title, (2) whether the person claiming is really entitled to the property, and (3) whether the person making the application is likely to be materially prejudiced if left to the ordinary remedy by a regular suit.

Where action was taken under Act XIX of 1841 without considering those three requisites, the High Court set aside the order. TARAK CHANDRA GOSWAMI *v.* SATYA CHARAN PATNI **504**

Sufficient Cause. *See* LIMITATION ACT, 1908, s. 5.

Suit for declaration that tenure liable to sale under Regulation—Party—Collector not made party to suit—Suit improperly framed—No declaration should be made **586**

——— *Institution—Failure to carry out strictly judicial order or statutory direction—Suit allowed to be withdrawn—Payment of defendant's costs made condition precedent to institution of fresh suit—Institution of fresh suit without paying defendant's costs—Costs paid subsequently on date fixed by Court—Suit to be treated as filed on day costs were paid.*

Suit—concld.

It cannot be laid down as an inflexible proposition of law that failure to strictly carry out statutory directions or judicial orders does always make it obligatory upon a Court of Justice to dismiss the suit as improperly instituted.

A suit was allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action, but the payment of the defendant's costs was made a condition precedent to the institution of the fresh suit. The plaintiff brought a fresh suit without paying the costs of the defendant. The Court, upon an objection taken on behalf of the defendant, directed that those costs must be paid within a day, and they were duly deposited:

Held, that the suit was competent, but it must be taken to have been validly instituted only on the day on which the costs were deposited. SAJJAD HOSSAIN *v.* RAM LAL SHAHU **159**

Suits Valuation Act (VII of 1887), s. 8 **46**

Summons to accused for production of document or other thing incriminating an accused **493**

————, return of— Order of Court **188**

Surety. *See* CONTRACT ACT, s. 139.

————Bail bond—Prisoner committing suicide **1008**

Survival of suit—Suit by reversioner for declaration of invalidity of alienation **213**

Tenancy—Relinquishment by one joint tenant of his share—Whether tenancy extinguished **330**

Thakbust map—*State of things at Permanent Settlement—Presumption—Evidence.*

An entry in a *thakbust* map cannot be said to be insufficient to entitle a Court of fact to hold that the disputed lands were really included in the estate at the time of the Permanent Settlement. FAZLAR RAHIM *v.* NABENDRA KISHORE ROY **341**

Tincture, whether liquor **961**

Title—*Decree for rent of coal land—Judgment-debtor declared insolvent—Official Assignee made party in execution proceedings—Lease-hold property sold in execution—Subsequent sale by Official Assignee—Superiority of title—Official Assignee bound by execution sale—Purchaser in execution to have better title—Decree for rent of coal lands, whether can give first charge on property in arrears.*

The defendant granted a *patta* of coal lands to *A.*, against whom he obtained a decree in the Sub-Judge's Court at Burdwan, for rent, in execution of which he attached the lease-hold interest of *A.* The sale of the property was fixed on September 10th, 1904, and on September 8, *A.* filed his petition of insolvency in the High Court and the vesting order was made on the same day. The defendant then applied to the Sub-Judge of Burdwan to substitute the Official Assignee in the place of the judgment-debtor in the execution proceedings, which was done and the sale was held on March 6, 1905, and the defendant became the purchaser and took possession on June 14, 1905. In the meanwhile on May 23, 1905, the Official Assignee sold the property with the permission of the High Court to one *B.* from whom the plaintiff purchased and sued for recovery of possession :

Title—contd.

Held, that, although the order for substituting the Official Assignee in place of the judgment-debtor in the execution proceedings, was incorrect,—*A. B. Miller* v. *Budh Singh Dudhuria*, 18 C. 43—yet he having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence; and he having taken no steps to have that sale set aside in the manner provided by law, the sale must be held to be good and effective as against him and also against the plaintiff who claims through him.

Obiter dictum.—The decree for rent, being in respect of coal lands and not agricultural lands, cannot give the decree-holder a first charge on the lease-hold property in arrears. SUNDAR DAS KHETRY *v.* RAGHUNATH DAS **288**

————*Evidence—Admission of defendant* — Mulki *papers filed by* elakadars—*Regulation VIII of* 1800, *para. III—Admissibility of admissions—Road-cess returns.*

The plaintiff sued for resumption of certain villages on the allegation that they were held as a maintenance *jagir* for life in joint tenancy by certain ladies and that defendant No. 1 had been holding the villages under a *mokarari* deed from them and had subsequently purchased the right, title and interest of the ladies in a sale under section 124, Act I (B. C.) of 1879.

The defence was that the *jagir* was not one for life for maintenance of the ladies, but an absolute *jagir* granted to the ancestors of their husbands, which the ladies had been holding under the ordinary Hindu Law.

Owing to lapse of time, the plaintiff's evidence as to the grant to the ladies was not very strong, but, such as it was, it was strongly corroborated by the conduct of the ladies themselves and by the admissions of defendant No. 1:

Held, that the question of title need not be positively proved by the plaintiff, but that he could avail himself of the defendant's admissions.

Mulki papers filed by the *elakadars* under Regulation VIII of 1800, para. III, containing statements made by the plaintiff's predecessor at a time when there was no dispute against his own interest, are admissible in evidence.

Admissions of the ladies made in a road-cess return filed by their *muktear* could be used against defendant No. 1. If they were not admissions, they were positive evidence of plaintiff's title. KALI SANKAR SAHAI *v.* PRATAP UDAI NATH SAHI DEO, 16 C. W. N. 683 **691**

————*Priority—Purchase of holding—Plaintiff's purchase at mortgage decree sale—Defendant's purchase at co-sharer landlord's rent decree sale—Question of transferability of holding, if can be raised by defendant—Defendant, representative-in-interest of judgment-debtor—Estoppel—Defendant bound by same estoppel as judgment-debtor.*

The plaintiffs purchased a holding in execution of a decree on a mortgage held by them against the admitted tenant. The defendants subsequently purchased the same holding in execution of a decree for rent held by a co-sharer landlord:

Title—concld.

Held, (1) that the title of the plaintiffs was superior to that of the defendants who, as purchasers at a sale in execution of a decree for rent by a co-sharer landlord, were in the same position as a purchaser at a sale held in execution of a decree for money;

(2) that the question of transferability of the holding could not be raised at the instance of the defendants who were the representatives-in-interest of the tenant and were bound by the same estoppel as the judgment-debtor whose right, title and interest had been purchased by them. TULSI SINGH *v.* DAYAL SINGH **718**

Tort—Negligence—Use of land in ordinary manner —Damage to neighbour—Liability **543**

Tout. *See* LEGAL PRACTITIONERS ACT, s. 36.

——— *Declaration without legal proof—Legal Practitioners Act (XVIII of* 1879), *s.* 36.

Section 36 of the Legal Practitioners Act, requires proof by evidence of general repute or otherwise before a man can be declared a tout. Such evidence should be taken in the ordinary manner and brought on the record and where this is not done, the order of declaration cannot be maintained. SHANKAR SINGH *v.* EMPEROR, 12 P. W. R 1912 CR ; 112 P. L R. 1912; 13 CR. L. J. 467 **307**

Trade-mark—*Infringement — Limitation Act (IX of* 1908), *s.* 23—*Continuing wrong—Registration of mark—Right to sue—Cause of action—Actual deception not necessary—Imitation of mark when an infringement of trade-mark—Third person allowed to use a similar mark—Damages—Actual damage not necessary to be proved.*

The infringement of a trade-mark is a continuing wrong and so long as the infringement continues, a fresh cause of action arises *de die in diem.*

In India, a plaintiff can maintain a suit for infringement of trade-mark even if he has not proved registration of his trade-mark.

In a suit for infringement of trade-mark, it is not necessary to prove that any one has been actually deceived.

It is sufficient if it is proved that the defendant contemplates committing or has threatened to commit an infringement.

The question is not whether a purchaser has been deceived but whether he is *likely* to be deceived.

In deciding whether there has been an infringement of plaintiff's trade-mark, the Court has to see whether the device used by the defendant is such a colourable imitation of the plaintiffs' mark as would be calculated to deceive the *ultimate* purchaser. The question is not what would be the effect on brokers or large dealers but whether the mark is calculated to deceive incautious, ignorant or unwary purchasers.

If as the result of an arbitration, another trader has been allowed to use a trade-mark more closely resembling plaintiff's mark than that of defendant, that is no reason why the defendant should not be restrained from using other marks calculated to deceive the public.

For damages to be recovered for infringement of trade-mark, it is not necessary that special damage should be proved.

It is sufficient to show that plaintiff's right has been invaded, in which case, some damages, even if only nominal, will be given. ABDUL SALAM *v.* HAMID ULLAH, 166 P. W. R. 1912 **116**

Transfer of case. *See* CRIMINAL PROCEDURE CODE, s. 526.

——— ——— ——— Discharge of cross-case **804**

——— ——— ——— Power of High Court to transfer a case under section 145, Criminal Procedure Code **84**

——— ——— ——— *Complainant related to a friend of the Magistrate—Increasing of bail during trial—Criminal Procedure Code (Act V of* 1898), *s.* 526.

The fact that a Magistrate is a friend of a remote relative of the complainant is not *per se* a ground for transferring a case to another Court.

A Magistrate is justified in increasing the amount of bail if by further proceedings the case turns out to be more serious than he first imagined. SITA RAM *v.* GOBIND SAHAI, 4 P. W. R. 1912 CR.; 66 P. L. R. 1912; 13 CR. L. J. 474 **314**

Transfer of Promissory-note executed in favour of partners **380**

Transfer of Property Act (IV of 1882), s. 6 (c) **278**

——— ——— ——— **s. 8** **853**

——— ——— ——— **s. 53**—*Fraudulent transfer—Transfer with a view to defeat an anticipated attachment—Transferee not sharing in fraudulent intention—Burden of proof on plaintiff when he sets up a deed as genuine—Finding of fact, right of appellant to challenge in second appeal—Inferences from facts found can be challenged in second appeal.*

The mere fact that a transfer was made to defeat an anticipated attachment does not evidence an intent to defeat or delay creditors of the vendor.

Where a plaintiff sues for a declaration that a particular transfer in his favour is a good and valid one, it is incumbent upon him to make out in the first instance the validity of the sale in his favour.

Although an erroneous finding of fact cannot be challenged in second appeal unless it is shown that there is an error of procedure or that there is no evidence in support of the finding, yet inferences drawn from facts found might be questioned in second appeal. BAKHT BALI SINGH *v.* LEKHRANI KUNWAR **509**

——— ——— ——— **s. 54** **853**

——— ——— ——— **s. 54**—*Delivery of possession, what is.*

The defendant purchased property worth less than Rs. 100 at an auction-sale in execution of a decree against the plaintiff. In 1898, he executed an unregistered document on plain paper in favour of the plaintiff in which he, the defendant, admitted that the porperty was the plaintiff's property and that he agreed to hold possession as a tenant for five years; it was also agreed afterwards to make the property over to the plaintiff, and that after the lapse of five years, the entire rights should vest in the plaintiff. In a suit by the plaintiff to recover possession:

Held, that, under section 54 of the Transfer of Property Act, the delivery of possession was an alternative to the execution and registration of a document which was an act formal in a high degree, that the document did not amount to a delivery of possession by the defendant to the plaintiff, and that the plaintiff did not acquire any title by means of the document. KONNORMAL OSWAL *v.* NABIN CHANDRA DAS **228**

Transfer of Property Act—contd.

——— ——— ——— ——— **ss. 54, 118**—*Sale—Exchange—Price—Oral sale of equity of redemption to usufructuary mortgagee—Registration—Right of mortgagor to redeem—Adverse possession—Limitation Act (IX of* 1908), *Sch. I, Arts.* 144, 148.

The word "*price*" in section 54 of the Transfer of Property Act is not restricted to money or current coin, but it includes whatever the vendor accepts as tantamount to such price.

If two persons mutually exchange two things and mutually fix the values of the exchanged things in current coin and exchange them as of equal value, they must be held to have effected sales and paid prices and not merely to have effected an exchange or barter.

A conveyance of land in consideration of moneys already due to the vendee by the vendor is either a "sale" under section 54 of the Transfer of Property Act or an "exchange" under section 118 of the said Act.

Where a usufructuary mortgagee gave up his right to possession in part of the land mortgaged and the mortgage-money due to him, and in consideration therefor, purchased orally the equity of redemption in another part of the land from the mortgagor:

Held, (1) that the transaction amounted to a 'sale' under section 54 of the Transfer of Property Act, and was invalid for want of registration;

(2) that the mortgagee continued to remain in possession only as mortgagee after the said oral sale, and that the mortgagor was entitled to redeem the property within the statutory period;

(3) that the mortgagee could not assert a title by adverse possession as from the date of the oral sale;

(4) that Article 144 of Schedule II of the Limitation Act could not be invoked by the mortgagee if the mortgagor was not barred by Article 148 from redeeming and recovering possession of the mortgaged property;

(5) that oral evidence was not admissible to prove the discharge of the mortgage by an invalid oral sale. ARIYAPUTHIRA PADAYACHI *v.* MUTHUKUMARASAWMI PADAYACHI, (1912) 1 M. W. N. 854; 23 M. L. J. 339; 12 M L. T. 425 **343**

——— ——— ——— **s. 54**—*Transfer of right to cut and appropriate plants—Registration.*

A transfer of the right of cutting and appropriating "plants now standing or that may hereafter form" on certain land, is a transfer of an interest in immoveable property and, therefore, it can only be made by a registered instrument. KUTTUVA LETCHUMANA BAGAVATHAR *v.* THOPPAI L. VENKATARAMIER **234**

——— ——— ——— **s. 58** **206**

——— ——— ——— **s. 58 (a) and (c)**—*Mortgage by conditional sale—Test—Sale with condition of re-purchase.*

A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right of re-purchase, is not on that account to be construed as if it were a mortgage. The test to apply is whether the relation of debtor and creditor subsists between the parties. If the relation does not exist, then the transaction does not fall within the general definition of a mortgage in section 58 (*a*) of the Transfer of Property Act, and, therefore, cannot be regarded as *a mortgage by conditional sale* within section 58 (*c*). MA HNIN U *v.* OSMAN GANI, 5 BUR. L. T. 99 **423**

——— ——— ——— **ss. 60, 61** **605**

——— ——— ——— **ss. 82, 83, 100**—*Contract Act (IX of* 1872), *s.* 69—*Contribution, suit for—Several lands burdened with payment of common revenue—Liability of owners who have not paid to person who pays the revenue—Nature of decree—Plaintiff's right to a charge.*

Where several lands are liable for payment of a definite amount of Government revenue and the amount has been paid by the owner of one of such lands, the latter is entitled, in a suit for contribution, to a charge on the land of each of the others for the proportionate fraction of the amount payable by each, and not to a personal decree. PUTHENPURAYIL AMMAN PARUYKYI *v.* MANGALASERI PULLIKANDI **262**

——— ——— ——— ——— **s. 83** **262**

——— ——— ——— ——— **ss. 85, 91**—*Attachment of mortgaged property by holder of a money-decree—Suit on mortgage—Decree—Attaching creditor not made party, effect of.*

Where mortgaged property was attached by a person holding only a money-decree, and after attachment the mortgagee brought a suit on his mortgage and obtained a decree for sale, without impleading the attaching creditor as a party:

Held, that the order for sale obtained by the mortgagee was not binding on the attaching creditor, who was entitled to bring the property to sale under his attachment. TITALI *v.* VEDVLA **334**

——— ——— ——— ——— **ss. 86, 87** **824**

——— ——— ——— ——— **s. 89** **732**

——— ——— ——— ——— **s. 90** **23**

——— ——— ——— ——— **s. 90**—Personal decree when to be made **911**

——— ——— ——— ——— **s. 91** **334**

——— ——— ——— ——— **s. 91**—Person interested in the property **206**

——— ——— ——— ——— **s. 95** **605**

——— ——— ——— ——— **s. 99**—*Trusts Act (II of* 1882), *s* 90—*Purchase by mortgagee of equity of redemption in Court sale—Fraud—Misconduct—Scope of section* 90 *of the Trusts Act.*

Section 99 of the Transfer of Property Act does not lay down as a general principle that a purchase by the mortgagee of the mortgagor's equity of redemption is invariably and in all cases invalid even in the absence of fraud, misrepresentation or misconduct.

Section 90 of the Indian Trusts Act only applies to a case where the mortgagee or other qualified owner of any property has availed himself of his position and has thereby gained an advantage in derogation of the rights of other persons. RAMAKRISHNA CHATRAIYA DEO *v.* PUSHAPATI VIJAYARAMA **589**

——— ——— ——— ——— **s. 100** **262, 666**

Transfer of Property Act—contd.

——————— **s. 106**—*Ejectment suit—Notice to quit—Denial of landlord's title—Purchase by mortgagee in Court sale—Attornment and payment of rent by lessee to lessor's assignee, whether amounts to denial of the title of the purchaser in Court sale.*

Payment of rent by a lessee to the lessor's assignee, who took the property on usufructuary mortgage from the lessor, and attornment to him, do not amount to the denial of the title of a purchaser of the property at Court sale held after the date of the said assignment, so as to dispense with the necessity of giving notice to quit prior to an action in ejectment by the said purchaser to the lessee. MANIYAM PATTAR *v.* LAKSHMANA NATTAMA KARAN **52**

——————— **s. 107**—*Lease for more than a year—Registration—Admissibility—Oral evidence—Admission of relationship of landlord and tenant—Estoppel—Practice—Compensation for use and occupation—Lease of salt-pan legal without Collector's sanction—Admissibility of landlord's receipt.*

A.'s one-third interest in certain salt-pans was leased to *B.*, for a period of three years at Rs. 500 a year during *A.*'s minority by her guardians and co-sharer, who owned the remaining two-thirds share.

On attaining majority, *A.* leased her share for two years more to *B.* on a rental of Rs. 1,000 a year.

A. sued *B.* to recover the rent of the last two years at the rate of Rs. 1,000 a year and Rs. 653 as rent due on the previous lease.

The rent-deed was not registered but *B.* admitted *A.*'s ownership of the salt-pan and also his tenancy under her and her co-sharer; *B.*, however, alleged that he had been in possession from the beginning under a lease for five years and not three years:

Held, (1) that *A.* could not be allowed to rely on the lease set up by her, as it was unregistered; nor could she be allowed to give oral evidence of that lease;

(2) that as *B.* admitted *A.*'s ownership and that he was her tenant, proof of the relation of landlord and tenant became unnecessary, the admission of *B.* acting as an estoppel to the production of any evidence contradicting the admission;

(3) that *A.* could only recover the money as for use and occupation for the two years of the tenancy and as the amount claimed by her was not shown to be excessive, she was entitled to it.

The lease of a salt-pan is not illegal merely because the sanction of the Collector of Salt Revenue has not been obtained thereto.

Per Batchelor, J.—Receipts for rent granted by a landlord are admissible in evidence, not as proving the terms of the contract of letting, but as proving from the conduct of the parties what would be a fair rent for the admitted tenancy. RAMCHANDRA SHIVJIRAM *v.* TAMA RAGHO MANGLYA, 14 BOM. L. R. 390 **830**

——————— **ss. 108 (b) (c), 111** **711**

——————— **ss. 111, 112, 116**—*Lease—Forfeiture condition—Election by landlord to avail himself of forfeiture, whether revocable—Subsequent agreement to revive the tenancy—Lessee again put in possession—Compensation for use and occupation.*

Transfer of Property Act—concld.

Where, under the terms of a lease, a right of forfeiture accrues to the lessor, he is put to his election, and, if he manifests and communicates to the lessee his intention to enforce the forfeiture, that is an election to determine the tenancy, the election is irrevocable and the parties cannot, by a subsequent agreement, revive the old tenancy.

Similarly, if he elects not to enforce the forfeiture and manifests and communicates to the lessee his intention accordingly, that is, elects to waive the forfeiture, his election is irrevocable.

If lessees are re-admitted, after the determination of tenancy by exercise of the right of forfeiture, the old tenancy is not revived and the lessees are liable to pay compensation for use and occupation. CHENGIAH *v.* DAMARA KUMARA THIMMA **445**

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Trial with assessors—One of them found disqualified to act after the trial was begun—*De novo* trial **313**

Trust. *See* TRUSTS ACT

Trusts Act (II of 1882), s. 63 *Following trust property—Liability of third person.*

Trust property may be followed into the hands of any one in whose hands it can be identified. The only person, who can escape liability for trust property in his possession, is a *bona fide* transferee for value without notice of the trust, or a transferee from him.

By two deeds, one *L.* vested his property in trust in order that his debts might be liquidated and appointed *P.* and *H.* as trustees. One of the two deeds was attested by *S.* the son of *L.* *P.* and *H.*, as trustees, executed certain promissory-notes in favour of certain creditors of *L.* After *L.*'s death, his son *S.* repudiated the trust. Soon after, the District Judge released the original trustees, *P.* and *H.*, and appointed in their place *G.* and *R.* as trustees. Thereafter, *S.* sued *G.* and *R.* for possession of the trust property but this suit was dismissed on compromise on the understanding that all the property had been restored to the plaintiff *S.* As a matter of fact, however, some property remained with the trustees *G.* and *R.*, while some was restored to *S.* The creditors sued *S*, *G.* and *R.* on the footing of pro-notes which had been executed by *P.* and *H.*, the original trustees The first Court dismissed the suits as against *S.* on the ground that he was no party to the pro-notes:

Held, that *S.* was equally liable with *G.* and *R.* GHULAM ALI *v.* SHIV NATH, 158 P. W. R. 1912; 189 P. L. R. 1912; 101 P. R. 1912 **845**

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Under-proprietary tenancy—Position of grove-holder of long standing **181**

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U. P. Land Revenue Act (III of 1901), ss. 110, 112, 233 (k)—*Perfect partition*—Mahal *formed in the name of a* benamidar—*No objection by real owner—Subsequent suit for declaration not barred.*

At a perfect partition, a *mahal* was formed in the name of a *benamidar*. No objection as to the title of the *benamidar* was taken at the time of partition by the real owner who also happened to be a co-sharer in the village:

Held, that a subsequent suit by the real owner, after the completion of the partition, for a declaration of his title was not barred by section 233 (*k*) of the U. P. Land Revenue Act, 1901. BHAIA SHEORAJ SINGH *v.* SAMPAT SINGH **339**

——————— **ss. 111, 233 (k)**—*Partition—Proprietary title*—Res judicata—*Person not recorded as co-sharer at the time of partition.*

A., a Muhammadan, died leaving three heirs, *B.*, *C.* and *D.* *B.*'s name alone was recorded in the revenue papers in place of *A.* Subsequently, there was a partition proceeding in which *B.* raised certain objections as to proprietary title which were overruled by the partition officer:

Held, that in a subsequent civil suit, *C.* and *D.*, whose names had not been recorded, were also precluded from raising any question as to the proprietary title. TARIFAN *v.* FATEH DIN **685**

——————— **ss. 111, 112**—*Partition—Question of proprietary title which ought to and might have been raised*—Res judicata—*Jurisdiction.*

A party to a Civil suit cannot raise a question of proprietary title which he ought to and might have raised in partition proceedings under the Land Revenue Act. MAHADEO RAI *v.* RAGHU NAIK RAI **817**

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Unlawful Assembly. *See* PENAL CODE, s. 147.

———————, *member of, lying unconscious from the outset, not charged with offence committed by others during his unconscious state—Penal Code (Act XLV of* 1860*), ss.* 148, 149, 304.

Where it was found that *A.*, a member of an unlawful assembly, was felled to the ground at the outset and was left lying unconscious on the spot where the fight started, while the remaining members of *A.*'s party pursued the persons, one of whom had knocked *A.* down, and having overtaken them committed the offence of culpable homicide:—

Held, that *A.*, who was lying unconscious, could not be considered a member of the unlawful assembly at the time the offence of culpable homicide was committed and was, therefore, not liable to conviction on this charge. RAGUNANDAN *v.* EMPEROR, 15 O. C 183; 13 CR. L. J. 556 **972**

Usage. *See* HINDU LAW **409**

Valuation of suit—Jurisdiction—Redemption of mortgage **587**

———————Sale by subsequent mortgagee—Suit by prior mortgagee for declaration that sale must be subject to his right **221**

Valuation of suit—concld.

———————*Appeal—Jurisdiction—Pre-emption suit.*

For the purposes of determining the course of appeal in a pre-emption suit, the value for purposes of jurisdiction must only be looked at, and not the amount which the pre-emptors may have to pay. GUJAR *v.* FATTEH JANG, 201 P. W. R. 1912; 225 P. L. R. 1912 **407**

———————*Suit for lease, annual rent being Rs.* 71—*Suit to be valued at Rs.* 71—*Jurisdiction of Munsif—Court Fees Act (VII of* 1870*), s.* 7 *cl. x, sub-cl. (c)—Suits Valuation Act (VII of* 1887*), s.* 8—*Civil Procedure Code (Act V of* 1908*), s.* 115 *—Decision on facts—Failure of Court below to grasp real point—Judicial decision—Interference by High Court—Prejudice to neither party—Question of prejudice, if arises.*

In a suit in a Sub-Judge's Court, the plaintiff prayed that his *mourasi mokarari* right in certain lands be declared and a decree passed against the defendants for directing them to grant him a lease, the yearly rent payable on which was Rs. 71. The plaintiff valued the suit for the purposes of jurisdiction at Rs. 1,100 but gave no materials or *data* to support the valuation:

Held, that, under the provisions of section 7, clause (x), sub-cl. (*c*), of the Court Fees Act and section 8 of the Suits Valuation Act, the suit should have been valued at Rs. 71 for purposes of Court-fee and jurisdiction, and it ought to be filed in the Munsif's Court.

Where the decision of a Subordinate Court is arrived at, though wrongly, either on the facts or on a proper judicial consideration of the matters placed before it, the High Court will not interfere under section 115 of the Civil Procedure Code.

But where the Court below failed to grasp the point which really had to be determined, namely, whether, under the provisions of the Court Fees Act and the Suits Valuation Act, the valuation of the suit given by the plaintiff was correct or not, and the Court simply accepted the valuation given by the plaintiff without attempting to ascertain the materials on which the valuation was based, in fact without arriving at a judicial decision at all:

Held, that the High Court should interfere, if satisfied that the decision of the Court below was wrong.

In such a case, the High Court will interfere even if neither party is prejudiced, because the law requires that suits of certain values should be tried in certain Courts and the question of prejudice does not arise. PORT CANNING AND LAND IMPROVEMENT CO., LD. *v.* ROSON ALI **46**

——————*Jurisdiction—Appeal—Suit for declaration in respect of land.*

For the purposes of determining the course of appeal and jurisdiction, the value of a suit for a declaration that an alienation of land is null and void so far as plaintiff's proprietary rights in it are concerned, is thirty times the land revenue of the land in respect of which the declaration is sought. SAHIB DITTA *v.* NARINJAN DAS, 182 P. W. R. 1912; 226 P. L. R. 1912 **272**

Vendor and purchaser — *Agreement for sale—Subsequent execution of mortgage by vendor to third party—Execution of sale-deed subsequent to mortgage—Declaration that mortgage does not affect purchaser's rights, maintainability of suit for.*

A vendee of property in whose favour the vendor has executed an agreement for sale is entitled to maintain a suit for a declaration that a mortgage of the same property, executed by the vendor to a third party subsequent to the said agreement, does not affect his rights. KINTADU DALAPADU, *In re*, (1912) 1 M. W. N. 902 **457**

———— ——— *Condition that if any one lays claim and dispossess purchaser, purchase-money would be refunded—Attachment of property by third party in execution of decree against vendor—Claim by purchaser—Dismissal of claim—Suit for purchase-money—Cause of action.*

In a sale-deed there was a condition that if in future any one would lay claim to the property and dispossess the purchaser, then the vendor would refund the purchase-money with interest. A third party attached the property in execution of a money-decree obtained against the vendor. Thereupon, the purchaser laid a claim which was dismissed. He did not bring a suit to establish his title but brought this suit against the vendor to recover the purchase-money under the proviso in the sale-deed :

Held, that the condition provided for in the deed did not arise and the suit should be dismissed. TASSUDUK HOSSAIN KHAN *v.* ABTAB HOSSAIN KHAN **334**

———— ———— ———— *Evidence Act (I of 1872), s. 92—Rescission of sale-deed by mutual consent—Parol evidence, admissibility of—Non-delivery of possession after sale—Acquisition of prescriptive title—Onus of proof.*

Oral evidence to prove that parties to a sale-deed, which was duly executed and registered subsequently rescinded it by mutual consent, is inadmissible under section 92 of the Indian Evidence Act.

Where a sale-deed has been duly executed by one party to another and duly registered, the *onus* of proving that possession was not given to the vendee in accordance with the sale-deed and that the vendor had acquired a title by prescription lies on the party asserting it. BIJJUKALLU PAPAKKA *v.* YEDDULA ROSI REDDI. **282**

———— ———— ———— *Money left with purchaser for payment to a prior mortgagee—Amount due to mortgagee in excess of that deposited with the purchaser—Redemption.*

Where a sum of money is left in the hands of a purchaser for payment to a prior mortgagee, the purchaser is not bound to redeem the mortgage if the amount due under it is in excess of that deposited with him. BADRI DAS *v.* JIWAN LAL **854**

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Water—*Land, use of, in ordinary manner—Damage to neighbour—Lowering level of land to make land culturable—Tank water coming upon land and overflowing into neighbour's land—No wilfulness or negligence—Liability.*

Where an owner of land, without wilfulness or negligence, uses his land in the ordinary manner, though mischief thereby accrues to his neighbour, he is not liable for damages; but if, with a view to use the land in an unusual manner, he brings upon his land water which would not naturally have come upon it, he will be liable for damages for the escape of the water into the land of his neighbour.

The defendants lowered the level of their land so as to render it culturable, with the result that the water from an adjoining tank passed to the land of the defendants and subsequently overflowed into the lands of the plaintiffs:

Held, (1) that as the defendants had not used their land in any artificial or unusual manner, they were amply within their rights in what they did;

(2) that the plaintiffs were not entitled to an injunction as against the defendants, to compel the latter to raise a barrier for their protection. KENARAM AKHULI *v.* SRISTIDHAR CHATTERJEE, 16 C. W. N. 875 **543**

Will disinheriting son—Son's creditor if has *locus standi* to oppose grant—Order of Judge holding he has right to oppose—Appeal—If order appealable **686**

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Where a testator bequeathed his landed property among his heirs and gave one part to his wife and provided that if her son *A.* outlived his mother, her share should descend to him:

Held, that the interest of the wife was only a life-interest and not an absolute one.

It is only in those cases where the testator speaks of death, which is certain, as if it were a mere contingency by using such expressions as "if any of them die" or "in case of his decease", that such death to render the divesting clause operative must be deemed to be death within the testator's life-time. MAUNG PU *v.* NAPEAN, 5 BUR. L. T. 87 **355**

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Workman's Breach of Contract Act (XIII of 1859)—*Jurisdiction after the expiration of term of contract or completion of work—Preamble—Object of the Act to punish workmen who receive advances and then break their contracts to work.*

In a case under the Workman's Breach of Contract Act, where either the work has been completed or the term of the contract has expired, a Magistrate has jurisdiction to entertain a complaint under section 1 and to order re-payment of the advance under section 2 of that Act.

One object of the Act may have been to provide against workmen a speedy remedy for employers who have made advances on account of work; but the main object was, as the preamble shows, to provide for the punishment of workmen who have taken advances and have fraudulently broken their contracts to work.

The impossibility of a master being able to exercise the option of demanding an order from a Magistrate ordering a workman to perform the work, does not affect his right to ask for an order for the re-payment of the advance and subsequently for an order for the workman's punishment by imprisonment if he fails to comply with the order. GURUDEEN TAILY *v.* MUTTU SERVAI, 5 BUR. L. T. 133; 13 CR. L. J. 580 996

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